Neutral Citation Number: [2011] IEHC 222

THE HIGH COURT

2006 1440 JR

BETWEEN

MICHAEL FAHERTY

APPLICANT

AND

THE ATTORNEY GENERAL, THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES,

IRELAND AND DISTRICT COURT JUDGE JOHN O'DONNELL

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered the 3rd day of June 2011

1. The applicant is Master of the Irish Registered Fishing Vessel the "Atlantean". He seeks, *inter alia*, an order prohibiting his trial on charges relating to breaches of s. 224B of the Fisheries (Consolidation) Act 1959 as amended ("the 1959 Act") and various declarations to the effect that both s. 224B of the 1959 Act and the Blue Whiting (Fisheries Management and Conservation) Regulations 2006 (S.I. 104 of 2006) ("the 2006 Regulations") are invalid having regard to certain provisions of the Constitution.

2. The first named respondent is the adviser to the government on all matters of law and legal opinion. The second named respondent is the Minister who, together with his Department, has responsibility for the regulation, protection and development of the natural resources of Ireland. The third named respondent is joined in its capacity as an entity which may be sued for the wrongful acts of its servants. The fourth named respondent is the District Judge with seisin of the criminal case against the applicant, the continuation of which the applicant now seeks to prevent.

Factual Background

3. As set out in the Affidavit of Greg Casey, the applicant's solicitor, the Atlantean arrived into Killybegs harbour on 24 February 2006 with a full load of Blue Whiting. The next day, the applicant was informed that the local fish meal plant had suffered a serious breakdown and would be unable to take the load until the following week. The applicant then made alternative arrangements to unload the catch in Iceland, arriving there on 28 February and departing again on 1 March 2006. Upon its departure from Iceland, the Atlantean began steaming for fishing grounds on its' return trip to its' home port of Killybegs.

4. The applicant arrived at fishing grounds at 4pm on 3 March 2009, deployed the fishing nets at 11pm that night and made two hauls of Blue Whiting. The Atlantean returned to Killybegs on the afternoon of 4 March 2006 whereupon the fishery officer on duty, a Ms. Karen Anderson, came on board the vessel and detained the applicant therein on a charge of illegal fishing. The fishery officer took possession of the Log Book, the boat Registration papers and the Fishing Licence for the Atlantean.

5. In the course of the time from when he had left Ireland for Iceland and his return journey home, the 2006 Regulations had been brought into force, rendering it an offence to engage in fishing for Blue Whiting. The applicant now seeks, *inter alia*, to extend the grounds on which leave to seek judicial review was obtained to include a claim that he did not know and could not have known of this change in the Regulations.

The statutory framework

6. Section 224B of the 1959 Act provides as follows:

> "(1) Without prejudice to the generality of Section 3(1) of the Act of 1972 [the European Communities Act 1972], the Minister may by regulations make provision to give effect within the exclusive fishery limits of the State to any provisions either of the Treaties or of any Act adopted by institutions of the European Communities which authorises any or all of the Member States of the European Communities to restrict, or otherwise regulate in a manner specified in the provision, fishing in waters, or in part of waters, under its or their sovereignty or jurisdiction.
>
> (2) Regulations under this section may include such incidental, supplementary and consequential provisions as appear to the Minister 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) A person who fishes or attempts to fish in contravention of Regulations under this section shall be guilty of an offence.

7. Regulation 4 of the Blue Whiting (Fisheries Management and Conservation) Regulations 2006 came into force on 3 March 2006 and provides as follows:

> "The Master of an Irish sea-fishing boat shall not engage in or cause or permit any person on board to engage in fishing for Blue Whiting in the specified area…"

8. An important aspect of the applicant's claim is that the relevant Council Regulation which is referred to by the Minister in the 2006 Regulations does not provide that a breach of the EC Regulations will be a criminal offence or a criminal offence triable on indictment or for any system of forfeiture.

9. The applicant claims that it is highly relevant to the validity of the 2006 Regulations that the Minister used s. 224B to give effect to EC Regulation 51 of 2006 yet nothing in that EC provision provides for the criminalisation of the prohibited fishing activity.

10. Section 224B expressly provides that the Minister, when making Regulations, must be giving effect to obligations imposed on him by an EC Regulation. If the Minister's powers are used otherwise than to give effect to EC law, the powers are *ultra vires*. The applicant says that the only piece of EC law referred to by the Minister in the 2006 Regulations is EC Regulation 51 of 2006 but that those Regulations do not provide for the creation of a criminal offence or the imposition of any sanction in respect of the prohibited fishing activity.

11. Therefore, the applicant claims that the wrong EC Regulations were referred to by the Minister in making the 2006 Regulations and that this error is fatal to their validity. In the legal submissions and in the arguments advanced before the Court, the applicant referred to EC Regulation 2371 of 2002 as the relevant EC law which ought to have been relied upon by the Minister in making the 2006 Regulations as they require Member States to maintain a system of inspection and enforcement of the rules of the Common Fisheries Policy.

The applicant's submissions

12. The applicant claims that a Minister, in making Regulations, must do no more than is necessary to transpose or give effect to community law and that if ministerial powers are used in a way other than to give effect to EC law, the resulting Regulations will be *ultra vires*. The applicant cited *Meagher v Minister for Agriculture* [1994] 1 I.R. 329 in support of this submission. In *Meagher*, the Supreme Court, in considering whether s. 3 of the European Communities Act 1972 was "necessitated" by the obligations of Community membership, held as follows:

> "If… [a]… challenge were to be made to the validity of a ministerial regulation having regard to the absence of necessity for it to be carried out by regulation instead of by legislation and having regard to the nature of the content of such regulation, it would have to be a challenge made on the basis that the regulation was invalid as *ultra vires* being an unconstitutional exercise by the Minister of the power constitutionally conferred upon him by the section."

13. The applicant argues that s. 224B of the 1959 Act is unconstitutional because it gives the Minister power to create a criminal offence which was not necessitated by EC law. In effect, the applicant argues that the Minister has created an offence or decided to make an activity criminal and that in so doing has gone outside the powers conferred on him by EC law. The applicant submits that there was no obligation to make these matters criminal, which is what the Minister has done and that in so doing, he exercised a choice that should have been reserved to the Oireachtas.

14. In order for the applicant to succeed in proving this contention, the court must be satisfied that the relevant offence was in fact created, as the applicant contends, by the Regulations, and not by the 1959 Act, as contended for by the respondent. If the respondent's contention that the Act created the offence is correct, the applicant's claim in this regard falls away.

15. Section 224B of the 1959 Act provides that the Minister may by Regulation make provision to give effect to any EC Regulation in relation to fishing. As regards the validity of the Regulations, the applicant submits that EC Council Regulation 51 of 2006, the measure of EC law referred to by the Minister in the 2006 Regulations, contains no provision dealing directly with sanctions for breach of the Regulations. Nothing is said about Member States having any power to control or regulate fish stocks or quotas *et cetera*. This is an important point in the applicant's case because the applicant alleges that if the 2006 Regulations referred to the incorrect provision of EC law, then they are invalid. In other words, the applicant claims that s. 224B expressly states the Minister in making Regulations must be doing so to give effect to an EC Regulation. The applicant's contention is that if the Minister fails to cite the relevant EC Regulation, the resulting Statutory Instrument will be invalid or fatally flawed for failing to accurately comply with the requirements of section 224B of the 1959 Act.

16. Further, the applicant brought to the attention of the Court EC Regulation 2371 of 2002, an EC Regulation which does give Member States a choice between administrative or criminal sanctions for fishing violations. In particular, Article 25 of the 2002 Regulations specifically provides that Member States may adopt criminal or administrative sanctions for the violations.

17. Pursuant to s. 224B of the 1959 Act, the Council Regulation to be relied upon for the making of any Regulations by the Minister must authorise the restriction of fishing adopted by those Regulations. Thus, the applicant argues that the 2006 Regulations are invalid for failing to invoke the correct Council Regulation as necessitated by section 224B.

18. The applicant argues there cannot be any policy discretion involved in the making of a Ministerial Regulation but that in spite of this, the Minister clearly exercised a choice in making the breach of the relevant EC law a criminal offence, something which he was not entitled or empowered to do. That in essence is the gravamen of the applicant's challenge to the Regulations.

The respondent's submissions

19. While the Statement of Opposition contains a claim that the applicant is out of time for seeking judicial review, the respondent did not press the delay point at the hearing and acknowledged the Supreme Court decision in *C v. Ireland* [2006] IESC 33 which established that in an application for judicial review of a prosecution for an indictable offence, time runs from when the indictment is served. To date, no indictment has been served.

20. The respondent referred to the very high threshold an applicant for judicial review must meet before being granted an order for prohibition, which is in essence what the applicant is seeking, and submits that the applicant has failed to reach that threshold. Counsel for the respondent relies on *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 and the extensive body of case law on prohibition in this regard.

21. The respondent submits that the criminal offence in question was created not by Regulation at all as contended for by the applicant, but by statute in the form of s. 224B(4) of the 1959 Act. In this regard, the respondent says there has not been any impermissible delegation of legislative power to the Minister in contravention of Art. 15 of the Constitution because there was no delegation of power at all.

22. Counsel for the respondent drew the court's attention to section 224B of the Fisheries Act which provides that a person who fishes in contravention of the relevant regulations "shall be guilty of an offence" and which then goes on to set out various penalties.

Counsel submits that the nature of the language used in the section is the same as the language used in countless statutes to create a criminal offence. Merely because the statute mentions "Regulations" does not mean that those Regulations actually "create" the offence and the respondent submits that cross-referencing regulations is not unusual in statutes creating criminal offences. The respondent points to the Misuse of Drugs Act 1977 as amended and the Misuse of Drugs Regulations referred to in that Act as an example of such cross-referencing.

23. Nowhere in the 2006 Regulations does it say that a person fishing in contravention of the Regulations will be "guilty of an offence". The respondent submits that the offence consists of contravening the Regulations – that is the substance or description of the offence – but that the offence itself is created by the statute.

24. The respondent says that far from helping the applicant, the case of *Browne v. The Attorney General* [2003] 3 I.R. 205 assists them. *Browne* is authority for the proposition that a Minister may give effect to principles and policies contained in an EC Regulation even though those principles and policies have not been embodied in an Act of the Oireachtas and that the Minister is entitled so to do by virtue of the provisions of s. 3 of the European Communities Act 1972 but that he may not create an indictable offence. In *Browne*, Keane C.J. held, at pp. 219 and 220, as follows:

> "It is clear from the decisions of this court in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 and *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 that the fact that, in such cases, the principles and policies to which the regulation gives effect are not to be found in any Act of the Oireachtas, but rather in the Community measure concerned, does not affect its constitutional validity. It is beyond argument at this stage that the law as laid down by this court in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 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... There is, however, one crucial qualification to that general statement of the law, namely that any such regulation cannot create an indictable offence."

25. Later on in that judgment, Keane J. held, at p. 220:

> "…there is not the slightest doubt as to the power of the [Minister]… to give effect by statutory instrument to the principles and policies… even though they have not been embodied in any Act of the Oireachtas: that is the clear object of s. 3 of the Act of 1972. What no minister can do, in availing of the powers conferred by that section, is to provide for the creation of an indictable offence: that power was expressly reserved to the Oireachtas by subs. (3)."

26. If the Court in the instant case accepts the respondent's claim that it was the 1959 Act which created the offence and not the 2006 Regulations, then the principles set out by the Supreme Court in *Browne* assists the State's argument and the point made by the applicant as to the invalidity of the Statutory Instrument falls away. In the *Browne* case, the relevant section under consideration was s. 223A of the 1959 Act. The wording of that section may be distinguished from the wording of the relevant section in these proceedings i.e. s. 224B. This section does exactly what Keane C.J. directs must be done, i.e. it clearly sets out the offence and leaves no doubt as to what the offence is. Counsel for the respondent submitted that if the court goes against him on this primary submission and finds that the Minister in fact created the offence, then that was validly done because the Act gives the Minister the power to create the offence and the wording of the Act is sufficiently clear and precise for that purpose. The respondent relies on the decision of Denham J. in the *Browne* case in this regard and in particular the following paragraph which is to be found at p. 246 of the judgment:

> In the absence of clear words from the Oireachtas " in s. 223A of the Fisheries (Consolidation) Act 1959, as amended, giving such power to the [Minister] I am satisfied that the [Minister] acted *ultra vires* in creating an indictable offence in purported exercise of his powers under that section."

27. Counsel for the respondent submitted that unlike s. 223A of the 1959 Act, s. 224B, if not itself creating the offence as primarily contended for by the respondent, does at the very least contain clear words which give the Minister the power to create an indictable offence.

28. Counsel also referred to the decision of the Supreme Court in *Quinn v. Ireland* (Unreported, 28 November 2006) where the applicant's claim was dismissed and the Court held that the relevant offence was created by the Act and not by the Regulations. That case concerned s. 20 of the Animal Remedies Act 1993 and various regulations made thereunder in 1996, 1998 and 2002. Denham J. held as follows:

> "In conclusion, s. 20 of the Act of 1993 provides expressly that breach of any of the regulations made under the Act shall be an indictable offence. This was a decision of the Oireachtas, and not the Minister".

The respondent argued the Court should adopt the approach taken by the court in *Quinn* to the question of whether the offence in question in this case was created by the Act or by the Regulations and to find that the Oireachtas in fact created the offence.

29. The respondent says the applicant's claim is based on the *Meagher* case whereby the applicant argues that s. 224B is unconstitutional because it gives the Minister power to make Regulations not necessitated by EC law. To succeed in that point, the applicant must show the Minister made the relevant law – and the respondent says he did not, that the offence was in fact created by statute.

30. If wrong in that, the respondent submits that the Regulations were necessitated and that the choice of a criminal over an administrative sanction is not a sufficiently large discretion to render the Regulations invalid for lack of necessity. In any event, the respondent argues that the choice was made by the Oireachtas, not the Minister.

31. The applicant claims that the Minister chose a criminal sanction – the respondent disputes this and says the Minister did no such thing. The Oireachtas made that choice. The fact that Ireland was left with a choice as to how to implement the relevant measure does not mean that the implementation was not necessitated. The creation of this criminal offence was indeed necessitated. The respondent further describes as unsustainable the applicant's argument that if any choice whatsoever is left over to a Member State as to how to implement a measure, the matter is removed from the category of being "necessitated".

32. The relevant EU measure expressly states that each Member State is entitled to choose the mode of implementation. Ireland created the statute which created the offence and the Regulations. The applicant is merely focusing on what the Minister did or did not do – without focusing on what the Oireachtas has done. The respondent further says the Oireachtas elected to opt for the

criminalisation of breaches of the relevant regulation which is something it was perfectly entitled to do.

33. Again, according to the Supreme Court in *Meagher*, where a Directive left matters of principal and policy to be decided, such principles and policies had to be the subject of an Act of the Oireachtas. Here, the respondent submits that that criterion has been met. The policy choice of opting for criminal or civil sanctions was exercised by the Oireachtas and the outcome of that exercise is evident in the statute which opts for a criminal sanction.

34. The respondent referred to the recent decision of Feeney J. in *Montemuino v. Minister for Communications* [2009] 1 I.L.R.M. 218. In that case, which concerned a challenge to s. 224B, the existence of a valid offence created by that section was acknowledged by Feeney J. who dismissed the applicant's challenge. In *Montemuino*, regulations were made pursuant to s. 224B in 2003, as in this case. The respondent seeks to rely on the decision in that case.

35. The respondent also referred to the *Quinn* case, referred to above, in which the applicant sought a Declaration that certain Regulations were *ultra vires* the provisions of s. 3(2) of the European Communities Act 1972. The applicant in *Quinn* was in a similar position to the applicant in this case in that he was alleged to have committed a criminal offence in contravention of Regulations. The offence was in fact ultimately held to have been created by an Act of the Oireachtas, and not by the Regulations and the applicant's claim was dismissed by the Supreme Court. The respondent urges the court to adopt the approach taken by the Supreme Court in that case on the basis that s. 224B(3), like the relevant legislative provision in *Quinn*, created the offence the subject matter of the proceedings.

The Decision

Extension of Grounds

36. At the outset of the hearing herein, I refused the application for an extension of grounds for the following reasons:

(a) The remedy of judicial review is itself an exceptional one.

(b) Judicial review prohibiting the prosecution of an alleged criminal offence is even more exceptional.

(c) Extending time or allowing new grounds is governed by the principles set out in *McCormack v. Garda Siochána Complaints Board* [1997] 2 I.R. 489:

(i) Such applications will only be granted in exceptional circumstances.

(ii) The circumstances which could justify the making of the order involve those which come to light after and which could not be known at the time leave was obtained.

(iii) The court's jurisdiction in a judicial review is based on the leave granted.

(iv) Is there prejudice to the respondent in meeting the new case?

(d) The application is to allow new grounds in relation to the lack of knowledge of the applicant of the fact that Blue Whiting fishing was closed. This proposition on the facts is dubious. There was a system in place whereby the authorities notified the KFO and they notified the various fishermen. The nature and operation of that system is classically a matter for factual ascertainment and therefore one for the court of trial.

(e) The applicant's alleged lack of knowledge of the closure was a fact to which he averred in his grounding affidavit and so are not new facts.

(f) Even were the grounds allowed, the proposition of his exculpation on the grounds alleged is highly problematic on the basis of the existing system of disseminating information on the closure of fisheries. Fishermen had a duty to ensure they kept up to date with such information. It was not necessary that they be avid readers of Irish Oifigiúil only that they paid heed to their own system for ascertainment of when various fisheries were closed.

Delay

37. The applicant relies on the decision of the Supreme Court in *C v. Ireland* [2006] IESC 33.

38. In the *C* case, Denham, Geoghegan and Fennelly JJ. each addressed the issue of delay. In the course of her judgment Denham J. stated as follows:

> "The learned High Court judge held that the applicant's application for judicial review was out of time and had not been made promptly. However, he determined that the issues in the instant case were far too important to permit the judicial review application to be decided on a time point only unless some serious prejudice has or is likely to be caused. He held that prejudice in this context is not confined to the parties but is to be considered in the context of a fair and efficient justice system to the whole community. Further, he relied on the public policy that proceedings relating to public domain law should take place promptly, except where good reason is furnished. In all the circumstances, including the delivering of a fair and just legal system, the learned trial judge permitted the application for judicial review to proceed. On this preliminary issue I am in agreement with Geoghegan J. that as the indictment had not been served in either case neither applicant was out of time to seek leave for judicial review."

39. Denham J. distinguished applications for judicial review made before an applicant is on trial from applications brought during the currency of a trial. She pointed out that no indictment had yet been laid against the applicant although the charges were known for some time. She observed:

> "There is an important difference between considering an application for judicial review in the currency of a trial as opposed to an application prior to the commencement of the trial, prior to the laying of an indictment. While an application for review in the currency of a trial may only be successful in the most exceptional circumstances, applications for judicial review prior to trial fall into a different category. However, even in these latter cases it is still *inter alia* within the discretion of the court to refuse the application for judicial review on the grounds that the issue would best be met at the trial by the trial judge."

40. In light of these authorities and in light of the respondent's attitude to the delay point at the hearing, I am satisfied that the application for judicial review was not out of time.

Who created the offence?

41. Turning to the question of who created the offence, I am of the view that it was the Oireachtas who imposed criminal sanctions for the offences in question.

42. Section 224B(3) of the 1959 Act provides that a person who fishes or attempts to fish in contravention of the Regulations "shall be guilty of an offence". The respondent submits that this section clearly and expressly creates the offence, not the Regulations. The fact that the Regulations are referred to in the section and that the Regulations set out the subject matter of the offence does not mean that they are to be taken as creating the offence and the respondent urges the court to accept that the Act created the offence.

43. In the alternative, the respondent submits that if they are wrong in that and if it was the Minister who created the offence, then that was validly done as the 1959 Act clearly and unambiguously gave the Minister the power to do so. The applicant argues that if the Minister created the offence, that could not have been validly done because the Minister did more than was necessary to give effect to EC law by making the matter a criminal offence.

44. In this regard, the dicta of Denham J. in *Browne* are relevant:

> "This is a specific power given to the Minister, expressly stated to be without prejudice to the generality of s. 3 (1) of the Act of 1972, to make regulations and to give effect within the exclusive fishery limits of the State, to any provision of either the treaties or any act adopted by an institution of the European Communities to restrict or regulate fishing in waters of the community. S. 224B (2) mirrors s. 3 (2) of the Act of 1972. Provision is made in sub-section 3 expressly for an indictable crime. Thus, here the legislature expressly created machinery and gave power to the Minister to implement community law by regulation and to create an indictable offence."

45. It seems clear to me in reading it that the Act did in fact create the offence and the subject matter or details of the offence are set out in the Regulations. The Act used the words "shall be guilty of an indictable offence". In the event that I am wrong in that, I find that s. 224B (3) clearly and unequivocally gave the Minister the power to create the offence. The implementation of the relevant EC Regulations was an obligation which was necessitated by our membership of the European Union. The manner in which that implementation was done was left to Member States. The Oireachtas opted to make the matter a criminal offence and gave the Minister the power to implement the Regulations accordingly. In short the Regulations did no more than implement the details of a policy clearly contained in the 1959 Act. In this regard, the views expressed by O'Higgins C.J. in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381, at p. 398 apply:

> "The giving of powers to a designated minister… to make regulations or orders under a particular statute has been a feature of legislation for many years… [T]he courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated minister or subordinate body – there is no unauthorised delegation of legislative power."

Applying this test to the case before me, it seems to me that the provisions of the 2006 Regulations do not stray beyond the principles and policies which are contained or expressed in the 1959 Act. Therefore, even if the offence was created by the Regulations as opposed to the Oireachtas, it would still be done correctly because the Regulations sought to do no more than implement policies and principles set out in the 1959 Act.

Was the creation of an indictable offence necessitated?

46. There was clearly a necessity to implement the measures set out in EC Regulation 51 of 2006. While Member States were given a choice as to the nature of the sanctions to be imposed, they were given no choice regarding implementation, only the mode of implementation. In arriving at this decision on this aspect of the applicant's claim, the following extract from the judgment of Ó Caoimh J. in *Kennedy v. The Attorney General* (Unreported, High Court, Ó Caoimh J., 30 July 2004), whose decision was ultimately upheld by the Supreme Court, was particularly instructive:

> "In the instant case it is clear that there are features which suggest that the impugned measures were not necessitated by the obligations of membership of the European Communities. However, it is clear from the terms of the Council regulations referred to, that Ireland was required to adopt appropriate measures to comply with its obligations under the terms of the Common Fisheries Policy. Accordingly, I believe that it can be said that while there was a limited discretion vested in the State that the essential obligation rested on it to comply with the Council regulations and to adopt appropriate measures within the State's discretion to fulfil its obligations."

47. In regard to the E.U. measure herein, the mode of implementation was left to Ireland and it chose to implement it by way of Regulations the breach of which would be an indictable offence. That in my view was a course open to the respondent in order to meet its obligations necessitated by Ireland's membership of the European Union. The E.U. Regulation required there to be implementation. The Member State was free to choose how.

48. For all of those reasons, I am satisfied that the applicant is not entitled to any of the reliefs sought and accordingly I refuse the

application.