Neutral Citation: [2015] IEHC 558

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2014/ 151 JR]

BETWEEN/

JOHN O'CONNOR AND CHRISTOPHER MCCARTHY

APPLICANTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE CIRCUIT COURT JUDGE FOR THE TIME BEING ASSIGNED TO THE SOUTH-WESTERN CIRCUIT, THE MINISTER FOR ARTS, HERITAGE AND THE GAELTACHT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 25th day of August 2015

Introduction

1. In these proceedings the applicants seek orders of prohibition and declaratory relief in respect of prosecutions pending against them for cutting turf by machine in a Special Area of Conservation.

2. In summary, the applicants contend that the regulations creating the offence with which they are charged are unconstitutional and *ultra vires* the third named respondent ("the Minister"), because it has been created by way of a statutory instrument rather than by primary legislation. In so far as the respondents maintain that the regulations are necessitated by Ireland's membership of the European Union and by EU legislation, the applicants say that the creation of an indictable offence in this manner was not "necessary" for the purpose of giving full effect to the relevant Directive and was not, as required by law, grounded upon proper considerations of effectiveness, proportionality and deterrence.

The offence charged

3. Each of the applicants is charged as follows:

> *"That you the above named accused […] did on the 20th May, 2012 at Moanveanlagh Bog, Co. Kerry a European site in said District Court area of Listowel, without lawful authority use an object to wit machinery for the extraction or mining of natural resources including turf or peat where such use on the European site of such object was likely to have a significant effect on or adversely affect the integrity of the European site.*
>
> *Contrary to Section 35(1)(b) and Section 67(2) of the European Communities (Birds and Natural Habitat) Regulations 2011."*

4. The charges are brought in the name of the first named respondent.

5. According to the applicants' affidavits they were charged on the 10th July, 2013, but the matter first came before the District Court on the 9th May, 2013. On the 23rd July, 2013, the applicants were sent forward to the Circuit Court for trial on indictment. There is obviously some problem with the dates here but nothing appears to turn on that.

6. Leave to seek judicial review was granted (by Peart J.) on the 10th March, 2014.

The regulations

7. The offence with which the applicants are charged is created by regulation 35(1) of the European Communities (Birds and Natural Habitats) Regulations, 2011 (S.I. 477/2011), which provides as follows:

> *"35. (1) A person who, without lawful authority-*
>
> *(a) carries out, on land within or outside a European site, any plan or project or activity that may have a significant effect on, or adversely effect the integrity of, a European Site,*
>
> *or*
>
> *(b) enters or occupies any European Site, or brings onto or places or uses or releases in any European Site any animal or object, including but not limited to-*
>
> *(i) any off-road vehicle, recreational watercraft, plant and equipment, tractor or engine,*
>
> *(ii) machinery for the extraction or mining of natural resources including, but not limited to trees, vegetation, minerals, rock, soil, gravel, sand, turf or peat, where such action or the use or presence on the European Site of such an animal or object is likely to have a significant effect on, or adversely affect the integrity of, a European Site,*
>
> *Shall be guilty of an offence.*

8. By virtue of regulation 35(2) it is a defence to prove that the accused took all reasonable steps and exercised all due diligence to avoid committing the offence.

9. It is not disputed that Moanveanlagh Bog, a raised bog which has been designated as a Special Area of Conservation, comes within

the definition of a "European site" set out in the regulations.

10. Regulation 67 (2) provides that a person who commits an offence under regulation 35(1) is liable

> *"(a) on summary conviction, to a Class A fine or imprisonment for a term not exceeding six months, or both, or*
>
> *(b) on conviction on indictment , to a fine not exceeding €500,000, or imprisonment for a term not exceeding three years, or both."*

11. A court imposing sentence is obliged, pursuant to regulation 67(3), to have regard in particular

> *"…to the risk or extent of injury to the environment arising from the act or omission constituting the offence, and to the polluter pays principle."*

12. The 2011 regulations are stated in the preamble to have been made by the Minister for Arts, Heritage and the Gaeltacht

> *"[I]n exercise of the powers conferred on me by section 3 of the Act of 1972 and for the purpose of giving effect to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 (which codifies Council Directive 79/409/EEC of 2 April 1979 (as amended)) and Council Directive 92/43 EEC of 21 May 1992 [as amended by various measures related to the accession of Member States]".*

13. The regulations came into operation on the 21st September, 2011.

The Directives

14. Council Directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora, is by now well known as the Habitats Directive. Its objective is described in Article 2, which reads in full as follows:

> *"(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."*
>
> *(2) Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest.*
>
> *(3) Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."*

15. The Directive provides for the establishment of the Natura 2000 network. This is composed of special areas of conservation designated by reference to the lists of habitats annexed to the text of the Directive. Raised bogs are included in the annex. Each Member State is obliged to propose and transmit lists of sites for designation.

16. Article 6 deals with the measures to be taken by Member States. As far as this case is concerned, the relevant sub-articles are (1) and (2).

> *"(1) For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the site.*
>
> *(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."*

17. Article 23(1) obliged Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification.

18. Article 23(2) stipulates that when such measures are adopted, they shall contain a reference to the Directive or be accompanied by such reference on the occasion of their official publication.

19. Directive 2009/147/EC, known as the "Birds Directive", does not appear to be of direct relevance to this case.

20. Directive 2008/99/EC, on the protection of the environment through criminal law, requires Member States to ensure that, *inter alia*, any conduct which causes the significant deterioration of a habitat within a protected site shall constitute a criminal offence. The annexes to this Directive include the Habitats Directive as part of a list of legislation which must be made the subject of criminal law measures.

21. Article 5 requires Member States to take the necessary steps to ensure that offences are punishable by effective, proportionate and dissuasive penalties.

22. It is relevant to note the following recitals in the preamble:

> *"(3) Experience has shown that the existing system of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.*
>
> *[…]*
>
> *(5) In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.*

[…]

(10) This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment…

(12) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment…"

23. Member States were obliged to transpose this directive by the 26th December, 2010.

The power of the Minister to provide for criminal offences by regulation

24. Section 2 of the European Communities Act, 1972 provides that from the 1st January, 1973, the Treaties of the European Communities, and existing and future acts adopted by those institutions, shall be binding on the State and be part of Irish domestic law under the conditions laid down in such treaties.

25. Section 3 of the Act of 1972, as it originally stood, read in relevant part as follows:

"(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.

(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).

(3) Regulations under this section shall not create an indictable offence."

26. This section was considered in *Browne v. Ireland* [2003] 3 I.R. 205, which concerned certain provisions of the Fisheries (Consolidation) Act, 1959, as amended. The applicant had been charged on indictment with offences contrary to a particular statutory instrument and contrary to s. 223A of the 1959 Act. That section conferred on the Minister for the Marine a power to make orders for the purposes of conservation of fish stocks and rational exploitation of fisheries. Breach of such an order was an offence. The order, pursuant to which the applicant had been charged, was stated to have been made for the purpose of giving effect to a Council Regulation.

27. A further section – s.224A – provided, without prejudice to the generality of s.3 of the Act of 1972, that the Minister could make regulations in relation to fishing for the purpose of giving effect to any provision of the Treaties or any act adopted by an institution of the European Communities. The Act further provided that to fish or attempt to fish in contravention of any such regulations would be an offence punishable, on conviction on indictment, by fine and forfeiture.

28. In upholding a challenge to the validity of a particular order made under s.223B, the Supreme Court observed that the order was not intended to give effect to the principles and policies of any domestic legislation. Rather, it was clear that they were intended to give effect to the principles and policies of the relevant Council Regulation. There was *"not the slightest doubt"* as to the power of the Minister to adopt that course, even though those principles and policies had not been embodied in any Act of the Oireachtas. That was the clear object of s.3 of the 1972 Act. However, the latter made it clear that the power to create an indictable offence pursuant to that provision was reserved to the Oireachtas.

"There is no indication whatever in the language of s. 223A that it was envisaged by the Oireachtas that [the Minister] could give effect to principles and policies which had never been considered or adopted by the Oireachtas by means of a statutory instrument under that section which effectively circumvented the prohibition on the creation of indictable offences in s.3(3) of the Act of 1972."

29. At p. 243 Denham J. said that any statute purporting to give power to a Minister to create an indictable offence should set out such power in plain and clear language.

30. The Court noted the distinction between s.223A and 224B in this regard.

31. The Supreme Court considered this area again in *Kennedy v Attorney General* [2005] 2 I.L.R.M. 401. Again, the applicant had been charged with an offence contrary to an order made under s.223A of the Fisheries (Consolidation) Act, as amended. The respondents sought to distinguish *Browne* by arguing that the order in question did not involve a measure giving effect to Community law but was, rather, adopted by the State in the exercise of its residual power to manage and control sea fishing and was covered by the principles and policies of the parent Act.

32. Giving the judgment of the majority, Denham J. noted (at p.412) that s.3(3) of the Act of 1972 retained to the Oireachtas the power to create an indictable offence. She went on:

"This recognition of the power of the Oireachtas is consistent with Community law, as the method of implementing Community law is a matter for the Member State. This principle and policy may be revisited by the Oireachtas. However, in view of the expressed policy in the Act of 1972 any change in that policy should be clear from the words of a statute."

33. Having regard to the context in which the order was made, and to relevant measures adopted by the Community, the Court considered that it was "unrealistic" to suggest that the order had been made as an exercise of the residual power of the State and not to give effect to the rules and objectives of the common fisheries policy. Browne was therefore not distinguishable. The Oireachtas had not intended that s.223A, rather than s.224B, should be used to implement Community law.

34. In 2007, the prohibition in the Act of 1972 on the creation of indictable offences by Ministerial order was dropped. Section 3 was amended by substitution of the following subsection for subs. (3):

"(3) Regulations under this section may-

(a) make provision for offences under the regulations to be prosecuted on indictment, where the Minister of the Government making the regulations considers it necessary for the purpose of giving full effect to-

(i) a provision of the treaties governing the European Communities, or

(ii) an act, or provision of an act, adopted by an institution of the European Communities or any other body competent under those treaties,

and

(b) make such provision as that Minister of the Government considers necessary for the purpose of ensuring that penalties in respect of an offence prosecuted in that manner are effective and proportionate, and have a deterrent effect, having regard to the acts or omissions of which the offence consists, provided that the maximum fine (if any) shall not be greater than €500,000 and the maximum term of imprisonment (if any) shall not be greater than three years."

35. Both the "maximum fine" and the "maximum term of imprisonment" are defined by reference to the potential penalty on indictment.

36. By virtue of s. 4 of the European Union Act 2009, s. 3(a)(i) and 3(a)(ii) now refer to the treaties governing, and the institutions of, the European Union.

The Evidence

37. The applicants do not themselves claim ownership of turbary rights in Moanveanlagh Bog. The first named applicant describes himself as an agricultural contractor, working on contract for farmers in his local area of Co. Kerry. The second named applicant is a machine operator employed by the first named applicant.

38. Both of the applicants assert that various families living on or near Moanveanlagh Bog have turbary rights in it, and have taken turf from it for generations. It is further asserted that these owners of turbary rights oppose the designation of the bog as a Special Area of Conservation and allege that their property rights have been infringed by the designation process. This opposition is alleged to be on the basis that there was a lack of adequate or proper notification. The applicants aver that it is their understanding that the owners claim that they are entitled to continue to exercise their rights.

39. An affidavit sworn by Mr. Francis Donohoe of the National Parks and Wildlife Service sets out the history of the issue from the point of view of the respondents.

40. Mr. Donohoe refers to the obligation imposed on Member States by the Habitats Directive to list candidate sites of Community Importance. He says that this process began, in relation to active raised bogs and degraded raised bogs, in the late 1990s. In 1999 a list of 30 bogs was transmitted. Further sites were added in 2000 and 2002. Over that period a total of 53 individual bog sites were nominated for designation as SACs.

41. Also in 1999, the then Minister decided to prohibit commercial turf extraction on raised bogs which had been proposed for designation. She provided, however, for a 10-year period of "derogation" during which individuals could continue to cut turf subject to certain restrictions. She also established a scheme for the purchase by the State of freehold ownership or turbary rights in affected areas.

42. In May, 2010 on foot of receipt of a report by an inter-Departmental working group in relation to the legal obligation to provide effective protection for raised bogs, the Government decided that turf cutting should cease immediately in the 31 sites that had been selected for designation between 1997 and 1999. It was also decided that cutting would cease at the end of 2011 for the sites selected in 2002.

43. In January, 2011 the European Commission issued a letter of formal notice to Ireland concerning breaches of the Habitats Directive and the Environmental Impact Assessment Directive in respect of peat extraction from protected bogs. In June of that year the Commission issued a "reasoned opinion", requiring the State to take "urgent action" to improve the implementation of protective legislation and indicating that it was considering the use of interim measures – that is, potentially, an application to the Court of Justice of the European Union for a direction compelling the State to prevent further damage to the sites. Mr. Donohoe says that such a step could cause considerable reputational damage to Ireland and would also entail the risk of significant fines against the State.

44. According to Mr. Donohoe, the Government has introduced a number of measures to implement the decision of May, 2010. A scheme to compensate affected persons and provide them with alternative locations for cutting is described as "heavily subscribed".

45. Dealing specifically with Moanveanlagh Bog, Mr. Donohoe says that it was proposed for designation in December 2002. Public notices were placed in the local media at this time and relevant persons were informed either individually or through public announcements. Copies of the Notice of Intention to Designate (accompanied by an information pack) were made available in offices of the National Parks and Wildlife Service, Garda Stations, Social Welfare offices, Teagasc and the Farm Development Service. A number of people indicated that they wished to object to the proposal but, according to Mr. Donohoe, no "valid" appeals were submitted to the Department.

46. The Bog was included in a list transmitted to the European Commission in February 2007 and was subsequently adopted, by decision made in December 2008, as a site of Community Importance for the Atlantic biogeographical region.

47. On the 16th December, 2011, a letter was sent to landowners and the owners of turbary rights on the Moanveanlagh Bog SAC informing them of the compensation scheme and reminding them that the "derogation" granted in 1999 had expired in relation to the Bog. Notices to the same effect were placed in newspapers (including *The Kerryman* and the *Kerry's Eye*) in January 2012.

48. On the 22nd May, 2012, a registered letter was sent by the Department to the first named applicant at his home address advising him that it had come to the attention of officials of the Department that he had been engaged in unauthorised turf-cutting within the Moanveanlagh SAC. He was notified that this was an offence under the Regulations, and requested to desist from any further cutting or drainage works within the SAC.

49. With reference to the penalties applicable under the regulations, Mr. Donohoe deposes as follows:

"I say that the cutting of turf on designated sites is a highly mechanised process carried out for the most part by contractors as a commercial enterprise. Nowadays the cutting of turf by hand on these sites is extremely rare. I say

that typically, plot owners are charged up to €500.00 to have their plot cut and Department officials have observed a single plot being cut in approximately one hour. It is quite feasible for a contractor to cut ten plots in a single day yielding a gross return of €5,000.00, the amount equivalent to the maximum Class A fine on summary conviction. I understand that recently, five contractors cut fifty-four plots on one of these sites in a single day. To be an effective deterrent the Regulation had to provide for both summary conviction and convictions on indictment."

50. Mr. James Ryan, a Wildlife Inspector in the Department who describes himself as "the Irish national expert on raised bog conservation and restoration", has sworn an affidavit as to the effects of turf-cutting in raised bogs. I do not believe that it is necessary to go into this in great detail, since no issue is taken with it by the applicants, but it should be noted that he says that turf-cutting has both direct effects (by removal of habitat) and indirect effects (by drying out the bog system, thus affecting capacity to support the habitat). Almost all raised bogs in Ireland have been subjected to cutting, many for centuries, and many have been cutover or cutaway completely. There are no completely intact raised bogs left in the country. Only 1,639 ha of "intact" high bog can now be classified as Active raised bog and of the remainder, only 11% is considered to have significant potential for restoration.

51. Moanveanlagh Bog is considered one of the best remaining examples of a raised bog in the south-west of Ireland. However, it has suffered very adverse effects from cutting and associated drainage and now has only 4.6 ha of active bog. The most recent monitoring assessment (in 2013) gives it an Unfavourable Bad-Declining Assessment, the lowest ranking possible. Mr. Ryan says that it is essential that cutting is stopped and restoration initiated as soon as possible in order to minimise further avoidable losses.

The applicants' grounds
52. The applicants plead that the Habitats Directive does not require the Member States to create an offence, whether summary or indictable, for the purpose of transposing the Directive into national law. The creation of a criminal offence by way of ministerial regulation for the purpose of transposing the Directive was done at the discretion of the Minister. The regulations are *ultra vires* the Minister, in so far as the indictable offence created is not necessary for the purpose of giving full effect to the Directive or for the purposes of the European Communities Act 2007.

53. It is claimed that the regulations fail to recite a finding or determination that the creation of an indictable offence is necessary for the purpose of giving full effect to the Habitats Directive such as would show that the jurisdiction created by the European Communities Act 2007 was properly exercised.

54. It is further pleaded that the regulations are *ultra vires* the Minister, invalid and of no legal effect in so far as the indictable offence created thereunder is not necessitated by Ireland's membership of the European Union.

55. The regulations are said to be *ultra vires* the Minister, invalid and of no legal effect in so far as they create the indictable offence with which the applicants are charged. If (which is denied) the Minister was entitled to create an offence and/or an indictable offence by regulation, he was obliged to consider the extent to which the penalty provided for under the regulation was such that it would be effective in implementing the directive and/or would act as a deterrent and/or would otherwise be proportionate having regard to the act or omissions so impugned. In fixing the maximum penalty without reference, for example, to the severity of the act or omission impugned, but rather following a pattern in ministerial regulations implementing Community law, the Minister failed to consider the effectiveness, deterrence and/or the proportionality of the penalty imposed in this case.

The Applicants' submissions
56. The applicants submit that the Habitats Directive makes no provision for criminal offences.

57. According to the applicants it is significant that the 2011 Regulations were not expressed to have been made in order to give effect to Directive 2008/99/EC on the protection of the environment through criminal law. They refer to Recital (3) of that Directive, set out above. They also refer to Article 8 of the 2008 Directive. This requires that when Member States adopt measures pursuant to its provisions they shall contain a reference to the Directive, or be accompanied on publication by such a reference. The 2011 Regulations contain no reference to this Directive, and were not made within the time limit prescribed by it.

58. It is contended that, in any event, the provision in directive 2008/99/EC requiring the criminalisation of *"any conduct which causes significant deterioration of a habitat within a protected site"* differs significantly to the offence created by the 2011 Regulations, which does not require actual damage to have been caused.

59. The argument is made that, having regard to the foregoing, the Habitats Directive does not have as a "principle or policy" the creation of criminal offences and therefore does not necessitate the imposition of criminal sanctions. If it did, the introduction of the 2008 directive would have been unnecessary. The decision to create an indictable offence was a policy decision made by the third named respondent which fell outside the requirements, or "principles and policies" of the Directive.

60. The applicants refer to Article 15.2 of the Constitution, which vests in the Oireachtas the sole and exclusive power of making laws for the State. Having regard to the jurisprudence of the Supreme Court on this provision, the applicants submit that s.3(3) of the Act of 1972 cannot be relied upon by the Minister unless the EU instrument intended to be implemented contains in its principles and policies a requirement for criminal sanctions. If it does not, the creation of such sanctions can be done only by way of an Act of the Oireachtas.

61. The applicants make the further submission that there is no evidence that the Minister had regard to whether or not the creation of an indictable offence was effective, proportionate and would have a deterrent effect. It is contended that 90% of statutory instruments made in the year 2011 under s.3 of the Act of 1972 created offences carrying the maximum penalty permitted by the section. This is said to demonstrate a "blanket policy" on the part of the Minister and a failure to exercise due consideration.

Respondent's Submissions
62. The respondents' position is that, as a matter of European Union law, Ireland is required to take all measures necessary to guarantee the application and effectiveness of the Habitats Directive. In particular, the State is required to ensure that infringements of Union law are subject to penalties which are effective, proportionate and dissuasive. It was in consideration of these obligations and requirements that the regulations, the subject-matter of these proceedings, were made.

63. The respondents point to the obligation of the State, pursuant to Article 4(3) of the Treaty of the European Union, to take

"any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."

64. It is submitted that the creation of an offence, and the provision for it to be prosecuted on indictment pursuant to Regulations 35(1)(b) and Regulation 67(2) were, and are, considered by the Minister to be appropriate and necessary for the purpose of ensuring the effectiveness of the Habitats Directive.

65. Reliance is placed on *Bund Naturschutz (Case C-244/05)* [2006] ECR I-8445, a case concerning the Habitats Directive in which the European Court of Justice held that Member States must

> *"… in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission."*

66. It is submitted that a failure by the State to take action against private individuals who infringe EU law would in itself entail a breach of EU law on the part of the State.

67. The respondents accept that, as a general rule, criminal law does not fall within the competence of the EU. However, it is contended that the use of criminal sanctions may on occasion be necessary to ensure that full effect is given to EU law and that this is an accepted method in measures of transposition in this jurisdiction. It is suggested that this practice "foreshadowed" the introduction of Directive 2008/99/ EC, and that the latter measure did not indicate that criminal sanctions had not been permissible before its introduction.

68. In the context of the instant case, it is argued that the fulfilment of obligations under the Habitats Directive can only be achieved through the use of the criminal law. The creation of an indictable offence is rationally connected with the objective and the punishment is proportionate, having regard to the irreparable damage that may be caused.

The authorities

69. In *Meagher v Minister for Agriculture* [1994] 1 I.R. 329 the applicant had been charged with offences created under regulations dealing with certain veterinary medicinal products. The regulations, which were made for the purposes of implementing a Council Directive, extended the time limit for prosecutions set out in the Petty Sessions (Ireland) Act 1851 from six months to two years. They also conferred a power of search. The applicant contended, in the first instance, that s. 3, sub-s. 2 was invalid having regard to Article 15 of the Constitution in so far as it permitted a Minister by regulation to amend existing law. On this issue, the judgment of the Court was given by Finlay C.J. who said at pp.351-3:

> *"The power to make regulations contained in section 3, subs. 1 of the Act of 1972 is exclusively confined to the making of regulations for one purpose, and one purpose only, that of enabling s. 2 of the Act to have full effect. Section 2 of the Act which provides for the application of Community law and acts as binding on the State and as part of the domestic law subject to conditions laid down in the Treaty which, of course, include its primacy, is the major of fundamental obligation necessitated by membership of the Community. The power of regulation-making, therefore, contained in s.3 is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.*
>
> *The Court is satisfied that having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities in some instances at least, and possibly in a great majority of instances, by the making of ministerial regulation rather than legislation of the Oireachtas.*
>
> *The Court is accordingly satisfied that the power to make regulations in the form in which it is contained in s.3, sub-s. 2 of the Act of 1972 is necessitated by the obligations of membership by the State of the Communities and now of the Union and is therefore by virtue of Article 29, s. 4, sub-ss. 3, 4 and 5 immune from constitutional challenge.*
>
> *In so far as it may be possible to point to hypothetical instances of certain types of laws, measures or acts of the Community or Union which in their implementation or application within the national law might not, as to the method of implementation or application, be necessarily carried out by ministerial regulation, but rather should have been carried out by enactment of law by the Oireachtas, the Court is satisfied, without deciding that such instances do occur, that the principles laid down by this Court in the decision of East Donegal Co-Operative Livestock Marts Ltd. v. Attorney General [1970] I.R. 317, must be applied to the construction of the impugned subsection in the manner in which it was applied by the decision of this Court in Harvey v. The Minister for Social Welfare [1990] 2 I.R. 232 to the construction of the section of the statute impugned in that case, namely, s. 75 of the Social Welfare Act, 1952. That principle is that it must be implied that the making of regulations by the Minister, as is permitted by the section, is intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice, and therefore that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to the section, contravene any provisions of the Constitution.*
>
> *If therefore in such an instance challenge were to be made to the validity of a ministerial regulation having regard to the absence of necessity for it to be carried out by regulation instead of legislation and having regard to the nature of the content of such regulation it would have to be a challenge made on the basis that the regulation was invalid as ultra vires being an unconstitutional exercise by the Minister of the power constitutionally conferred upon him by the section."*

70. The applicant had also argued as a separate issue that the provisions of the regulations in respect of the time limits and search powers were *ultra vires* the Minister.

71. The Court approached this issue on the basis that the Minister had the power to include these provisions if it was necessary for the purpose of giving effect to the directives.

72. The powers of search were considered to be clearly necessary having regard to the obligations imposed on the State in respect of matters such as the taking of samples from farms.

73. It had been argued on behalf of the applicant that there was nothing in the directive that expressly required a two-year time limit and for that reason it was not justified. In rejecting this Blayney J. said at p. 359:

> *"The directive clearly required…that offences had to be created and obviously…it had to be possible for these offences*

to be effectively prosecuted. Accordingly the implementation of the directive required that the Regulations should provide for an adequate time for the preparation of the prosecution. It was not necessary that the directive should itself fix a time. It was a matter for the State to decide on the length of time required to enable the prosecution to be brought and that is what the Minister has done in providing for a period of two years."

74. Blayney J. went on to deal with the argument that, since the directive left to national authorities the choice of implementation method, the method chosen was not "necessitated", saying:

> *"[Article 189 of the Treaty of Rome] obliges the State to implement the directive and equally obliges the State, in exercise of the discretion given to it, to choose an appropriate method of implementation. If the State were free not to implement the directive, then clearly, if it were to do so, it would be a voluntary act not necessitated by the obligations of membership and would not be protected by Article 29, s.4, sub-s.5 of the Constitution. But the State is not free. It is obliged to implement the directive and so is obliged o choose a method of implementation and, provided the method it chooses is appropriate for the purpose of satisfying the obligation of the State and the measures it incorporates do not go beyond what is required to implement the directive, it is correctly characterised as being necessitated by the directive."*

75. Similarly, Denham J. held that on the facts of the case, both the amendment of the time limit and the creation of the power of search were necessary, and had to be enacted into domestic law in fulfilment of the State's obligations.

76. The applicant had also contended that since Member States have a choice as to the forms and methods of implementation of a directive, what was done by the way of implementation of a directive was not "necessitated" by membership of the Community.

77. Having noted that the directive in question set out the principles and policies while leaving to the national authorities the choice of form and methods of implementation, Denham J. went on (at pp. 365-6):

> *"If the Directive left to the national authorities matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authorities, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice."*

78. However, if the Minister was in a position, under a directive, to make choices as to principles and policies then primary legislation would be required. Denham J. considered that the appropriate test was that set out in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381.

> *"Applying the test to this situation the test is whether the ministerial regulations under s. 3 of the Act of 1972 are more than the mere giving effect to principles and policies of the said Act and the directives which are part of Irish law as to the result to be achieved.*
>
> *If the regulations contained material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s. 3 unless the material was incidental, supplementary or consequential."*

79. In *Maher v Minister for Agriculture* [2001] 2 I.R. 139 the Supreme Court was dealing with a statutory instrument made in order to give effect to a Council Regulation on milk quotas. The applicants were the holders of lands with milk quotas which, under the Irish regulations, they would be compelled to sell to the Minister at a fixed price. They argued that the regulations involved substantial policy choices which were not necessitated by membership of the EU and should have been made by way of Act of the Oireachtas.

80. The Supreme Court, noting that Community law did not require any particular form of implementation and that the choice of form and method was a matter for each Member State, held that choice of implementation by statutory instrument was a valid one. The Council Regulations were part of Irish law and could be regarded in the same way as an enabling statute of the Oireachtas.

81. Keane C.J said at pp. 178-179, having referred to the passages quoted above from the judgment of Finlay C.J. in *Meagher*:

> *" As that passage indicates, there are two broad categories of cases in which regulation made in purported exercise of the powers conferred by s. 3 might be found to be ultra vires the powers conferred on Ministers by section 3. The first category would be cases in which the making of the regulation was found not to be "necessitated" by the obligations of the membership referred to in Article 29.4.5 and to have violated some constitutional right of the plaintiff. The challenge in such a case would be no different from the challenge mounted to an Act of the Oireachtas allegedly necessitated by the obligations of membership which prima facie violated a constitutional right of the plaintiff. The second category of cases in which such a challenge could be successfully mounted to a regulation is where the implementation of a directive or defined parts of a European Community or European Regulation by ministerial regulation rather than an Act of the Oireachtas would be in conflict with the exclusive legislative role of the Oireachtas under Article 15.2.1 and would not be saved by the provisions of Article 29.4.5. That would arise in a case where the ministerial regulation went further than simply implementing details of principles or policies to be found in the directive or regulation in question and determined such principles or policies for itself and the making of the regulation in that form, rather than in the form of an Act of the Oireachtas, could not be regarded as necessitated by the obligations of membership. That this is what was intended to be conveyed by that passage in the judgment of the court is, I think, made clear when one comes to consider the judgments of the court on the vires issue in that case and, in particular, the judgment of Denham J."*

82. Fennelly J. said that the issue of "necessity" was appropriately to be considered by reference to the content, not the form, of the implementing instrument and that consequently, it was perfectly possible for the courts to apply the case-law on Article 15.2.1 without any conflict with Community law.

> *"Meagher v. Minister for Agriculture is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1 of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the court and that of Denham J. expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The "principles and policies" test applies mutatis mutandis where the delegated legislation represents n exercise of a power or discretion arising form Community law secondary legislation. It applies with particular clarity to the case of directives where Article 294(EC) leaves the choice of forms and methods to the member states. The question will not arise so frequently in the case of regulations since they are directly applicable without the*

need for national implementing measures."

83. In *Maher*, it was held that the choices as to policy left to the member states by the Regulation had been reduced "almost to vanishing point".

84. *Browne v The Minister for the Marine* has already been referred to in relation to the legislative history of s. 3 of the Act of 1972. In reaching the conclusion dealt with in para.28 above, the Supreme Court cited the decisions in *Meagher* and *Maher*. At p.219, Keane C.J. said:

> *"It is clear from the decisions of this court in [Meagher and Maher] that the fact that, in such cases, the principles and policies to which the regulation gives effect are not to be found in any Act of the Oireachtas, but rather in the Community measure concerned, does not affect its constitutional validity. It is beyond argument at this stage that the law as laid down by this court in Cityview Press v An Chomhairle Oiliúna, that secondary legislation will trespass on the exclusive law making role of the Oireachtas unless it does no more than give effect to principles and policies laid down in an Act of the Oireachtas, is not applicable to regulations intended to give effect, by virtue of s. 3 of the Act of 1972, to European measures…"*

Discussion and conclusions

85. The applicants do not assert that any of their property rights have been infringed by the regulations and the sole question is whether the criminal offence with which they have been charged was lawfully created. The answer to this question depends on whether or not it was lawful to utilise the provisions of s.3 of the Act of 1972.

86. It seems clear from the authorities discussed above that the validity of this method of legislation cannot depend purely on the opinion of the Minister that it was necessary to create the offence. The power conferred on a Minister to make regulations is only for the purpose of enabling s. 2 to have full effect. In assessing whether a particular measure fulfils that purpose regard must be had to the relationship between the regulations made by the Minister and the EU measures intended to be implemented.

87. What then are the "principles and policies" of the Habitats Directive? As far as is relevant to this case, it seems to me that that question is answered by reference to Article 6(2). The State is obliged to take all appropriate steps to prevent deterioration in listed sites, of which Moanveanlagh Bog is one.

88. There is no dispute as to the obligation of the State to implement effectively the objectives of the Habitats Directive, or as to the status of the bog in question as a protected site. Further, there has been no challenge to the evidence adduced on behalf of the respondents either as to the damage being caused by turf-cutting on raised bogs, or as to the efforts made by the State, dating back to the 1990s, to halt the practice by means of persuasion and/or compensation. It is also clear that those efforts have not been fully successful and that cutting continues on protected sites, with the associated damage thereby entailed.

89. In those circumstances, it seems to me that the introduction of criminal sanctions, almost twenty years after the Habitats Directive came into being, can fairly be said to have been necessary for the proper implementation of that Directive. The fact that it does not, in terms, call for the creation of criminal offences is not, in my view, decisive, since directives by their nature leave the choice of implementation methods to the member states. No authority has been referred to which might suggest that criminal sanctions cannot be created unless the "parent" directive calls for them. Other measures to bring a stop to the deterioration of raised bogs have been tried. If they have not succeeded, as appears to be the case, then the choices of the State as to how the Directive is to be implemented may narrow down to the point where the criminal law has to be invoked. In my view that situation has been reached in relation to this issue. It is not open to the State to stand by and permit further damage to be done – that would be a breach of its legal obligations under the Directive.

90. The applicants say that there is no evidence of any consideration by the Minister of the questions of effectiveness, proportionality and dissuasiveness. It seems to me that this argument is misconceived. The burden of proof lies on them, if they wish to argue that the regulations are ineffective, disproportionate or not dissuasive. In any event, I consider that the respondents have adduced sufficient evidence to establish that the penalties imposed by the 2011 regulations are not disproportionate, having regard to the potential damage caused by the conduct in question and also to the commercial nature of much of the continuing cutting. Effectiveness and dissuasiveness are matters not capable of empirical proof at this stage.

91. In the circumstances I refuse the reliefs sought.