

BETWEEN

PATRICK O'SULLIVAN AND CATHAL O'SULLIVAN

PLAINTIFFS

AND

THE SEA-FISHERIES PROTECTION AUTHORITY, THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice O'Connor delivered on the 15th day of January, 2016.

Introduction

1. This case raises issues concerning the supremacy of European law in our national legal system. The principal challenge concerns the power of the Minister to make specific regulations pursuant to the European Communities Acts 1972 to 2012. This part of the plaintiffs' claim could not be made if relevant parts of the regulations had been introduced by primary legislation.

Layout

2. The Court considers that reading this judgment will be facilitated by providing at the beginning a glossary of abbreviated terms and references which will be used:-

Glossary:-

"The Act of 1972"	The European Communities Acts 1972 to 2012 which provide that statutory instruments made under " The Act of 1972 " "shall have statutory effect".
"The Act of 2006"	Sea Fisheries and Maritime Jurisdiction Act 2006.
"Annex XXX"	Annex XXX of " the Implementing Regulation " which identifies:- "points to be assigned for serious infringements " ranging from three points for "not fulfilling of obligations to record and report catch or catch related data..." to seven points for "obstruction of work for officials in the exercise of their duties in inspecting for compliance...."
Article 15.2.1°	Article 15.2.1° of the Constitution which provides:- "The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the state".
Article 29.4.6°	Article 29.4.6° of the Constitution which provides:- "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union...."
Article 34.4	Article 34.4 of the Constitution which provides:- "1 - The Court of Appeal shall – (i.) save as otherwise provided by this Article, and (ii.) with such exceptions and subject to such regulations as may be prescribed by law have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law. 2 - No law shall be enacted excepting from the appellate jurisdiction of the Court of Appeal cases which involve questions as to the validity of any law having regard to the provisions of this Constitution. 3 - The decision of the Court of Appeal shall be final and conclusive, save as otherwise provided by this Article."
Article 37.1	Article 37.1 of the Constitution which provides:- "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."
"CFP"	Common Fisheries Policy.
"Cityview Press"	<i>Cityview Press Limited and Fogarty v. An Chomhairle Oiliúna</i> [1980] I.R. 381.
"Control Regulation"	Council Regulation (EC) No. 1224/2009 which established a Community control system for ensuring compliance with the rules of the " CFP "
"DPP"	Director of Public Prosecutions.

"DPR"	European Union (Common Fisheries Policy) (Point System) Regulations 2014 (S.I. No.3 of 2014) and commonly called the "Domestic Points Regulations".
"Implementing Regulation"	Commission Implementing Regulation (EU) No.404/2011 laying down detailed rules for the implementation of the Control Regulation .
"IUU fishing"	Illegal, Unreported and Unregulated fishing.
"IUU Regulation"	Council Regulation (EC) No. 1005/2008 establishing a community system to prevent, deter and eliminate " IUU fishing ".
"The licence holder"	The first named plaintiff who holds the licence to fish for the Tea Rose .
"The Maher judgment"	<i>Maher v. The Minister for Agriculture and Rural Development</i> [2001] 2 I.R. 139 (Supreme Court).
"The Master"	The second named plaintiff who is a brother of the first named plaintiff and the Master of the Tea Rose .
"The Meagher judgment"	<i>Meagher v. The Minister for Agriculture and Food</i> [1994] I.R. 329 (Supreme Court).
"The Minister"	The Minister for Agriculture, Food and the Marine who is the second named defendant.
"Penalty points"	The points to be assigned to the licence for serious infringements pursuant to Annex XXX .
"The 2011 Regulations"	Sea Fisheries (Common Fisheries Policy Community Control System) Regulations 2011 (S.I. 490 of 2011) made in exercise of powers granted to the Minister by the Act of 2006 .
"Relevant EU Regulations"	The IUU Regulation, the Control Regulation, and the Implementing Regulation.
"Relevant date"	8th April, 2015, being the date of detection of the alleged infringement in contravention of the 2011 Regulations and a serious infringement under the DPR .
"Serious infringement"	Infringement of the rules of the CFP mentioned in Annex XXX that is determined by the SFPA on the balance of probabilities to be serious having regard to the criteria set out in Article 3(2) of the IUU Regulation and guidance notes published by the SFPA .
"SFPA"	Sea Fisheries Protection Authority established by the Act of 2006 which is designated as the competent national authority in Ireland under the IUU Regulation and which is the first named defendant.
"SFPO"	Sea Fisheries Protection Officer appointed by the SFPA under the Act of 2006 .
"SI"	Statutory Instrument.
"Tea Rose"	The Irish Sea fishing vessel with registration number S73 and for which the licence holder on the polyvalent segment of the Irish fleet on the relevant date was the first named plaintiff.
"TFEU"	Treaty on the Functioning of the European Union.

Facts

3. The DPR came into operation on the 20th January, 2014, and have applied to serious infringements detected on or after that date.

Inspection

4. Late on the night of Tuesday 7th April, 2015, the Tea Rose was boarded by two SFPOs at Castletownbere, County Cork. The Tea Rose was detained following questioning of the Master in the presence of the licence holder from about 02:20 on Wednesday the 8th April, 2015. Following the inspection and weighing of the fish found on the Tea Rose at Castletownbere, a member of An Garda Síochána cautioned the Master and took custody of the Tea Rose with its fishing licence at around 11:30 on the 8th April, 2015.

Charge against the Master

5. Later that Wednesday, the Master (the second named plaintiff) was charged in the Bantry District Court Area with failing to correctly fill in the log book for the operations of the Tea Rose by under-recording its catch of hake, cod, haddock and pollock in contravention of Articles 5 and 6 of the 2011 Regulations.

Prosecution of master

6. The Master was served with a list of witnesses, statements and exhibits on that Wednesday also. The parties agree that the prosecution of the Master may take two years to conclude.

Request to defer penalty points for licence holder.

7. By email sent at 17:24 on Thursday 9th April, 2015, the solicitor for the SFPA was asked by the solicitor representing the plaintiffs to confirm that the penalty point process under the DPR would not commence. The plaintiffs' solicitor stated that no issue concerning delay in attributing the penalty points would be raised at a later stage if such confirmation was forthcoming.

Refusal to defer

8. The solicitor for the SFPA replied on Monday 10th April, 2015, with an extract from the DPR to the effect that the SFPA has no discretion and is obliged, as soon as may be on notification of detection of an infringement and having determined that the infringement is a serious infringement, to assign the appropriate points to the holder of the Irish licence for the relevant sea fishing boat.

Comments and reports by SFPO

9. An SFPO explained on affidavit that once an infringement which falls within Annex XXX has been detected, an SFPO communicates the findings to the operator of the vessel, which is usually the master of the fishing vessel. An opportunity is given for comment and these comments are reflected in the inspection report which is reviewed by a panel appointed by the SFPA.

Panel

10. The DPR do not refer to a panel but they do specify that the SFPA, as opposed to a SFPO who detected a serious infringement, must notify the licence holder of the proposal to assign points.

11. The inspection report is reviewed by a panel appointed by the SFPA which assesses the report in the terms of the gravity of the infringement detected having regard to the criteria in the IUU Regulation and the Control Regulation.

Application of points to licence

12. Where the panel determines that there has been a serious infringement the holder of the sea fishing licence for the vessel is notified of the infringement details, the proposed number of penalty points to be assigned and the right of the licence holder to appeal the assigning of penalty points to an independent appeals officer. Points are applied from the date of detection of the serious infringement according to reg. 5(7) of the DPR.

Effect of appeal

13. The assignation of penalty points cannot occur until:

- (i.) the period allowed to make an appeal has expired;
- (ii.) the day of withdrawal of any appeal or;
- (iii.) the date of a decision to uphold the proposed application of points where there is an appeal

whichever is the later.

Appeal procedure

14. The holder of the licence to fish relating to the vessel must lodge any appeal within twenty-one days from the date of notification from the SFPA. An appeal must be accompanied with a statement of grounds relied upon by the appellant together with a fee as published from time to time on the website maintained by the Minister's department.

Appeal Officers.

15. The Minister appoints appeal officers for renewable terms of three years¹. The Minister may set down procedures for the conduct and consideration of appeals other than for an appeal on a point of law to the High Court².

The powers of the appeals officer

16. An appeals officer may only allow an appeal if it is established on the balance of probabilities that the alleged serious infringements did not occur or did not involve the fishing vessel concerned³. The appeals officer has sole discretion on whether to conduct an oral hearing. In making a decision the appeals officer must have regard to the Implementing Regulation requirement that "the suspensory effects of review proceedings do not render the point system ineffective"⁴. The appeals officer may not alter the number of points which the panel decided upon.

High Court – appeal on a point of law

17. Under the DPR the licence holder and the SFPA may appeal on a point of law to the High Court arising from a decision by an appeals officer⁵. However, no provision is made for deferring the assignment of points if the appeals officer upholds the proposal of the SFPA while the decision on a point of law is awaited. The DPR provides that the decision of the High Court is final and conclusive which thereby limits, if not excludes, any role for the Court of Appeal or Supreme Court.

Detection, charges and no report

18. The SFPA in this case did not get beyond the detection point while the second named plaintiff (being the Master of the Tea Rose) was charged at the suit of the DPP. He was served with a list of witnesses, exhibits and the statement of charges.

19. No inspection report or evidence of an assessment for an inspection report by the SFPA concerning the assignment of points was made available to the Court. In addition, the licence holder (the first named plaintiff) was not notified of any actual proposal by the SFPA to assign points.

Prosecution and Penalty Points

20. The manager (legal and case management) of the SFPA explained on affidavit that the information given to the SFPA is the same as the information given to the DPP. The said manager averred that after the release of that information "the administrative point system is entirely separate from the criminal prosecution and... there is neither any crossover nor intertwining of the procedures".

Injunction to restrain application of DPR

21. After the Master was charged and before any attempt was made by the SFPA to comply with the obligation to notify the licence holder of a serious infringement detection, a successful application was made on behalf of both plaintiffs on Wednesday 15th April, 2015, on an *ex parte* basis, to the High Court for an injunction restraining the defendants from taking any step to apply the DPR against the licence holder pending delivery of this judgment. The Court gave liberty to serve short notice for an interlocutory hearing and the proceedings were subsequently managed in a way as to allow for an early full hearing of the substantive challenges by the plaintiffs to the DPR in November, 2015.

The Constitution

22. This Court has jurisdiction to answer any question about the validity of any law which includes the DPR having regard to the provisions of the Constitution.

Provisions of the Constitution relied upon.

Article 15.2.1°

23. The plaintiffs contend that only the Oireachtas, as opposed to the Minister, has power to introduce all of the provisions of the DPR because Article 15.2.1° vests the sole and exclusive power of making laws for the State in the Oireachtas. The adaptation of *Cityview Press* for SIs made under the Act of 1972 arises for consideration therefore.

24. O'Higgins C.J. for the Supreme Court in *Cityview Press* explained that establishing an unauthorised delegation of parliamentary power depends on whether there "is more than a mere giving effect to principles and policies which are contained in the statute itself."

Article 29.4.6°

25. Article 29.4.6°, which gives protection to laws necessitated by the obligations of membership of the European Union, comes to be reviewed again by the Court. It was submitted on behalf of the defendants that the matters of principle and policy granted to Member States by Article 92 of the Control Regulation and the requirements under Title VII [Enforcement] of the Implementing Regulation were

such that the penalty point system in the DPR may be introduced by way of a SI under the Act of 1972.

Article 34.4

26. It was submitted also on behalf of the plaintiffs that the broad-brush approach taken by the Minister when creating the architecture for the implementation of the relevant EU regulations fell outside what could be considered the principles and policies of the relevant EU regulations. This approach was exemplified by the restriction of the licence holder's right to a determination by a court which administers justice and more particularly by the exclusion of an appeal from the High Court which was also limited by the DPR in its jurisdiction. The sole function of the courts in the architecture created by the DPR is confined to a determination on a point of law arising from a decision by an appeals officer.

Article 37.1

27. Article 37.1 provides for the exercise of administrative powers in non-criminal matters and in a limited manner. The Court considers the issues arising from this provision of the Constitution also.

Limited function of DPR

28. Counsel for the defendants referred the Court to the nature of the right to fish and the effect of the penalty points on that right granted to a licence holder. The Court also takes into account the fact that penalty points are an administrative type sanction. The attribution of penalty points to a licence may not immediately preclude the licence holder from fishing and it is not a criminal sanction.

29. It may be useful to clarify that the criminal process as it has been commenced against the Master originates under the 2011 Regulations and the Act of 2006. The penalty point system, on the other hand, which has been commenced against the licence holder for the Tea Rose arises by virtue of the DPR made in 2014 under the Act of 1972. The DPR is concerned with licence holders who have acquired a right to fish for a vessel under the CFP. In other words, the position of the defendants is that the exclusive competence which was given to the European Union by Article 3 of the TFEU and the policies expressed in the relevant EU regulations allowed the Minister to introduce a novel means of administering penalty points to licence holders under the CFP.

Article 92 of the Control Regulation

30. Article 92(1) of the Control Regulation (2009) refers to "serious infringement" while relying upon Article 3(1) of the IUU Regulation (2008) that provides as follows:-

"a fishing vessel shall be presumed to be engaged in IUU fishing if it is shown that, contrary to the conservation and management measures applicable in the fishing area concerned, it has :-

(a.) ...

(b.) not fulfilled its obligations to record and report catch or catch-related data, including data to be transmitted by satellite vessel monitoring system...".

31. Article 92 of the Control Regulation requires Member States to apply a point system for serious infringements to stop IUU fishing.

Points for Consideration

32. In summary, the Court is asked to consider whether the DPR went beyond the principles and policies of the relevant EU regulations for a number of reasons, including the following:-

1. Article 5(1) of the DPR allows the SFPA to determine whether a serious infringement occurred as opposed to "assigning the appropriate number of points to the holder of a fishing licence"⁶ when determined;
2. Article 10(2)(c) of the DPR requires a licence holder to provide grounds when appealing from a proposal to assign points, and thereby reverses the burden of proof⁷;
3. Article 10(6) and Article 10(7) of the DPR fetter the discretion of the appeals officer⁸;
4. Article 10(12) of the DPR provides that an appeal to the High Court on a point of law shall be final and conclusive.

33. It was argued that the above provisions are not "necessitated" by the relevant EU regulations. Therefore the introduction of these novel measures ought to have been considered and enabled by an Act of the Oireachtas as it alone has the exclusive power to establish a novel system for determining a serious infringement before applying penalty points to a licence held by an individual in the State.

34. The Court must consider whether the DPR was "necessitated" by the relevant EU regulations for the following reasons:-

(1) The European Union, pursuant to Article 34 of the TFEU, possesses exclusive competence in the CFP and each Member State is required to enact enforcement systems which are proportionate and effective to dissuade non-compliance with the rules of the CFP. The IUU Regulations, as supplemented by the Control Regulation and the Implementing Regulation, established the community control system for ensuring compliance. In accordance with Article 288 of the TFEU these regulations are binding in their entirety and are directly applicable;

(2) Unlike European directives which can require administrative acts or orders, the said EU regulations are self-executing and do not require implementing measures. The EU regulations contain the necessary principles and policies required for each member state to enact domestic point regulations.

(3) The conflation of issues for the application of penalty points to the licence holder with issues for the criminal prosecution of the Master, ignore the discrete nature of the point system under Article 92 of the Control Regulation. The point system is directed towards the licence, and is applied *in rem*, affecting the entitlement and ability to fish which is a right regulated by the European Union through the competent authorities of member states. The penalty point system complements other enforcement measures but is not dependant on other enforcement measures which member states may take under the CFP.

Supremacy

35. Article 29.4.6⁹ 'immunises' domestic laws, acts or measures necessitated by Ireland's membership of the European Union from constitutional challenge, by providing that the Constitution does not prevent such laws, acts or measures from having the force of

law in the State.

36. It was, however, s.2 of the Act of 1972 which rendered acts adopted by the institutions of the European Union (other than acts relating to common foreign policy and security) part of the domestic law of Ireland. Therefore, in the event of conflict with national law, the law of the European Union takes precedence, and it is this principle which permeates the legal order in Ireland.

37. The Court considers it relevant to state that the Constitution continues to impose restraints on the power of the executive to make secondary legislation pursuant to the Act of 1972 which is necessitated by the State's membership of the European Union.

The Meagher judgments

38. In the Meagher judgments of Blayney J. and Denham J. (Finlay C.J.¹⁰, O'Flaherty J. and Egan J. concurring) delivered on the 18th November, 1993, the Supreme Court upheld the constitutionality of s.3(2) of the Act of 1972. The *Meagher* judgment concerned the making of SIs under s.3 of the Act of 1972 pursuant to European Council Directive of 16th July, 1985, supplementing Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action O.J. L 191/46 23.07.1985.

39. Suffice to say that the judgments delivered by the Supreme Court have given rise to considerable study and comment. The phrase in s.3(2) of the Act of 1972 "incidental, supplementary and consequential provisions as appear to the Minister" have preoccupied many while allowing the interpretation of that phrase to be shaped for the living, growing organism of European Union law.

40. Denham J. reasoned in *Meagher*:-

"...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 domestic law as to the result to be achieved."¹¹

Maher

41. The Supreme Court on 30th March, 2001, delivered their judgments in the Maher case, where an SI made under the Act of 1972 was impugned on the grounds that the enabling European Council regulations for milk quotas did not necessitate the elimination of milk quota leasing. The SI also provided detailed provisions involving family transactions which were not contained in the European Council regulations.

42. In summary the Supreme Court in the *Maher* case made it clear that a European regulation may be implemented by way of an SI if the policy is the policy of the European Union and if the Member State does not have to make any policy decision itself.

43. Fennelly J. in the *Maher* case observed:-

"the issue of 'necessity' is appropriately considered by reference to the content, not the form of the instrument".¹²

44. He continued on to clarify:-

"The mere existence of a Community Regulation implies some sort of community policy. Article 253 (EC) obliges the Community Legislature to state in such acts "the reasons on which they are based". Member States implementing measures come inherently within the scope of such a stated policy. However the principle of the applicability of the test is a recognition of the possibility that the choices left to the Member States may be of such significance in their nature of scope or so unconnected with Community policies and aims that they require legislation and that resort to regulations in such cases would infringe Article 15.2.1°."

NAMA

45. The Supreme Court in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51 emphasised the need to appreciate the extent and terms of an EU directive while identifying the different concepts of administrative law and public law throughout the member states.

46. The passage at para.9 of the judgment (O'Donnell J.) resonates particularly with what this Court now has to determine:-

"The problem of interpretation posed in this case calls to mind the observations of the Caliph of Baghdad on the burning of the library of Alexandria quoted by Lord Hoffman in the United Kingdom House of Lords in *Kirin-Amgen Inc v. Hoechst Marion Roussel Ltd.* [2005] R.P.C. 169: if it contained nothing that was not in the Koran it was superfluous, and if it contained something different it was dangerous. In the same way it can be said that if subparagraphs (i) to (vi) say something different to subparagraphs (a) to (c) then they are possibly dangerous and certainly difficult."

Registered Employment Agreements

47. The Supreme Court in *McGowan v. Labour Court* [2013] IESC 21 [2013] 2 I.L.R.M. 276 dealt with the alleged excessive delegation of legislative powers to the Labour Court without an EU aspect or involving the Act of 1972.

48. This judgment is cited because O'Donnell J. at para. 31 summarised the case law in relation to Article 15.2.1 since 1937 in one sentence as follows:-

"Indeed the case law since that time can be understood as an attempt to seek to delineate the boundary between permissible subordinate regulation and the abdication, whether by delegation or otherwise, of the law making authority conferred on the Oireachtas by the people, through the Constitution".

EU principles and policies

49. The following gives a flavour of the determination of the EU to stop IUU fishing and which is relied upon by the defendants for the principles and policies when making the DPR under the Act of 1972:-

1. Recital 3 of the IUU Regulation explains that "IUU fishing" constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources and jeopardises the very foundation of the [CFP] and international efforts to better ocean governance.

2. Recital 34 of the IUU Regulation refers to:-

"The persistence of a high number of serious infringements against the rules of the..." [CFP] and the weakness of the existing sanctions as the reason for harmonising "maximum levels of administrative sanctions".

3. Recital 40 of the Control Regulation which mentions that:-

"The establishment of sanctions should be complimented by a point system for serious infringements on the basis of which a fishing license should be suspended if a certain number of points have been attributed to the holder of a fishing licence...."

4. Article 90(2) of the Control Regulation which provides:-

"Member States shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions and measures...."

5. Article 91 of the Control Regulation which provides that:-

"Member States shall take immediate measures to prevent masters of fishing vessels or other natural persons and legal persons caught in the act of committing a serious infringement as defined in s.42 [of the IUU Regulation] from continuing to do so."

6. Article 125 of the Implementing Regulation which requires each member state to designate the competent authority which shall be responsible for "setting up the system for the attribution of points for serious infringements..."

7. Article 126 of the Implementing Regulation which specifies that the number of points assigned shall accord with Annex XXX.

Conclusion

50. The DPR asserts that the Minister is exercising his power conferred by s.3 of the Act of 1972 for the purpose of giving full effect to Article 92 of the Control Regulation and Title VII of the Implementing Regulation. As a result, the Court's attention is focused on whether those specific articles of the Control Regulation and Implementing Regulation enabled the Minister to authorise the SFPA to decide on whether a serious infringement had occurred, as opposed to investigating a serious infringement and attributing points following a determination.

51. The SFPA can attribute the penalty points to the licence holder once a decision has been made on whether a serious infringement has occurred, but the essential question concerns whether the principles and policies permitted the Minister to appoint the SFPA as investigator, judge and regulator with the simultaneous role of maintaining records for licences, while giving limited rights of review of any action by the SFPA.

52. Many of the provisions in the DPR do indeed reflect the principles and policies of the relevant EU Regulations. The introduction at European Union level of a penalty point system for a licence as opposed to sanctions for an individual was innovative. Therefore there are clear principles and policies in the relevant EU Regulations for the Minister to make the DPR in this regard.

53. However it is the combination of provisions which concentrates power in the SFPA that raises a question about policy and principles. There is no doubt that the Minister may designate the SFPA as the competent authority under the Implementing Regulation by way of the DPR. However the licence holder is entitled to ask about the principles and policies which allow the Minister to introduce a novel scheme into Ireland for determining the action or omission that triggers the imposition of penalty points for a licence.

54. The following in particular sets the Court on a trail of enquiry as to overall compliance with the *Cityview Press* test as applied in the *Meagher* judgments and in the *Maher* case: it is the combination of these issues as opposed to any one single point discussed in this paragraph which leads the Court to its decision about the DPR:-

- a. The limited opportunity under the DPR for the licence holder, if not his exclusion, from access to any typical adjudication process about whether a "serious infringement has occurred". Licence and permit holders in other sectors in Ireland typically have access to courts for adjudication of alleged wrongdoing if not appeals to a court from an independent adjudicator;
- b. The edifice created by the DPR for the combined investigation, detection and assessment of serious infringements followed by the imposition of penalty points and limited appeal opportunities is new to licensing in Ireland;
- c. The Minister has not explained why traditional processes were not adopted in the DPR. The relevant EU regulations do not require member states to abandon established legal order and administration systems;
- d. The Court has not been persuaded that the two year delay for the trial of the alleged offence by the Master should affect the assignation of penalty points to a licence holder if other sanction-like systems used in the State were adopted by the Minister in making the DPR;
- e. The Minister has not sought to explain why potential delays in investigating and determining an alleged serious infringement, in processing any appeal and in attributing penalty points could be avoided by means other than by the novel approach used in the DPR;
- f. Article 10(ii)(c) of the DPR, which requires a licence holder to provide grounds for challenging a determination by the SFPA of a serious infringement, may not be unique in Irish legislation. Nevertheless it is uncommon in Ireland for those licensed to bear a burden which sits uneasily with the principles of constitutional and natural justice that allow those with a profession or trade for example to have allegations of wrongdoing established. The relevant EU regulations do not require a licence holder to bear the burden of proving that a serious infringement has not occurred. The Minister has not explained why this provision was inserted and the Court cannot find any specific principle or policy in the relevant EU regulations to justify what may be categorised as minimising the burden to establish a serious infringement;
- g. It may be open to the Oireachtas to introduce legislation which requires a licence holder to bear the burden of disproving a detection of a serious infringement without the usual recourse to a review by a court. However, such a measure, in this Court's view, tilts the scales in favour of zealous adherence to the stated EU policy for the point system to be effective and dissuasive as against the demands of Article 15.2.1°. The Court remains ever conscious of the prerogative of elected members of the Oireachtas to debate and to enact legislation which establishes principles and

policies to allow a Minister to adopt new norms such as those set out in the DPR.

h. The Court was not persuaded by the reference in the relevant EU regulations to “effective, proportionate and dissuasive administrative sanctions” to justify a novel determination system which could be regarded by licence holders as somewhat skewed against them. The opaqueness associated with the introduction of the relevant novel measures for the sake of effectiveness does not sit well with the requirements of the Constitution for Ministers when they exercise powers to make secondary legislation pursuant to the Act of 1972.

i. The fettering of the discretion of the Appeals Officer as described, together with the somewhat limited opportunity to involve the High Court in any determination with the exclusion (coupled with the finality of any High Court decision) is unusual if not unique in the legal framework of the State for licensing. This Court cannot find any principle or policy in the relevant EU regulations to justify this incursion into what may ordinarily fall within the remit of primary legislation.

j. Submissions filed by the Defendants asserted that making a High Court decision final and conclusive did not require primary legislation. Eleven examples of SIs which so provide were given. The Court notes that those eleven SIs were made in areas in which the Labour Court also had a role and that the Labour Court when those SIs were made was governed by the Industrial Relations Act 1946. Section 17 of that Act provided for finality of a Labour Court’s decision and provides a limitation of the right to appeal based on domestic legislation which was enacted by the Oireachtas. This Court takes the view that the examples cited by the defendants merely show that primary legislation has enabled the making of secondary legislation which limits recourse to the Courts on the basis that the secondary legislation accords with the principles and policies of the enabling legislation. Although the relevant EU Regulations were themselves innovative and demanding, there is no requirement for Member States to limit recourse to the courts on appeal or otherwise.

k. The Court returns to its earlier observation that the Act of 1972 which the Minister relies upon is of a general nature and is more significantly subjected to the expectations for primary legislation when the EU legislation do not specifically require abandonment of domestic norms.

Decision

55. However serious the threat of IUU fishing is to aquatic resources and however willing the Minister is to contribute to better ocean governance, it is the view of this Court that the Minister, in exercising his powers under the Act of 1972 to make the DPR, has failed to recognise the absence of principles and policies to introduce a novel way of determining serious infringements which cause penalty points to be imposed on licences. The principles and policy of the relevant EU Regulations relied upon by the Minister are indeed demanding but they are also general in nature. They do not require the Minister to ignore established systems for independent adjudication and recourse to the courts in such matters. Effectiveness and dissuasiveness can be achieved without abandoning established norms for the determination of events for the imposition of administrative sanctions.

56. The Court invites the parties to make submissions about the order which should now be made in relation to the DPR.

¹ Regulation 9 of the DPR

² Regulation 10(5) and Regulation 10(12) of the DPR

³ Regulation 10(7) of the DPR

⁴ Regulation 10(8) of the DPR

⁵ Regulation 10(12) of the DPR

⁶ Article 125(b) of the Implementing Regulations

⁷ Article 3(1) of the IUU Regulation only provides that “a fishing vessel shall be presumed to be engaged in IUU fishing if it is shown... it has... (b) not fulfilled its obligations to record and report catch...”.

⁸ Article 10(6) and 10(7) of the DPR limits the power of the appeals officer to allow an appeal where he/she considers on the balance of probabilities that the serious infringement did not occur when there was no such requirement set out in the relevant EU regulation.

⁹ This was originally Article 29.4.3^o (1973-1993); Article 29.4.5^o (1993-1999); Article 29.4.7^o (1999-2002); and Article 29.4.10^o (2002-2009)

¹⁰ The decision of the Court was pronounced at the direction of the Court by Finlay C.J. pursuant to Article 34.45.5^o

¹¹ [1994] 1 I.R. 329 at 366

¹² [2001] 2 I.R. 139 at 252