Neutral Citation Number: [2010] IEHC 325

THE HIGH COURT

2007 322 JR

Between:

CLEMENT HAYES

Applicant

-and-

IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR AGRICULTURE, FOOD AND DISTRICT JUDGE FINN

Respondents

JUDGMENT of Justice William M. McKechnie delivered on the 18th day of June 2010

1. This judgment is given in respect of an application heard by this Court, at the same time as it heard the associated linked cases of GVM Exports Limited (In Voluntary Liquidation) v. Ireland & Ors (Record No.: 2005/843P) and *GVM Exports Limited (In Voluntary Liquidation) v. The Minister for Agriculture, Food and Rural Development and District Judge O'Halloran* (Record No.: 2003/745 JR), in respect of which a separate judgment is given.

Background:
2. The applicant is a farmer in Emly, County Tipperary, and is currently facing a number of charges in Tipperary District Court. The charges relate to breaches of various regulations relating to the testing of cattle for Bovine Tuberculosis ("TB") and Brucellosis. The applicant was originally served with 30 summons in 2005 and a further 50 summonses in 2006. As against him, these allege breaches of:

> i) Brucellosis in Cattle (General Provisions) Order 1991 (S.I. 114/91) ("Brucellosis Order 1991") – Articles 5(5), 18(1), 18(2), 18, as amended by Article 10 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 2003 (S.I. 700/03), and 19(7), as amended by Article 7 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 2001 (S.I. 229/01);
>
> ii) Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1989 (S.I. 308/89) ("TB Order 1989") – Articles 12(4);
>
> iii) European Communities (Identification and Registration of Bovine Animals) Regulations 1999 (S.I. No 276/99) ("EC(IRBA) Regulations 1999") – Regulations 6(2), 8, 12, 19(b), 20(1), 21 and 24;
>
> iv) Diseases of Animals Acts 1966 to 2001 (Approval and Registration of Dealers and Dealers' Premises) Order 2001 (S.I. 79/01) ("DAA 1966 to 2001 Order 2001") – Article 8(3).

3. An example of a summons in one group of such charges will identify the first issue in the case. The summons reads:

> *"That you the said accused … did on the 10th May 2003 within the State move or allowed to be moved an eligible animal bearing ear-tag number IE 1911269 4 0417 out of your holding [emphasis added] without a valid cattle identity card in respect of that animal or a movement permit permitting such movement contrary to Article 18(1) of the Brucellosis in Cattle (General Provisions) Order, 1991 (S.I. No. 114 of 1991) as inserted by Article 2 of the Brucellosis in Cattle (General Provisions) (Amendment) Order, 1998 (S.I. No. 39 of 1998), an offence within the meaning of Article 31 of the Brucellosis in Cattle (General Provisions) Order, 1991 (S.I. No. 114 of 1991) as inserted by Article 4 of the Brucellosis in Cattle (General Provisions) (Amendment) Order, 2000 (S.I. No. 57 of 2000) and Section 48(1)(a) and (d) of the Diseases of Animals Act, 1966 (No. 6 of 1966)."*

As can be seen, what constitutes a "holding" is essential to the offence as charged. A review of the other legislative provisions under which the applicant is also charged, as outlined at para. 2 *supra*, similarly, either directly or derivatively, rely on the definition of a "holding".

4. The applicant, to answer such charges, appeared in the District Court before Judge Finn and argued, *inter alia*, that inconsistencies between national legislation, under which he was charged, and the relevant European Legislation, in particular that relating to the definition of "holding" under EC Regulation 1760/2000, were such that the national legislation should be set aside, and the summons dismissed.

5. The learned Judge reserved judgment, delivering it on the 26th February 2007. He held, when dealing with the holding issue, *inter alia*, that:

> *"[T]his Court is satisfied that there is no distinction between the word kept in its singular form and the words held, kept or handled as is set out in the European Directives here."*

Therefore effective transposition was in place. Being dissatisfied with the ruling, the within judicial review proceedings were commenced; with the charges being left stand pending outcome.

6. The applicant takes issue on a number of grounds. In particular the applicant, pursuant to the leave Order of the 26th March 2007 (Peart J.) alleges that:

> i) Article 18 of the Brucellosis Order 1991, as amended by Article 2 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 1998 (S.I. 39/98) ("Brucellosis Order 1998"), an offence within the meaning of Article 31 of the Brucellosis Order 1991, as inserted by Article 4 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 2000

(S.I. 57/2000) ("Brucellosis Order 2000") is *ultra vires* s. 3 of the Diseases of Animals Act 1966 ("DAA 1966") in respect of the 1991 and 1998 Orders and ss. 3, 13, 20 and 27 of the DAA 1966 in respect of the 2000 Order.

ii) Article 18(2) of the Brucellosis Order 1991, as amended by Article 10 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 2003 (S.I. 700/03) ("Brucellosis Order 2003"), and an offence under Article 31 of the Brucellosis Order 1991, as inserted by Article 4 of the Brucellosis Order 2000, are *ultra vires* s. 3 of the DAA 1966 in respect of the 1991 and 1998 Order, and ss. 12, 20 and 27 of the DAA 1966, as amended by the Diseases of Animals (Amendment) Act 2001 ("DA(Am)A 2001"), in respect of the 2003 Order.

iii) Article 19(7) of the Brucellosis Order 1991, as amended by Article 7 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 2001 ("Brucellosis Order 2001"), (S.I. 229/2001), contrary to Article 11 of the 2001 Order is *ultra vires* s. 3 of the DAA 1966 in respect of the 1991 Order and ss. 3, 13, 14, 15 and 16 of the DAA 1966 in respect of the 2001 Order.

iv) Article 5(5) of the Brucellosis Order 1991 and Article 31 of the Brucellosis Order 1991, as inserted by Article 4 of the Brucellosis Order 2000 are *ultra vires* s. 3 of the DAA 1966 in respect of the 1991 Order and ss. 12, 20 and 27 of the DAA 1966 in respect of the 2000 Order.

v) Articles 12(4) and 35 of the TB Order 1989 are *ultra vires* s. 3 of the DAA 1966.

vi) Articles 3(1) and 8(3) of the DAA 1996 to 2001 Order 2001 are *ultra vires* ss. 3 and 29A (inserted by the Diseases of Animals (Amendment) Act 2001) of the DAA 1966.

vii) Articles 3, 6, 8, 12, 19, 20(1), 21, 24 and 29(1) of the EC(IRBA) Regulations 1999 are *ultra vires* s. 3 of the European Communities Act 1972 ("ECA 1972").

viii) Section 4 of the ECA 1972 as amended by the European Communities (Amendment) Act 1973 is unconstitutional.

The applicant also seeks an Order of *certiorari* quashing the ruling made by Judge Finn in the District Court on the 26th February 2007, and an Order of prohibition preventing his trial in relation to the above charges.

7. In summary, the applicant alleges that:

i) The definition of "holding" was improperly transposed into national law, and the State has failed to set up the Identification and Registration system as required by European law.

ii) The Orders made under the DAA 1966 are *ultra vires* the powers granted to the Minister under that Act, either *simpliciter*, or because they are in fact implementing European law and therefore should have been made under s. 3 of ECA 1972.

iii) The Orders have impermissibly sought to create an indictable offence, since the EC(IRBA) Regulations 1999 have altered or extended the ingredients of offences under the DAA 1966, contrary to s. 3(3) ECA 1972.

iv) The permission granted by s. 4 ECA 1972 to the Minister to create orders with statutory effect is unconstitutional having regard to Article 15.2.1° of the Constitution.

v) In the alternative, regulations having statutory effect are not covered by the Interpretation Acts and it is therefore impossible to ascertain a legitimate commencement date.

The Definition of "Holding" in European and national legislation:

8. The applicant has been charged under a number of orders and regulations. It would not appear to be in dispute that the definition of "holding" is a fundamental component of those charges.

9. The applicant contends that there is a fundamental inconsistency between the definition of the phrase "holding" under the national legislation, by reference to which he is charged, and European legislation, in particular Regulation (EC) 1760/2000, "establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97".

10. The applicant draws attention to the following definitions contained in the Brucellosis Order 1991. "Herd" is defined in Article 2 of that Order as meaning:

"the animals which are for the time being on a particular holding and in case only one animal is for the time being on a particular holding, the animal shall for the purpose of this Order be regarded as being a herd"

"Holding" is defined by that Order as:

"all the land used by an owner of animals, whether solely or jointly with any other person or persons, for farming purposes or used by a dealer for or in connection with an animal purchased or disposed of (by sale or otherwise) by him."

These definitions are likewise contained in identical form in Article 2 of the TB Order 1989, although in the definition of "holding" under this Article, the word "either" is included so that the definition commences "all the land either used by an owner of animals…". However, in my opinion, nothing turns on such addition.

11. Article 2 of the EC(IRBA) 1999 defines "holding" as:

"any establishment, construction or, in the case of an open air farm, any place situated within the country in which animals are kept." (Emphasis added)

12. The applicant seeks to contrast these definitions with the definition of "holding" in Article 2 of Council Regulation 1760/2000, originally contained in Council Regulation 820/97, which defines "holding" as:

> *"any establishment, construction or, in the case of an open-air farm, any place situated within the territory of the same Member State, in which animals covered by this Regulation are held, kept or handled." (Emphasis added*

13. The applicant contends that the EC(IRBA) Regulations 1999 have not adequately transposed the definition of "holding" under European law; the Irish legislation refers to places where animals are "kept", but does not include places where animals are also "held" and "handled". The applicant argues that under the current regime the Restriction Orders served on him must apply to all of his holdings, whereas if the Regulation had been properly transcribed, it would be possible to restrict only places where cattle were "kept" or "held" or "handled"; in the instant case the cattle were only being "held". There is also currently no requirement for some connection between the animals, other than the fact that they are included in the same "herd", regardless of geographic location.

14. Although many of the summonses referred on their face to the phrase "holding", a number of the summons, in particular those alleging breaches of Regulation 8, 6(2) and 24 of the 1999 Order, do not expressly so refer. It should therefore be noted how it is contended that the definition of "holding" is relevant in those instances.

15. With regards to the offences charged under Regulation 8 of the 1999 Order, Regulation 8 requires that:

> *"A keeper shall not transfer responsibility for an animal unless the passport relating to that animal, which has been signed and completed as appropriate in accordance with Regulation 5 and where appropriate in accordance with Regulation 12, is transferred at the same time to the new keeper."*

Regulation 5, referred to in Regulation 8, requires that a passport which has been issued in accordance with Regulation 4(1)(a) shall be signed by the keeper, and Regulation 4(1)(a) notes that the Minister may issue a passport in the format as set out in the Second Schedule. The front of the passport, as set out in that Schedule, states:

> *"This is an official document. It is the property of the Minister for Agriculture and Food. Any alteration/defacement/damage renders it invalid. Documents must be signed by the owner/keeper and completed at record of owners/keepers transactions and movements following arrival of animal at each holding."*

It is therefore clear that the definition of a "holding" is relevant to offences under Regulation 8, since the obligations in relation to passports arise at the time of arrival of the animal at a "holding".

16. In the alternative, under Regulation 5, a passport could be issued in accordance with Regulation 4(1)(b) or 4(1)(c), and in such cases:

> *"(i) in the case of an animal born on his holding, be signed by the keeper to whom the passport was issued in the space provided, or*
>
> *(ii) in other cases, be completed and signed by the keeper of the animal to whom the passport is issued at the first available line of the section titled 'record of owners/keepers (to be completed by each new owner/keeper on arrival of animal at holding)'."* (Regulation 5(b))

Again the definition of "holding" would be a relevant consideration.

17. Regulation 12, referred to in Regulation 8, states:

> *"Where an animal is moved onto a holding, other than a mart, the new keeper shall, within seven days of such movement, and in any event before responsibility for that animal is transferred further, insert on the passport relating to that animal in the first line available in the section of the passport titled "record of owners/keepers (to be completed by each new owner/keeper on arrival of animal at holding)"—*
>
> *(a) the date of arrival of the said animal on the holding,*
>
> *(b) where appropriate, the herd number, or other identification number, allocated by the Minister for the time being to the new keeper,*
>
> *(c) the name and address of the new keeper, and*
>
> *sign the passport at the place indicated in that line."*

The definition of a "holding" is clearly an important consideration in this Regulation.

18. With regards to offences charged under Regulation 6(2), the Regulation requires that animals not be moved from a "holding" unless the animal is accompanied by a passport.

19. In relation to the offences charged under Regulation 24, the Regulation states:

> *"A person shall not, in purported compliance with Regulation 3, 5, 10, 12 or 20, include in any passport, application form, book, document, register or record a particular which he knows to be false or does not know to be true or recklessly include in such passport, application form, book, document, register or record a particular which is false or which he does not know to be true."*

The plaintiff notes that only Regulation 3 is relevant for our purposes, and this states that:

> *"A keeper shall, in the case of an animal born on his holding and identified in accordance with the 1999 Order after the date of coming into force of these Regulations, within seven days of the date on which the animal has been so identified —*
>
> *(a) complete an application form in respect of that animal.*

(b) sign the application form at the place indicated therefor, and

(c) return the application form by post to the address indicated thereon."

It is therefore clear that the definition of a "holding" is relevant in all of the summons received and challenged by the plaintiff herein.

20. The plaintiff further contends that in failing to properly transpose the definition of "holding", the Minister has also failed to comply with four elements of the Identification and Registration system required by EC Regulation 1760/2000, namely:

i) Ear tags within the meaning of Article 4 of the Regulation;

ii) Computerised databases within the meaning of Article 5;

iii) Animal passports within the meaning of Article 6; and,

iv) The keeping of individual registers on each holding within the meaning of Article 7.

21. In reply, with regards to the alleged invalidity of the various Orders and Regulations, as outlined *supra*, the respondents categorically deny that they are invalid in the ways alleged or at all. It is denied that the national Regulations/Orders have failed to properly transpose Council Regulation No. 820/97 and/or Council Regulation 1760/2000. It is also denied that the Orders/Regulations were in any way *ultra vires* the powers of the Minister, either under the DAA 1966, or Council Regulations, or at all.

22. When considering whether the EC(IRBA) Regulations 1999 have properly transposed Council Regulations 820/97 and 1760/2000 , and thus whether they comply with the requirements of the Identification and Registration system, one must first consider the ordinary meaning of these phrases. The term "kept", given its ordinary meaning, could, in my opinion, include the terms "hold" or "handled". However, it is recognisable that the natural meaning of "kept" could imply some, more than transitory, period of retention. In this regard the ordinary meaning of the word could, in my opinion, *ex facie*, be broad enough to cover "held" and "handled", but it is not wholly conclusive.

23. One must therefore also look at the phrase in context. Council Regulation 820/97 was enacted, *inter alia*, to create a system for the identification and registration of cattle. It arose in circumstances where, as stated in the preamble, the market for beef and beef products had been *"destabilised by the bovine spongiform encephalopathy crisis".* It is thus clear that the aim of the Regulation was to re-establish confidence in the market after a major problem due to disease in the food chain, and aimed to do so through *"improving the transparency of the conditions for the production and marketing of the products concerned particularly as regards traceability."* Further, it would protect both human and animal health. In this regard, it would seem strange if the phrase "kept" could be utilised to circumvent such rules, which have clear public interest aims, so that a person who was merely "holding" animals would be considered exempt. I am reinforced by this view to some extent, although by no means determinatively, by the definition of "keeper" contained in both the national and European regulations which:

"shall mean any natural or legal person responsible for animals, whether on a permanent or temporary basis, including during transportation or at a market."

The concept of "keeper" therefore does not imply any permanent or non-transitory element.

24. I would also mention Article 2(3) of EC(IRBA) Regulations 1999 which states that:

"A word or expression that is used in these Regulations and is also used in the Council Regulation or the Commission Regulations has, unless the contrary intention appears, the meaning in these Regulations that it had in the Council Regulation or Commission Regulations."

25. The parent Regulation having direct effect, it would not be possible for the national legislation to run contrary to it: the applicant has therefore argued that if there is some conflict between the two, the national legislation must inevitably fail. Reference was made to the *Simmenthal* doctrine of the supremacy of Community / Union law (named after *Administrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629. See also *Falminion Cost v. ENEL* [1964] ECR 585; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125). This doctrine requires that where national provisions are in conflict with European law, national courts must refuse to apply them (see Craig & de Búrca, *"EU Law (4th Ed.)"* (2008), Ch. 10).

26. Having considered the above, I do not believe that the EC(IRBA) Regulations 1999 are in conflict with Council Regulation 820/97 and thus also Council Regulation 1760/2000. There is at most ambiguity as to whether the natural and ordinary meaning given to the phrase "kept", used in the national legislation, is sufficient to cover "held, kept or handled". In circumstances where there is ambiguity I have therefore had regard to both the circumstances surrounding the Council Regulation and the relationship between the implementing legislation and the parent Regulation. I can only come to the conclusion that the national Regulation has not improperly transposed the European Regulation. I therefore find that the phrase "kept" used in the EC(IRBA) Regulations 1999 can be understood from its context as to include places where animals are also "held" and "handled", in conformity with the European definition. By implication I therefore also reject the applicant's assertion that the Minister has failed to properly implement the Identification and Registration system as required under European law in this regard. Although it may have been preferable for the national legislation to transpose the definition verbatim, its failure to so do, is not, in this case, fatal.

***Ultra vires* and the Diseases of Animals Act 1966:**

27. The applicant contends that the control of diseases in cattle, in particular bovine TB and brucellosis, have become an area of exclusive European competency. In this regard orders and regulations made under the old system have now been superseded by European legislation. Further, the Brucellosis Order 1991, Brucellosis Order 1998, Brucellosis Order 2000 and Brucellosis Order 2001 are *ultra vires* ss. 3, 12, 13, 14, 15, 16, 20, 27 and 29A of the DAA 1966. Before continuing it is therefore necessary and helpful, although lengthy, to set out the relevant provisions of that Act in full.

28. Section 3 of the DAA 1966 states:

"(1) The Minister may make orders, subject and according to the provisions of this Act—

(a) generally, for the due execution of this Act or for the prevention of the spreading of disease;

(b) in particular, for the several purposes specified in this Act, including any matter which under this Act may be prescribed.

(2) The Minister may by order amend or revoke any order under this Act."

Section 12 states:

"(1) The Minister may prescribe that notice be given of the existence or suspected existence of any particular disease or illness of animals or poultry, the persons by whom the notice is to be given, and the authority to whom and the manner in which it is to be given.

(2) …"

Section 13 states:

"The Minister may, for the purpose of the prevention or checking or eradication of disease, make orders for all or any of the purposes set out in the Second Schedule."

The relevant parts of the Second Schedule, as amended, state:

"PURPOSES FOR WHICH ORDERS MAY BE MADE BY THE MINISTER UNDER SECTION 13.

1. Securing and regulating effective isolation on land or premises and prohibition or restriction of movement into or out of land or premises or part thereof of animals or poultry affected or suspected of being affected or capable of infecting animals or poultry with a disease or animals or poultry capable of being infected.

2. Securing and regulating the cleansing and disinfection of premises and removal therefrom and subsequent disposal of dung, litter, fodder or any other thing, and exclusion of any animals and birds therefrom.

3. Securing and regulating the cleansing and disinfection of vehicles, places, pens, fittings and receptacles used for animals and poultry.

4. …

5. …

6. …

7. Prescribing and regulating the seizure, detention and disposal of diseased or suspected animals or poultry, carcasses or eggs exposed, carried, kept or otherwise dealt with in contravention of an order of the Minister; and for prescribing the liability of the owner or consignor or consignee of any such animals, poultry, carcasses or eggs in the matter of the expenses connected with the seizure, detention or disposal thereof.

8. …

9. …

10. …

11. Prescribing and regulating the disinfection of the clothes of persons coming in contact with or employed about diseased or suspected animals or poultry and the use of precautions against the spreading of disease by such persons.

12. Prohibiting or regulating or restricting the sale, use or movement of any kind of fodder, litter or other material whereby disease might be spread.

13. Prescribing and regulating the treatment of diseased or suspected animals or poultry, or animals or poultry which appear to the Minister to be in any way exposed to the infection of disease.

14. Prohibiting the exposure for public sale or exhibition or the export of diseased or suspected animals or birds or animals or birds at risk of contracting a disease except under and in accordance with a licence.

15. …

16. Requiring, prescribing and regulating the taking from animals and poultry or any particular, categories of animals and poultry of samples, as appropriate of blood, urine, faeces, or other bodily discharges, semen, saliva, milk, eggs, hair, wool, fur, feathers, mucus, skin or other tissue and, in the case of carcasses of animals or poultry, the taking of samples from such carcasses and the subjection of any samples so taken to such tests as may be necessary to establish or confirm the existence of disease, and the submission of reports on such tests.

17. Requiring, prescribing, regulating and prohibiting the application to or the injection into animals and poultry of any substance with a view to the carrying out of such tests as may be necessary to establish or confirm the existence of disease and the submission of reports on such tests.

18. Requiring, specifying or regulating any other tests of animals and poultry for the purpose of establishing or confirming the existence of disease.

19. Prohibiting, except with the consent of the Minister, tests of animals and poultry, other than such tests as are prescribed, specified or regulated by an order of the Minister.

20. Requiring, specifying, regulating and prohibiting (except with the consent of the Minister) the treatment of animals or poultry with serum or vaccine.

21. Prescribing in relation to any particular disease, that persons may not engage in the business of dealing in animals or poultry unless authorised by a licence issued in that behalf by the Minister and subject to such conditions as may be set out in such licence.

22. Purposes ancillary or incidental to any of the foregoing purposes."

Section 14 states:

"(1) The Minister may prescribe—

(a) the cases in which places and areas are to be declared to be infected or at risk of being infected with a disease;

(b) the authority, mode and conditions by and on which declarations in that behalf are to be made;

(c) the effect and consequences of such declarations;

(d) the duration and discontinuance of such declarations; and

(e) other matters connected with the making of such declarations.

(2) The Minister may by order alter the limits of a place or area declared to be infected or at risk of being infected by disease.

(3) Every place or area so declared infected or at risk of being infected shall be an infected place or area for the purposes of this Act.

(4) Where an order is made declaring a place or area or an area or place at risk of being infected to be no longer an infected place or area then from the time specified in the order the place or area shall cease to be, or be in, an infected place or area or an area or place at risk of being infected.

(5) An order or notice of the following description—

(a) an order of the Minister or of a local authority declaring a place to be an infected place or area, or declaring a place or area to be no longer an infected place or area; or

(b) a notice served in pursuance of directions of the Minister or of a local authority by virtue of an order made under this section,

shall be evidence, until the contrary is shown to all intents of the existence or cessation of the disease and of any other matter whereon the order or notice proceeds."

Section 15 states:

"The Minister may make orders—

(a) prescribing and regulating the publication, in relation to a place or area declared infected or at risk of being infected, of the fact of such declaration;

(b) prohibiting or regulating the movement of animals and poultry and persons into, within, or out of an infected place or area or a place or area suspected of being at risk of being infected;

(c) prescribing and regulating the isolation or separation of animals and poultry being in an infected place or area or a place or area suspected of being at risk of being infected;

(d) prohibiting or regulating the removal of carcasses, eggs, fodder, litter, utensils, pens, hurdles, dung, or other things into, within, or out of an infected place or area or a place or area suspected of being at risk of being infected;

(e) prescribing and regulating the destruction, burial, disposal, or treatment of carcasses, eggs, fodder, litter, utensils, pens, hurdles, dung, or other things, being in an infected place or area or a place or area suspected of being at risk of being infected, or removed thereout;

(f) prescribing and regulating the cleansing and disinfection of infected places and areas or a place or area suspected of being at risk of being infected, or parts thereof, and of receptacles or vehicles used for the confinement or conveyance of animal or poultry;

(g) prescribing and regulating the disinfection of the clothes of persons being in an infected place, and the use of precautions against the spreading of disease by such persons."

Section 16 states:

"A person owning or having charge of animals, poultry or eggs in an infected place or area or a place or area suspected of being infected may affix, at or near the entrance to a building, enclosure or farm in which the animals, or poultry or

eggs are, a notice forbidding persons to enter thereon without the permission mentioned in the notice, and thereupon it shall not be lawful for any person, not having by law a right of entry or way into, on or over that building, enclosure or farm, to enter or go into, on, or over it without that permission."

Section 20 states:

"The Minister may make, in relation to any clearance area or attested or disease-free area, orders—

(a) as to animals or poultry affected or suspected of being affected or capable of affecting animals or poultry with the relevant disease—

(i) authorising the taking of possession, by agreement, of the animals or poultry on behalf of the Minister;

(ii) in default of agreement, securing and regulating the removal out of the area or slaughter of the animals or poultry;

(iii) securing and regulating the isolation and maintenance of the animals or poultry pending their being taken possession of on behalf of the Minister or removed out of the area or slaughtered;

(b) securing and regulating the isolation and testing from time to time of animals or poultry brought on to land or premises;

(c) the prohibition or restriction of the movement of animals and poultry into, out of, through or within the area;

(d) securing and regulating the keeping of records in relation to animals or poultry and the production and inspection of the records;

(e) specifying forms of notices to be served under orders made by virtue of this section;

(f) providing, in cases in which there has been failure to comply with the requirements of any such notice, for—

(i) in case the notice requires removal out of the area or slaughter of animals or poultry—the taking of possession of the animals or poultry, their disposal as the Minister think fit and the recovery (without prejudice to any penalty that may have been incurred) of the cost of taking possession of the animals or poultry and of thereafter maintaining them and disposing of them;

(ii) in any other case—the carrying out of the requirements of the notice by or on behalf of the Minister and the recovery (without prejudice to any penalty which may have been incurred) of the cost of carrying out the requirements;

(g) determining, in the case of holdings situate partly within and partly outside any clearance, attested or disease-free area, or situate wholly or partly within two or more such areas, the area to which such holdings belong;

(h) authorising entry on land or premises for the purposes of any such order;

(i) for purposes ancillary or incidental to any of the foregoing purposes."

Section 27 states:

"The Minister may make orders—

(a) prohibiting, regulating or restricting the movement save under licence of animals or poultry and the removal of carcasses, fodder, litter, dung, eggs and other things, for prohibiting and regulating the user of eggs and for prescribing and regulating the isolation of animals or poultry newly purchased or imported;

(b) prescribing and regulating the issue and production of licences in regard to the movement and removal of animals, poultry, eggs and things;

(c) prohibiting or regulating the holding of markets, fairs, exhibitions and sales of animals or poultry and the exposure of animals and poultry thereat;

(d) prescribing and regulating the cleansing and disinfection of places used for the holding of markets, fairs, exhibitions or sales of animals or poultry or for lairage of animals, and yards, sheds, stables, and other places used for animals or poultry;

(e) prescribing and regulating the cleansing and disinfection of vessels, aircraft, vehicles, places, pens and fittings, used for animals or poultry or for the carrying of animals or poultry or purposes connected therewith;

(f) prescribing and regulating the records to be kept of purchases and sales of animals and poultry, the manner in which such records are to be kept and the circumstances under which, and the authority or person to whom, the contents of such records are to be made known."

Section 29A (see para. 6 (vi) *supra*.) states:

"(1) In this section 'dealer' means a person who purchases an animal or poultry and sells and supplies the animal or poultry to another person within a period of 45 days.

(2) The Minister may by order—

(a) regulate the possession, purchase, sale or supply of animals and poultry, or animals and poultry of a particular

class or description, by dealers for the purpose of preventing the outbreak or spread of a disease or for the purpose of preventing injury or suffering to animals or poultry,

(b) provide for the approval and registration of dealers and dealers' premises.

(3) Subject to this section, a person who purchases an animal shall not sell or supply that animal while it is alive for a period of not less than 30 days and, during that period, shall hold the animal on land in his or her ownership or under his or her control.

(4) Subsection (3) shall have effect only during such period and in respect of the whole of or such part or parts of the State as may be specified by the Minister by order, where he or she considers it reasonably necessary to avoid the outbreak or spread of disease or diseases of a particular class or description.

(5) The Minister or an officer of the Minister may issue a permit to a person or dealer or a class of person or dealer permitting an animal to be sold or supplied within the period referred to in subsection (3).

(6) In this section 'sell' includes offer, expose or keep for sale, invite an offer to buy, or distribute for reward and cognate words shall be construed accordingly."

Section 48 states:

"(1) If a person, without lawful authority or excuse, proof of which shall lie on him, does any of the following things, he shall be guilty of an offence—

(a) if he does anything in contravention of this Act, or of an order of the Minister, or of a regulation of a local authority; or

(b) if, where required by this Act or by an order or regulation made thereunder to keep an animal or bird separate as far as practicable, or to give notice of disease with all practicable speed, he fails to do so; or

(c) if he fails to give, produce, observe, or do any notice, licence, rule, or thing which by this Act, or by an order of the Minister, or by a regulation of a local authority, or by an authorised person he is required to give, produce, observe, or do; or

(d) if he does anything which by this Act or an order of the Minister is made or declared to be not lawful; or

(e) if he does or omits anything, the doing or omission of which is declared by this Act or by an order of the Minister to be an offence; or

(f) if he refuses to an inspector or other officer or authorised person acting in execution of this Act or of an order of the Minister, or of a regulation of a local authority, admission to any land, building, place, vessel, pen, vehicle, boat or aircraft which the inspector or officer is entitled to enter or examine, or obstructs or impedes him in so entering or examining, or otherwise in any respect obstructs or impedes an inspector or a member of the Garda Síochána in the execution of his duty, or assists in any such obstruction or impeding; or

(g) …

(h) if when duly required to do so under this Act or any order made thereunder he refuses or fails to give information within his knowledge or wilfully or negligently gives false or misleading information.

(2) A person who is guilty of an offence under subsection (1) shall be liable on summary conviction to a fine not exceeding £100.

(3) A person who has been convicted of an offence under any paragraph of subsection (1) shall, if within twelve months after such conviction he commits a further offence under the same paragraph, be liable on summary conviction, at the discretion of the court, to imprisonment for a term not exceeding one month in lieu of the fine to which he is liable under subsection (2)."

And, section 49 states:

"(1) If a person does any of the following things, he shall be guilty of an offence—

(a) if, with intent to evade this Act or an order of the Minister or a regulation of a local authority, he does anything for which a licence is requisite under this Act or an order of the Minister or a regulation of a local authority, without having obtained a licence; or

(b) if, where a licence is requisite, having obtained a licence, he, with the like intent, does the thing licensed after the licence has expired; or

(c) if he uses or offers or attempts to use as such a licence an instrument not being a complete licence, or an instrument untruly purporting or appearing to be a licence, unless he shows to the satisfaction of the court that he did not know of that incompleteness or untruth and that he could not with reasonable diligence have obtained knowledge thereof; or

(d) if he alters or falsely makes or antedates or counterfeits or offers or utters, knowing it to be altered, or falsely made or ante-dated or counterfeited, a licence, declaration, certificate, or instrument made or issued, or purporting to be made or issued, under or for any purpose of this Act or of an order of the Minister or a regulation of a local authority; or

(e) if, for the purpose of obtaining a licence, certificate or instrument, he makes a declaration or statement false in any material particular, unless he shows to the satisfaction of the court that he did not know of that falsity and that he could not with reasonable diligence have obtained knowledge thereof; or

(f) if he obtains or endeavours to obtain such a licence, certificate or instrument by means of a false pretence, unless he shows to the satisfaction of the court that he did not know of that falsity, and that he could not with reasonable diligence have obtained knowledge thereof; or

(g) if he grants or issues such a licence, certificate or instrument, being false in any date or other material particular, unless he shows to the satisfaction of the court that he did not know of that falsity, and that he could not with reasonable diligence have obtained knowledge thereof, or if he grants or issues such a licence, certificate or instrument, having and knowing that he has no lawful authority to grant or issue it; or

(h) if, with intent to evade or defeat this Act or an order of the Minister, or a regulation of a local authority, he grants or issues an instrument being in form a licence, certificate or instrument made or issued under this Act or an order of the Minister or a regulation of a local authority, for permitting or regulating the movement of a particular animal or bird or the doing of any other particular thing, but being issued in blank, that is to say, not being before the issue thereof so filled up as to specify any particular animal or thing; or

(i) …

(j) …

(k) …

(l) if, where the Minister has by order prohibited, absolutely or conditionally, the use for the carrying of animals or birds or for any purpose connected therewith of a vessel, vehicle, aircraft or pen or other place, he without lawful authority or excuse, proof whereof shall lie on him, does anything so prohibited.

(2) A person who is guilty of an offence under subsection (1) shall be liable on summary conviction to a fine not exceeding £100 or, at the direction of the court, to imprisonment for a term not exceeding two months."

29. Sections 48 and 49 of the DAA 1966, which relate to penalties for offences thereunder, were amended by s. 23 of the Bovine Diseases (Levies) Act 1979, which was later amended by s. 7 of the Bovine Diseases (Levies)(Amendment) Act 1996. These Acts included provision for prosecution on indictment, and increased the fines and potential imprisonment for offences under the DAA 1966. Section 7 provides for a maximum penalty of IR£1,500 and/or a term of imprisonment not exceeding six months in the case of summary conviction. Two separate regimes were created for offences on indictment. The first relates to offences where the person is convicted by reason of having:

"(I) in contravention of an order of the Minister under the Act of 1966, interfered with or removed an ear-tag, or

(II) altered or falsely made or ante-dated or counterfeited, or offered or uttered, knowing it to have been altered or falsely made or ante-dated or counterfeited, a licence, declaration, certificate or instrument described in section 49 (1) (d) of the Act of 1966." (s. 7(b)(i))

In relation to these offences a person convicted is subject to a maximum fine of IR£10,000 and/or a term of imprisonment not exceeding two years. If a person is otherwise so convicted on indictment, the maximum fine is IR£5,000 and/or a term of imprisonment not exceeding one year.

30. The impugned Orders were all adopted under the DAA 1966, with the exception of the EC(IRBA) Regulations 1999 which were adopted pursuant to s. 3 of the ECA 1972. However, they were not all adopted pursuant to the same sections of the DAA 1966. For the sake of clarity and completeness the sections under which they were adopted in each case should be set out:

- TB Order 1989 (S.I. No. 308/89) – Arts. 3, 13, 14, 19, 20, 27 and 48
- Brucellosis Order 1991 (S.I. No. 114/91) – Arts. 3, 12, 13, 19, 20, 27 ad 48
- TB (Amendment) Order 1996 (S.I. No. 85/96) – Arts. 3, 13, 20 and 27
- Brucellosis Order 1996 (S.I. No. 86/96) – Arts. 3, 13, 20 and 27
- TB Order 1996 (S.I. No. 103/96) – Arts. 3, 13, 14, 19, 20, 27 and 48
- Brucellosis Order 1998 (S.I. No. 39/98) – Arts. 3, 13, 20 and 27
- TB Order 1999 (S.I. No. 277/99) – Arts. 3, 13, 14, 19, 20, 27 and 48
- Brucellosis Order 2000 (S.I. No. 57/00) – Arts. 3, 13, 20, and 27
- DAA 1966 to 2001 Order 2001 (S.I. No. 79/01) – Arts. 3 and 29A
- Brucellosis Order 2003 (S.I. 700/03) – Arts. 3, 13, 15 and 27

As can therefore be seen each relies on a number of powers granted to the Minister under the DAA 1966.

31. The applicant, in written submissions, alleges in particular that Article 3 of the Brucellosis Order 1991 is contrary to s. 20(b) of DAA 1966. Article 3 of the Brucellosis Order 1991 states:

"It appearing to the Minister to be necessary for the eradication of brucellosis and the Minister being satisfied that brucellosis is virtually non-existent in the State, for the purposes of such eradication and of the Act the State is hereby

declared to be an attested or disease-free area."

In his view, that section only authorises the making of orders requiring post movement testing; thus Article 18(2) substituted by Article 2 of the Brucellosis Order 1998, which requires a blanket 30 day pre-movement test, without any change to the State's declared attested status, is *ultra vires* the DAA 1966.

32. The applicant contends that although the 30 day pre-movement test is a requirement under, *inter alia*, EEC Commission Decision 81/401, it is still *ultra vires* the DAA 1966, since the time of the alleged offences predates the validation given by the European Communities Act 2007 to European law implemented under Acts that do not otherwise provide for it.

33. Furthermore, with regards to the 30 day pre-movement test for brucellosis the Minister does not purport to objectively justify imposing a blanket requirement for a pre-movement test in what the competent authority has declared to be an attested or disease free area, i.e. the State.

34. Similarly with regards to the pre-movement requirement imposed on the applicant by the Brucellosis Order 2003, which provides at Article 10:

"Paragraph (2) of Article 18 of the Principal Order, as inserted by the 1998 Order, is hereby substituted by the following:

"(2) An eligible animal may not be moved into or out of any holding other than directly to a premises at which it is to be slaughtered or in the case of eligible male animals directly to an approved assembly centre for onward movement to slaughter in a country not requiring such a test unless —

(a) the animal has passed a blood test for brucellosis within the period of 30 days prior to the day on which the animal is so moved, and

(b) the date of such blood test is specified on the passport or cattle identity card in respect of such animal or movement permit issued in respect of such movement."

35. More generally the applicant contends that orders made under the DAA 1966 cannot give effect to European law. In particular such would be inconsistent with the decisions of the Supreme Court in *Browne v. Ireland* [2003] 3 IR 305 and *Kennedy v. Ireland* [2005] IESC 36. The applicant notes however that the Orders at issue in those proceedings have been retrospectively validated by s. 4 of the European Communities Act 2007.

36. In reply, the respondents firstly note that historically, particularly before membership of the Union, there has been a domestic statutory and regulatory framework, periodically reviewed, which introduced detailed and comprehensive rules relating to testing, movement, identification, isolation and trade in bovine animals in the State. Secondly, the principles and policies which underlie such rules, namely the eradication of certain animal diseases, including, *inter alia*, bovine tuberculosis and brucellosis, are currently set out in the DAA 1966 as amended, which itself consolidated earlier animal health legislation dating back to 1894. Thirdly, all of the impugned Orders, expressly made under powers conferred on the Minister by the DAA 1966 and DA(Am.)A 2001, give effect to the principles and policies as set out by the Oireachtas in those Acts.

37. The respondents characterised the above argument of the applicant and then responded. First the characterisation: whereas the Minister may well have been entitled to make orders under the DAA 1966, prior to accession to the Community in 1973, or perhaps prior to the 1990s when the European Union became more active in animal disease control, those Orders created under the 1966 Act became invalid when European directives or regulations were issued which were relevant to any of the subject matters of those Orders, even where the domestic legislation was not inconsistent with any instruments of European law. The respondents' reply: it is not a requirement of Irish constitutional law that any obligations imposed on the State by the EU, whether by directive or regulation, can only by brought into force by a statutory provision which provides for the making of an order to give effect to European legislation, and these pre-existing provisions are not rendered invalid, merely by the imposition of EU legislation in the area, where national measures are already consistent.

38. When considering allegations of *ultra vires*, the starting point must inevitably be whether the impugned regulations fall within the four walls of their parent legislation, *ex facie*. The applicant has particularised his allegations in this regard and I propose to deal with each in turn.

39. The first allegation is that Article 18 of the Brucellosis Order 1991, as inserted by Article 2 of the Brucellosis Order 1998 is *ultra vires* s. 3 of DAA 1966. Article 18 as amended states:

"18. (1) An eligible animal may not be moved into or out of any holding unless the person in charge of the animal has in his possession a valid cattle identity card in respect of such animal or a movement permit permitting such movement.

(2) An eligible animal may not be moved into or out of any holding other than directly to a premises at which it is to be slaughtered unless—

(a) the animal has passed a blood test within the period of 30 days prior to the day on which the animal is so moved, and

(b) the date of such blood test is specified in the cattle identity card in respect of such animal or movement permit issued in respect of such movement.

(3) A bull aged 12 months or more or a female animal aged 18 months or more may be sold not more than once, whether by public or private sale, during the period of 30 days from the carrying out of a blood test referred to in paragraph (2) of this Article.

(4) Where a bull or female animal, to which paragraph (3) of this Article applies, is sold, in accordance with that paragraph, by private sale, it shall be moved from the holding on which the blood test referred to in paragraph (2) of this Article has been carried out, directly to the holding of the purchaser.

(5) A bull or female animal, to which paragraph (3) of this Article applies, may be moved from the holding on which the

blood test referred to in paragraph (2) of this Article has been carried out directly to a mart (within the meaning of the Livestock Marts Regulations, 1968 (S.I. No. 251 of 1968)) for the purposes of being sold, in accordance with the said paragraph (3), and where such bull or female animal—

(a) is sold at such mart, it shall be moved from the mart directly to the holding of the purchaser, or

(b) is not so sold, it shall be moved from the mart directly to the first-mentioned holding.

(6) Where an eligible animal is being moved into or out of any holding, a veterinary inspector or authorised officer may require the person in charge of the animal to produce for inspection by him the movement permit issued in respect of such movement or identity card in respect of such animal and in case a requirement is made under this paragraph the person of whom it is made shall forthwith comply with the requirement."

40. Section 3 of DAA 1966 permits the Minister to make orders generally either (i) for the execution of the Act or (ii) for the prevention of the spreading of disease, and particularly for the several purposes as specified in the Act. It is clear that Article 18 of the Brucellosis Order 1991, as amended by Article 2 of the Brucellosis Order 1998 is therefore, *ex facie*, *intra vires* s. 3 of DAA 1966.

41. The applicant also takes issue with Article 18 of the Brucellosis Order 1991, as amended by Article 10 of the Cattle (General Provisions) (Amendment) Order 2003. This amends Article 18(2) of the 1991 Order so as to read:

"An eligible animal may not be moved into or out of any holding other than directly to a premises at which it is to be slaughtered or in the case of eligible male animals directly to an approved assembly centre for onward movement to slaughter in a country not requiring such a test unless —

(a) the animal has passed a blood test for brucellosis within the period of 30 days prior to the day on which the animal is so moved, and

(b) the date of such blood test is specified on the passport or cattle identity card in respect of such animal or movement permit issued in respect of such movement."

I am satisfied that no distinction of relevance, with regards to the *ultra vires* of the Article arises from this amendment, and consequently my conclusions in relation to Article 18 as amended by the 1998 Order equally apply.

42. The next article which the applicant takes issue with is Article 4 of the Brucellosis Order 2000, which amends Article 31 of the Brucellosis Order 1991, and extends its application to breaches of the Brucellosis Order 1998. Article 4 of the 2000 Order states:

"Article 31 of the Principal Order is replaced by the following Article:

'31. Where a person contravenes any provision of this Order or of the 1998 Order, he shall be guilty of an offence under the Act'."

The applicant contends that this Article is *ultra vires* ss. 3, 13, 20 and 27 of DAA 1966. With regards to s. 3 (see para. 28 *supra*.) it must fall under the first part, namely in and for the execution of the Act. It must therefore be referable to another section of the Act and be in execution of it. Section 13 permits the Minister to make orders for the prevention, checking or eradication of disease for all or any of the purposes set out in the Second Schedule. The Second Schedule of the Act contains a number of purposes, however the most relevant with regards to Article 4 is part 22 of the Schedule which allows orders for purposes ancillary or incidental to any of the other purposes listed. It is clear that in circumstances where the Minister may make orders prohibiting, prescribing, requiring or regulating certain actions, he must be able to sanction for failure to comply with such orders. Article 4 is therefore *intra vires* s. 13 of DAA 1966; similarly with regards to s. 20 of DAA 1966. In relation to s. 27 of DAA 1966, although this section does not contain an ancillary action clause, it is patent that as part of making orders which may prohibit, prescribe, regulate or restrict certain specified actions, the Minister must be able to include some form of sanction for breach. As stated, the Brucellosis Order 2000 is purported to be made under ss. 3, 13, 20, and 27 of DAA 1966, therefore Article 4 of the 2000 Order should fall within one of those sections. It is not possible to fully differentiate within the Order as to which particular Article has been enacted pursuant to which section, although it may be more apparent in some cases. In any event, it is not necessary to identify the exact section, once I am satisfied that the Article in question is *intra vires* the Act itself. As stated, I am confident that Article 4 of the Brucellosis Order 2000 is *intra vires* ss. 3, 13 and 20, and am of the opinion that it is almost certainly *intra vires* s. 27 of DAA 1966 as well. It is therefore not *ultra vires* any of the sections as alleged or at all.

43. The next provision which the applicant takes issue with is Article 19(7) of the Brucellosis Order 1991, as amended by Article 7 of the Brucellosis Order 2001, which provides that:

"It shall not be lawful for a keeper to be in possession of or to have under his control an animal whose eartag or eartags have been interfered with or altered in any way."

The applicant alleges that this Article is contrary to ss. 3, 13, 14, 15 and 16 of the DAA 1966. Again it is clear that firstly, s. 3 merely grants powers in execution of the Act, and is therefore not an authoritative provision. For the same reasons as considered in relation to Article 31 of the Brucellosis Order 1991, as amended, (see para. 42 *supra*.), I am satisfied that this article is not *ultra vires* the sections of the DAA 1966 as identified. Similarly I am confident that Article 5(5) is *intra vires* ss. 3, 12, 20 and 27 of the DAA 1966, as are Articles 12(4) and 35 of the TB Order 1989.

44. The applicant next contends, in this regard, that Articles 3(1) and 8(3) of the DAA 1966 to 2001 Order 2001 are *ultra vires* ss. 3 and 29A of the DAA 1966. Article 3(1) of the aforesaid Order of 2001 states:

"It shall not be lawful for a dealer to engage in the buying or selling of animals or poultry other than in compliance with this Order."

Article 8(3) thereof states:

> *"Where the Minister suspends or revokes a registration made under Article 6, the person concerned shall cease to be registered in the dealer's register and he or she shall not engage in dealing in animals or poultry subsequent to the date of revocation or suspension, as in the case may be, except with the approval of the Minister."*

Again, on consideration of the powers conferred by the DAA 1966 as amended, I am satisfied that these provisions are *intra vires*.

***Ultra vires* s. 3 ECA 1972:**
45. Finally in this regard, the applicant contends that Articles 3, 6, 8, 12, 19, 20(1), 21, 24 and 29(1) of the EC(IRBA) Regulations 1999 are *ultra vires* s. 3 ECA 1972. Section 3 ECA 1972 provides:

> *"(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.*
>
> *(4) …"*

46. It is therefore clear from s. 3(3) that regulations under s. 3 may not create an indictable offence. This limitation was considered in *Browne v. Ireland* [2003] 3 IR 219:

> *"It is beyond argument at this stage that the law as laid down by this court in Cityview Press v. An Chomhairle Oiliúna [1980] IR 381, 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 Community measures such as the Council Regulation of 1998. There is, however, one crucial qualification to that general statement of law, namely, that any such regulation cannot create an indictable offence.*

47. In the present case the applicant alleges that since s. 7 of the Bovine Diseases (Levies) (Amendment) Act 1996 provides for an indictable offence for breach of a ministerial order under DAA 1966, and since such orders were amended and extended by the EC(IRBA) Regulations 1999, which was made under s. 3 ECA 1972, this is *ultra vires* as a contravention of the prohibition on the creation of an indictable offence, which is referable to a Regulation made under s. 3 ECA 1972. Section 7 of the above Act of 1996 provides for both summary and indictable offences, in particular s. 7(1) provides:

> *"A person convicted of an offence under the Act of 1966 for which a penalty is provided for in section 23 of the Principal Act shall, in lieu of that penalty—*
>
> > *(a) on summary conviction be liable to a fine not exceeding £1,500, or, at the discretion of the court, to imprisonment for a term not exceeding six months or to both such fine and such term of imprisonment,*
> >
> > *(b) on conviction on indictment, be liable—*
> >
> > *(i) in case such person is so convicted by reason of his having—*
> >
> > > *(I) in contravention of an order of the Minister under the Act of 1966, interfered with or removed an ear-tag, or*
> > >
> > > *(II) altered or falsely made or ante-dated or counterfeited, or offered or uttered, knowing it to have been altered or falsely made or ante-dated or counterfeited, a licence, declaration, certificate or instrument described in section 49 (1) (d) of the Act of 1966,*
>
> *to a fine not exceeding £10,000, or, at the discretion of the court, to imprisonment for a term not exceeding two years or to both such fine and such term of imprisonment,*
>
> > *(ii) in case such person is otherwise so convicted, to a fine not exceeding £5,000, or, at the discretion of the court, to imprisonment for a term not exceeding one year or to both such fine and such term of imprisonment."*

It is therefore claimed that the extending or altering the ingredients of indictable offences by statutory instrument, amounts to a breach of s. 3(3) ECA 1972. Note, the "Principal Act" referred to in the section is the Bovine Diseases (Levies) Act 1979: see para. 29 *supra*.

48. It is a reasonable proposition that if s. 3 prohibits the creation of indictable offences, it must logically exclude the extension or alteration of them since the expansion of a criminal provision already in place may create new criminal liability where there was non before; similarly with regards to the alteration of existing criminal offences. The question before me must thus be whether the impugned articles of the EC(IRBA) Regulations 1999 do in fact extend or alter the ingredients of an indictable offence(s). The relevant impugned articles of the EC(IRBA) Regulations are Articles 3, 6, 8, 12, 19, 20(1), 21, 24 and 29(1).

49. Before looking at these Articles it must be borne in mind that if any of the Articles of the EC(IRBA) Regulations 1999 are breached, then under Article 29 they will be prosecutable summarily only. No provision is expressly made for indictable offences within these Regulations. On its face, the Regulations are therefore *intra vires* s. 3(3) ECA 1972. Article 29 should therefore be kept in mind when examining the below Articles, since a breach of their provisions is expressly stated to be summarily prosecutable. It is only if it could be said that one of the Articles amends the relevant part of an order which itself creates an indictable offence that any Article of the EC(IRBA) Regulations will be *ultra vires*.

50. I shall now turn to consider each of the impugned Articles in order. Article 3 requires a "keeper", within 7 days of the birth of an animal, to complete an application form, sign the application form at the place indicated therefor, and return the application form to the address indicated thereon. I am satisfied that it in no way alters or amends the provisions of any prior order made under the DAA 1966. Its breach is only prosecutable summarily under Article 29.

51. Article 6 requires that:

> *"(1) Without prejudice to the generality of Article 5 of the 1999 Order, any requirement in the 1989 Order or the Brucellosis in Cattle (General Provisions) Order, 1991 (S.I. No. 114 of 1991) for an animal to be accompanied by an appropriately completed identity card shall, in the case of an animal in respect of a which a passport has been issued, be construed as a like requirement for that animal to be accompanied by that passport.*
>
> *(2) Without prejudice to the generality of paragraph (1) a keeper shall not move an animal to which these Regulations apply from a holding unless the animal is accompanied by that passport.*
>
> *(3) …"*

Again I am satisfied that, having regard to the Orders referred to, this Article does not extend or alter any element of an indictable offence. Its breach is sanctionable only through Article 29.

52. In relation to the remaining articles. In summary:

> ? Article 8 provides that a keeper shall not transfer responsibility for an animal unless the passport has been properly signed and completed.
>
> ? Article 12 provides that a keeper shall, within 7 days of moving an animal to a new keeper, complete certain matters on the passport.
>
> ? Article 19 provides that a person shall not alter, efface, obliterate or make a false or unauthorised entry on a passport, or otherwise have in his possession a passport so altered, effaced or obliterated or has false or unauthorised entries, or have possession a passport other than one issued and transferred in accordance with the Regulations, or have in possession any document capable of being confused with a passport.
>
> ? Article 20(1) provides that a keeper shall keep a register of certain specified particulars including, *inter alia*, the number of animals present on the holdings.
>
> ? Article 21 requires that any register created in pursuance of the Regulations shall be produced or surrendered to an authorised person or a member of the Garda Síochána on demand.
>
> ? Article 24 provide that a person shall not include in any passport, application form, book, document, register or record a particular which he knows to be false or does not know to be true, or recklessly includes in such a passport etc. a particular which is false or which he does not know to be true.

None of these Articles purport to alter or amend any existing indictable offence. Any sanction for their breach is only prosecutable summarily under Article 29.

53. I am therefore confident that the Articles 3, 6, 8, 12, 19, 20(1), 21, 24 and 29(1) of the EC(IRBA) Regulations 1999 are *intra vires* s. 3 ECA 1972. The Articles clearly do not create any indictable offences *ex facie*. Nor can I see that they amend or alter any existing indictable offence which might be provided for under any of the other Regulations made under the DAA 1966; indeed none of the Articles purport to do so. The only sanction for breach of any of these Articles is under Article 29 of the Regulations and is summary in nature.

54. In relation to the allegations that certain provisions of the EC(IRBA) Regulations affect the operation of indictable offences, I would finally note that the applicant herein has not been charged with any such indictable offence. It could therefore be considered that his challenge in this regard could be moot or an expression of *ius tertii*. Notwithstanding the correctness or otherwise of this, I have proceeded to consider the above arguments, and nothing in fact turns on my considerations in this regard.

55. Having regard to the above, I am therefore satisfied that none of the provisions impugned by the applicant herein are *ultra vires* any of their parent Acts as contended or at all, and that the EC(IRBA) Regulations 1999 are *intra vires* s. 3(3) ECA 1972. I would therefore dismiss the applicant's claim in this regard.

Orders made under 1966 Act giving effect to European law:

56. The applicant alleges that a number of the Orders referred to above improperly seek to implement European law requirements under the 1966 Act. In particular, the applicant impugns:

> i) TB Order 1996 – which, he claims, seeks to introduce the identification requirements in terms of eartags from Directive 92/102/EC;
>
> ii) TB Order 1999 – which seeks to introduce the identification requirements in terms of eartags and passports from Council Regulation 820/78;
>
> iii) TB Order 2000 – which seeks to transpose provisions relating to health problems affecting *intra*-Community trade in bovine animals and swine, insofar as they relate to TB, from Council Directives 97/15/EC, 98/46/EC and 98/99/EC.

57. In *Browne v. Ireland* [2003] 3 IR 205 the Supreme Court held that the Sea Fisheries (Drift Net) Order 1998, an order made by the Minister for Marine and Natural Resources to give effect to Council Regulation (EC) No. 1239/98 was *ultra vires* s. 223A of the Fisheries (Consolidation) Act 1959 (as amended) ("the 1959 Act"). Similarly, in *Kennedy v. Attorney General* [2007] 2 IR 45 the Court held that the Mackerel (Licensing) Order 1999, an order made by the Minister for Marine and Natural Resources to give effect to Council Regulation (EEC) 2847/93 as amended by Council Regulation (EEC) 2846/98 was *ultra vires* s. 223A of the 1959 Act. In both cases the Supreme Court was satisfied that the Minister could have made the impugned Regulations under s. 3 ECA 1972 as he was merely giving effect to principles and policies contained in EC and EEC Regulations made by the Community, as part of the Common Fisheries Policy. However, the question arose as to whether the Minister was entitled to use the powers conferred by s. 223A of the 1959 Act to give effect to the EC instruments in question.

58. The respondents contend that it is clear from Browne that s. 3 ECA 1972 is not the only method of implementing European law. In particular they draw attention to the comments of Denham J. ([2003] 3 IR 205 at 242-243) where she stated:

"Of course the European Communities Act 1972 is not the only statute setting out procedures empowering a minister of state to make regulations for implementing Community law. While it is the primary such statute the Oireachtas may and has legislated in other statutes for modes of implementation. The legislature is not barred from revisiting the issue."

59. They further draw attention to what they contend is the ratio of both Browne and Kennedy. Keane C.J. in Browne at p. 220 of the report stated:

"It is clear, in this case, that the Order of 1998 was intended to give effect to the principles and policies as to the conservation of fishery resources adopted by the Council in Council Regulation 1998. There is not any Act of the Oireachtas in existence setting out principles and policies applicable to the conservation of fishery resources both within the exclusive fishery limits of the State and on the high seas. As is clear from the judgment of the Court of Justice in Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Case 804/79) [1981] 2 ECR 1045, since the 1st January, 1979, the power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has been vested exclusively in the European Communities.

I am satisfied that it follows inevitably that the Order of 1998 was not intended to give effect to principles and policies set out by the Oireachtas in parent legislation. It was intended simply to give effect to the principles and policies adopted by the Communities in Council Regulation 1998, as, indeed, the terms of the order itself make unambiguously clear: the second respondent while purportedly invoking powers conferred on him by s. 223A of the Act of 1998 says in express terms that this is being done:-

'for the purpose of giving effect to Council Regulation (E.C.) No. 1239/98.'"

60. The respondents argue that the fundamental purpose of any legislation enacted by the EU, whether by directive or regulation, is to require a Member State to take the necessary steps and have in place the necessary provisions by way of domestic legislation to provide for the outcome sought to be achieved in the EU legislation. If Ireland, or indeed any other Member State, already has in place provisions which are mirrored by subsequent EU legislation, it is not a legal requirement that the previous legislation be repealed and replaced by fresh legislation. Thus, if a member state has in place legislation which achieves the objectives of a directive, or which obviates the necessity to bring in law that would otherwise be needed to give full effect to a regulation, there is no necessity for new legislation to be enacted under, e.g., s. 3 ECA 1972.

61. In the alternative, the impugned Orders made under the DAA 1966 are of an entirely different kind to those annulled in Browne and Kennedy. In particular:

i) Unlike the situation under the Common Fisheries Policy, exclusive competence in the field of animal disease has not been given to the EU – Directive No. 64/432/EEC (as amended) is concerned with *intra*-Community trade in animals and does not set out to provide a code in relation to animal health / disease within member states themselves (see also the European Communities (Trade in Bovine Animals and Swine) Regulations 1997, S.I. No. 270/97 which was made with the purpose of, *inter alia*, giving effect to Council Directive No. 64/432/EEC, and which does not deal with the eradication of bovine TB or brucellosis in the State, but instead concerns *intra*-Community trade in bovine animals).

ii) The impugned Orders are made to give effect to principles and policies relating to the control and eradication of animal disease within the State, which is an express principle and policy of the DAA 1966, whereas the Drift Net Order 1998 and the Mackerel (Licensing) Order 1999 could not be said to give effect to any principles and policies of the 1959 Act.

iii) The Orders in this case are not expressed to be made to give effect to any EC or EU law, but made under various sections of the 1966 Act and to give effect to the principles and policies of that Act.

iv) In the alternative, even if the relevant EC instruments do in fact require the State to implement obligations set out therein in relation to animal health controls within the State, there is no support for the contention that Regulations made under the DAA 1966 must necessarily be inadequate for this purpose. If the Orders meet with the obligations set out in the relevant EC instruments, there is no difficulty as a matter of European law or Irish Constitutional law.

62. Keane C.J. in *Browne* provides a useful summary of the Court's approach in that case, with regards to whether the impugned Orders were *ultra vires* s. 223A of the 1959 Act:

"Either the Order of 1993 was intra vires s. 223A of the Act of 1959 or it was not. If it was within the power of the second respondent to make such a regulation for the reasons advanced on his behalf in the High Court and this court, it is not material whether the making of the regulation in that form was 'necessitated' by the obligations of the State as a member of the communities. If, on the other hand, the order was ultra vires s. 223A and could only have been made validly by the second respondent under s. 3 of the Act of 1972, it follows that it was of no effect and it is again unnecessary to consider the issue of whether it was 'necessitated' in constitutional terms by our membership of the communities. …" (ibid. at 221)

63. It is thus clear that if the principles and policies of the national legislation are such that the implementing legislation can be said to be *intra vires* that Act, they will not cease to be so, merely because they in some way implement European legislation. The problems which arose in relation to the Sea Fisheries (Drift Net) Order 1998 and the Mackerel (Licensing) Order 1999 in *Browne and Kennedy* can be located in the fact that prior to European legislation, the national legislation did not even contemplate regulations of this nature; namely those relating to the Common Fisheries Policy. In the present case, the control of diseases in animals within the State has been legislated upon for well over 100 years. The fact that there may be overlap between European legislation and national legislation will not render regulations made under the national legislation impermissible provided that those regulations are *intra vires* the parent act and consistent with the European legislation.

64. That implementation is a matter wholly within the competence of the Member States has been repeatedly emphasised both by the ECJ and national Courts (see Commission v. Belgium [1980] ECR 1473; *Commission v. Italy* [1983] ECR 711; *Commission v. Netherlands* [1987] ECR 3989; *Browne v. An Bord Pleanála* [1989] ILRM 865). The ECJ in *Deutsche Milchkontor GmbH v. Germany* [1983] ECR 2633 at 2665-6 stated:

"[I]t is for the Member States, by virtue of Article 5 of the Treaty, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory. Insofar as Community law,

including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law."

65. It has also been recognised that where national laws are already sufficient there is no requirement upon a Member State to legislate freshly merely to expressly implement a community directive. If the law of the Member State already carries the result to be achieved, no further action is required. This view is confirmed by paragraph 23 of the judgment of the Court in Commission of the European Communities v. Germany [1986] 3 CMLR 579 which states:

"It follows from that provision that the implementation of a directive does not necessarily require legislative action in each Member State. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from these principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles."

66. I am fully satisfied, having reviewed both the national and European legislation, that there is nothing improper or *ultra vires* in the inclusion of apparent European requirements in the impugned national Regulations. Indeed, from a practical point of view, it would seem sensible to harmonise or base national disease control with or on the requirements of *intra*-Union disease control; there is nothing improper in using EU legislation as a template in this regard. In any event, I am satisfied that the Regulations do not relate to matters fundamentally and wholly within the competence of the EU. I believe that the impugned Orders made under the DAA 1966 are not invalid, in such a way as was the case in Browne and Kennedy or otherwise. I therefore reject the applicant's arguments in this regard.

Constitutionality of Regulations having Statutory Effect:
67. Section 4(1)(a) of ECA 1972 provides that regulations made under s. 3 of the Act shall have statutory effect. The applicant contends that whilst it would be permissible for statutory effect to be given to secondary or European legislation existing when the section was enacted, it is not possible to give like effect to Orders/regulations created, and/or made, thereafter. Regulations having such statutory effect cannot undergo parliamentary consideration, amendment or decision in accordance with the provisions of the Constitution and the standing Orders of the Houses of the Oireachtas. Nor are they subject to the constitutional controls involved in submission by the Taoiseach of the Bill, as passed by the Oireachtas, to the President for her signature and for promulgation by her as law in accordance with Article 25 of the Constitution. Nor is a regulation made under s. 3 of ECA 1972 capable of being referred by the President under Article 26 of the Constitution for a decision on whether such might be, in whole or part, unconstitutional. Section 4, nonetheless, seeks to confer the force of statute on such regulations and to treat them as if they were in law legislation passed by the Oireachtas. Thus insofar as this section purports to give statutory effect to regulations subsequently made by the Minister under the ECA 1972, it is unconstitutional. The Oireachtas cannot, through this mechanism, clothe such regulations with the force of statute. Furthermore, s. 4 ECA 1972 is not necessitated by the obligations of Community membership, for the purposes of Article 29.4.10° of the Constitution.

68. The respondents draw attention to the Supreme Court cases of *Meagher v. Minister for Agriculture* [1994] 1 IR 329, which upheld the constitutionality of s. 3(2) of the ECA 1972, and *Maher v. Minister for Agriculture* [2001] 2 IR 139 which found that s. 3 did not trespass upon the exclusive law-making role of the Oireachtas under Article 15.2.1° of the Constitution. Insofar as they are relevant, the respondents consider that both Browne and Kennedy are distinguishable from the present case since the impugned Orders are of an entirely different kind to the ones annulled in those cases, and in any event and as a matter of fact the conclusions of the Court in those cases would support them.

69. The Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 IR 329 considered, *inter alia*, the constitutionality of s. 3 of the ECA 1972. Johnson J., as he then was, in the High Court found that s. 3 of the ECA 1972 was unconstitutional since:

"[A]ny power given to a Minister to make regulations for the purposes of amending or repealing laws is unconstitutional…" (ibid. at p. 344)

However, the Supreme Court upheld the constitutionality of the section since:

i) The power to make regulations in s. 3(1) of ECA 1972 is exclusively confined to the making of regulations for one purpose only, namely that in s. 2 of the Act; giving effect to Community law.

ii) The power of regulation contained in s. 3 is prima facie a power which is part of the necessary machinery for implementing European law, which became a duty of the State upon joining the then EEC, and is therefore necessitated by membership.

iii) It must be implied that regulations enacted by the Minister, as permitted by the section, are intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice, and therefore, it must be implied, constitutionally.

70. In *Maher v. Minister for Agriculture* [2001] 2 IR 139, Keane C.J. in the Supreme Court, considering Meagher, stated;

"[T]here are two broad categories of cases in which a regulation made in purported exercise of the powers conferred by s. 3 [of ECA 1972] 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 membership referred to in Article 29.4.5° [of the Constitution] 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…." (ibid. at p. 197)

The second category of cases which Keane C.J. identified arising from Meagher, was those where the ministerial regulation had gone beyond simply implementing the principles or policies contained in the European legislation and instead itself determined such principles or policies. This does not arise in the present case. Nonetheless, Keane C.J., considering what could be considered "necessitated" by membership of the Union, noted that the choice of a regulation rather than an Act in this regard was an important consideration:

> "I am satisfied, however, that neither the judgment of the Court [in Meagher] nor the judgment of Blaney and Denham JJ. on the vires issue lend any support to the proposition that, in cases where it is convenient or desirable for the community measure to be implemented in the form of a regulation rather than an Act, the making of the regulation can for that reason alone be regarded as 'necessitated' by the obligations of membership. … Doubtless, where no policy choices are left to the member state, expedition is one of the factors which may legitimately be taken into account in deciding to opt for the making of a regulation rather than the enactment of primary legislation, but it would be a serious overstatement to say that it justifies the making of regulations rather than the enactment of an Act in the case of every directive or European Union regulation and again that is clearly not consistent with what was held by this court in Meagher v. Minister for Agriculture." (ibid. at p. 182)

He continued:

> "It follows that, in the present case, it could not be said that the making of the rules in the form of the Regulations of 2000 rather than an Act were necessitated by the obligations of membership and the essential inquiry must be as to whether the first respondent in making the Regulations of 2000 was in breach of Article 15.2.1° of the Constitution.
>
> In determining that issue, it is accepted that the appropriate test is as set out by O'Higgins C.J. in City View Press Limited v. An Comhairle Oiliúna [1980] I.R. 381 … However, in applying that test to a case in which the regulation is made in purported exercise of the powers of the first respondent under s. 3 of the Act of 1972, it must be borne in mind that while the parent statute is the Act of 1972, the relevant principles and policies cannot be derived from that Act, having regard to the very general terms in which it is couched. In each case, it is necessary to look to the directive or regulation and, it may be, the treaties in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation."

71. It would thus seem the case that one must consider whether the implementation of the Regulation by way of statutory instrument was necessitated by membership of the EU, in order for it to be *intra vires* the power granted to the Minister under s. 3 of the ECA 1972. The ultimate question must be whether there was a sufficient level of choice left to the member state in the implementation of the Regulation. Does the member state have any real scope in the contents of any national implementing legislation? Was the Member State determining policies and principles? This analysis is borne out similarly in the decision of Denham J. in that case where she stated:

> *"The principles and policies of the milk quota scheme have been determined in the European provisions. The first respondent in making the Regulations of 2000 was not determining policies and principles in accordance with the general principles of Community law. The first respondent was not purporting to legislate. Consequently, there was no breach of Article 15.2.1° of the Constitution of Ireland."* (ibid. at p. 120)

72. Fennelly J., discussing the issue of permissible delegation, notes the following, adopting a more pragmatic approach:

> *"An enormous body of subordinate laws is, nonetheless, constantly passed by means of statutory instruments, regulations and orders. This type of delegated legislation is, by common accord, indispensable for the functioning of the modern state. The necessary regulation of many branches of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances. Without suggesting that a different approach is required for the present case, by reason of the fact that it concerns the implementation of European Community legislation, it is obvious that the adoption of detailed rules regulating production and trade in agricultural products is a particularly notable example of the exigencies of this type of law-making. There is, for example, an obvious need to be able to react rapidly and often severely to sudden trading problems or so as to protect human and animal health in the face of the outbreak of disease." (ibid. at p. 245)*

Fennelly J., however, goes on to note that, given that secondary legislation largely bypasses parliamentary scrutiny and the democratic process, it is:

> *"necessary to strike an appropriate balance between the protection of the exclusive law-making domain of the Oireachtas, and the proper function of the executive… Delegated legislation is permitted and does not infringe Article 15.2.1°, provided that the principles and policies which it is the objective of the law to pursue, can be discerned from the Act passed by the Oireachtas, so that the delegated power can only be exercise within the four walls of the law."*

73. Despite the statements above, Keane C.J., however, in *Browne v. Ireland* [2003] 3 IR 205 at 219 noted:

> *"It is beyond argument at this stage that the law as laid down by this court in Cityview Press v. An Chomhairle Oiliúna [1980] I.R. 381, that secondary legislation will not 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 Community measures … There is, however, one crucial qualification to that general statement of the law, namely, that any such regulation cannot create an indictable offence."*

Keane C.J. concluded that there were two possibilities in that case with regards to the validity of the Sea Fisheries (Driftnet) Order 1998 adopted under the Fisheries (Consolidation) Act 1959: either it was *intra vires* the Act, in which case it is unnecessary to enter into a question of whether it was necessitated by membership of the Union; or else it was *ultra vires* the Act and could only have been validly made under s. 3 of the ECA 1972, in which case again it is unnecessary to consider whether it was necessitated by membership of the Union.

74. In *Kennedy v. Attorney General* [2007] 2 IR 45, Denham J., in the Supreme Court, having reviewed the above-mentioned case law, noted that the core question in cases where it is alleged that the Minister has attempted to circumvent the prohibition on the creation of indictable offences under s. 3(3) of ECA 1972, is whether the Minister in making the impugned Order or Regulation under another Act purporting to use the national legislation to give effect to Community law. She ultimately concluded, having reviewed the relevant Community regulations and the common fisheries policy as reflected in those regulations, *"that it would be unrealistic to consider that the Order of 1999 was enacted for the purpose of a residual power of the State… without reference to the Community regulations and the common fisheries policy" (ibid*. para.35). She was in no doubt in that case that the Order had in fact been made

to implement such, and *"[t]he fact that there is an element of national management does not preclude application of the overarching Community law" (ibid.* para. 37). However, it should be noted that unlike the common fisheries policy involved in both *Browne and Kennedy*, in this case there is no question of a common system of disease control.

75. The constitutionality of s. 3 ECA 1972 was upheld by the Supreme Court in *Meagher*. That section permitted the Minister to make regulations *"repealing, amending or applying, with or without modification, other law exclusive of this Act".* It was therefore the case that s. 3 permitted the Minister to alter existing legislation by statutory instrument. Ordinarily such would be wholly inconsistent with law-making power of the Oireachtas and thus contrary to Article 15.2.1° of the Constitution; only acts may amend acts. However, where a matter, which would otherwise be contrary to the Constitution, is necessitated by membership of the Union it is saved by Article 29.4.10°. In relation to s. 3(2) ECA 1972, Finlay C.J. held that;

> *"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."*

It was therefore the case that s. 3(2) could be said to be necessitated by membership of the Union, and the question then fell as to whether any of the impugned provisions themselves were *intra vires* the ECA 1972, or otherwise unconstitutional themselves. As Finlay C.J. continued:

> *"[I]t 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."*

76. I am satisfied that s. 4 ECA 1972 is of a similar nature to the provision considered in *Meagher*. It purports to confer statutory status upon Orders of the Minister. Such would be unconstitutional but for Article 29.4.10°. Likewise I am satisfied that it is such that it is necessitated by membership of the Union; it follows that if the power to amend exclusive legislation through ministerial Order under the ECA 1972 is constitutional, the power to make Orders having statutory effect must likewise be so. The ministerial Orders in both cases act as though they are primary legislation (*Quinn v. Ireland* [2007] 3 IR 395 consideration). However that is not to say that the minister is given *carte blanche*. Any regulation made under the ECA 1972 must still be *intra vires* the Act, and thus must comply with the principles of constitutional justice, and they may still be challenged in that way. Furthermore it is clear that the Oireachtas is still left with a supervisory role in relation to such regulations under ss. 4(1)(b) and 4(2); the Oireachtas may remove such statutory effect from regulations made thereunder within one year of their making.

77. There is one final matter which was raised by the applicant in relation to statutory instruments having statutory effect. The applicant claims that it is not possible to ascertain, as a matter of law, when such instruments come into force under the Interpretation Acts 1937 – 1997, and therefore such instruments must be invalid. The relevant sections are ss. 8 – 9 of the Interpretation Act 1937, which state:

> *"8.—(1) The date of the passing of every Act of the Oireachtas shall be the date of the day on which the Bill for such Act is signed by the President.*
>
> *(2) Immediately after the passing of every Act of the Oireachtas the Clerk of Dáil Éireann shall endorse on such Act, immediately after the title thereof, the date, of the passing of such Act, and such date shall be taken to be part of such Act.*
>
> *(3) Every enactment contained in an Act of the Oireachtas shall, unless the contrary intention is expressed in such Act, be deemed to be in operation as from the end of the day before the date of the passing of such Act.*
>
> *9—(1) Where an Act of the Oireachtas, or a portion of any such Act, or an instrument made wholly or partly under any such Act, or a portion of any such instrument is expressed to come into operation on a particular day (whether such day is before or after the date of the passing of such Act or the making of such instrument and whether such day is named in such Act or instrument or is to be fixed or ascertained in any particular manner), such Act, portion of an Act, instrument, or portion of an instrument shall come into operation at the end of the day before such particular day.*
>
> *(2) Every instrument made wholly or partly under an Act of the Oireachtas shall, unless the contrary intention is expressed in such instrument, be deemed to be in operation as from the end of the day before the day on which such instrument is made."*

The above Acts (save for the Interpretation (Amendment) Act 1997) have since been repealed and replaced by the Interpretation Act 2005; the relevant provisions in relation to passing and commencement being ss. 15 and 16 respectively. Nothing of distinction arises from the changes made therein.

78. The applicant would appear to argue that if statutory instruments having statutory effect are to be treated for all intents and purposes as Acts of the Oireachtas, they must also comply with s. 8, or in the alternative they are not covered by either s. 8 or s. 9. It is clear to me that statutory instruments having statutory effect are not Acts of the Oireachtas for this purpose. The definition of an "Act" is given in s. 2(1) of the Interpretation Act 1937 (as in s. 2(1) of the 2005 Act) is either an Act of the Oireachtas, or *"a statute which was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution".* Clearly statutory instruments having statutory effect are not "Acts" in this regard. The fact that they have statutory effect, does not change the reality of what they are; statutory instruments. It is their effect which is statutory, not their physical nature. As stated above, although this method of legislating may be idiosyncratic, it is not unconstitutional, and the Minister is entitled to so legislate. There is, in my opinion, no weight in the argument that they are not covered by the Interpretation Acts 1937 – 1997 or the Interpretation Act 2005, or that it is unclear when they commence.

79. In the present case, the EC(IRBA) Regulations 1999 state expressly, in Article 1(2), that they are to come into force on the 13th September 1999. The applicant could not, therefore, complain that such is unclear or ambiguous. Nor could he complain that he was unable to ascertain whether such Regulations were or are in force. His arguments in this regard could thus be considered moot. Furthermore, having regard to s. 9(1) of the Interpretation Act 1937, it is clear that these Regulations came into force at the end of the 12th September 1999. Apart from the requirement in s. 8, there is, in any event, no real difference between an Act and a statutory instrument with regards to when it will be deemed in operation.

Conclusions:
80. I am therefore satisfied, having regard to the foregoing, that:

i) the relevant regulations impugned in this case are *intra vires* the DAA 1966 and ECA 1972 and are not unconstitutional having regard to the principles of constitutional justice;

ii) s. 4 ECA 1972, as amended by ECA 1973, is not unconstitutional;

iii) statutory instruments having statutory effect are covered by the Interpretation Acts 1937 – 1997 and the Interpretation Act 2005.

I would therefore refuse all reliefs sought by the applicant.