THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Neutral Citation Number: [2017] IECA 101

2016 193

John O'Connor and Christopher McCarthy

Appellant

V

The People at the Suit of the Director of Public Prosecutions, the Circuit Court judge for the time being assigned to the South Western Circuit, the Minister for Arts, Heritage and the Gaeltacht and the Attorney General

Respondents

JUDGMENT of the Court delivered on the 20th day of March 2017 by Mr. Justice Sheehan

1. This is an appeal against the judgment (25th August, 2015) and order (15th October, 2015) of the High Court (O'Malley J.) in which reliefs sought by the appellant Christopher McCarthy were refused. The proceedings concerned a challenge to the creation of criminal sanctions by statutory instrument for the purpose of giving effect to obligations arising from a European Union Directive. The appellant sought orders of prohibition and declaratory relief in respect of a prosecution pending against him for cutting turf in a Special Area of Conservation (SAC). The issue in this appeal is whether or not the Minister was entitled to create by way of regulation the indictable offence which the appellant faces.

2. The appellant is a machine operator from Killbaha, Moyvane, County Kerry who is charged with illegal turf cutting at Moanveanlagh Bog in County Kerry on 20th May, 2012 contrary to s. 35(1)(b) and s. 67(2) of the European Communities (Birds and Natural Habitats) Regulations, 2011. He works for a Mr. John O'Connor who is the first named plaintiff in these proceedings but not an appellant before us. The appellant is presently facing trial before the Circuit Criminal Court in Tralee. He was served with the "book of evidence" prior to his return for trial to the Circuit Criminal Court in Tralee on 23rd July, 2013. The trial has been adjourned from time to time pending the outcome of these proceedings. Part of the proposed prosecution case against the appellant is that he was observed operating turf cutting machinery at Moanveanlagh Bog on the relevant date. In the course of his grounding affidavit in these proceedings he avers *inter alia* that Moanveanlagh Bog is one from which various families living on or near the bog have taken turf over many generations and says that he understands these owners continue to assert their turbary rights over the said bog.

Moanveanlagh Bog
3. Moanveanlagh Bog comprises an area of 230 hectares, six km east of Listowel and is a site which comprises a raised bog that includes both areas of high bog and cutover bog. It is significant in terms of its geographical location being at the extreme south western range of raised bogs in Ireland. It is a site of considerable environmental and conservation significance as it comprises a raised bog, a rare habitat in the European Union and one that is increasingly scarce and under threat in Ireland. The site supports a good diversity of raised bog micro habitats including flushes.

4. In accordance with Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora as amended ("The Habitats Directive"), member states were required as a matter of Union law to take appropriate steps to avoid the deterioration of natural habitats in Special Areas of Conservation. Accordingly Ireland is required to take all measures necessary to guarantee the application and effectiveness of "the Habitats Directive".

5. An affidavit filed on behalf of the third named respondent James Ryan states that within government services he is the Irish national expert on raised bog conservation and restoration. He explains in the course of his affidavit how turf cutting and its associated activities damage the integrity of the SAC and are therefore in conflict with the raised bog conservation objective of these sites. He summarises the extent of this problem at para. 15 of his affidavit where he states:

> "Currently only approximately 50,000 hectares of intact high bog remain in the country out of an original figure of 310,000 hectares estimated in 1979. 18,000 hectares of the intact high bog are within designated sites and only 1,639 of the intact high bog can now be classified as active raised bog. Of the remaining non active bog in the SACs only 11% is now considered to have significant potential for restoration. This means that even after restoration is completed and a long period of recovery is concluded only 23% of the high bog in the Special Areas of Conservation will be preserved."

6. Regarding the importance of Moanveanlagh Bog he states at para. 17 of his affidavit:

> "I say and believe that Moanveanlagh Bog is significant because it is the largest and one of the best remaining examples of a raised bog in the south west of the country. It is accordingly of particular importance for the range of habitats in Ireland and in Europe.
>
> In addition it is also unusual as it has developed on Namurian shales and grits unlike most Irish raised bogs which overlie limestone. It supports examples of the Annex 1 habitats active raised bog, degraded raised bog and Rhynchosporion vegetation. The first habitat is a priority habitat which is in danger of disappearance in the EU and which requires special protective measures."

And at paras. 18 and 19 he states as follows:

> "18. The remaining area of high bog in Moanveanlagh is now approximately 35% of its original size … I say and believe that turf cutting and associated drainage has caused a major decrease in the area of uncut bog from 333 hectares to 117 hectares and of active bog from 333 hectares to 4.6 hectares. Even after restoration works and a long recovery period the best that could be achieved is less than 20 hectares of active bog. I say and believe that if activities which

encourage subsidence such as cutting and drainage occur this will further destabilise the topography of the bog and threaten the remnants of active bog. This would give rise to a very unstable and undesirable situation.

19. I say that the most recent monitoring assessment in 2013 gives this bog an unfavourable bad – declining assessment, the lowest ranking possible. I say that this is because the future prospects of the bog are poor due to the continuation of impacting activities such as peat cutting, drainage and the spread of an invasive species. Both the area and quality of the active bog are considered to be well below the level where the site could be considered to be in a favourable conservation condition. I say and believe that it is essential that cutting is stopped and restoration initiated as soon as possible in order to minimise avoidable further losses. Any continuation of cutting is in serious conflict with the conservation objectives of this European site."

And at para. 21 he states:

"I say and believe that Moanveanlagh Bog has suffered very significant adverse impacts from turf cutting and associated drainage and its integrity as a European site has been severely impaired."

7. In the course of an extensive replying affidavit on behalf of the respondents, Francis Donohue, who is an Assistant Principal Officer in the National Parks and Wildlife Service, avers that Moanveanlagh Bog was proposed for designation in December, 2002 when public notices were placed in the local media, including the Kerryman, on 19th December, 2002. He goes on to state that Moanveanlagh Bog was included in a list transmitted to the European Commission in February, 2007 and was adopted by the Commission as a site of Community importance for the Atlantic Biographical Region. At para. 41 of his affidavit he states:

"I say that on 16th December, 2011 a letter was sent to land owners and owners of turbary rights on Moanveanlagh Bog SAC informing them of the cessation of the turf cutting scheme announced by the Government in April of that year which was designed to compensate turf cutters in sites where continued turf cutting is no longer possible for reasons of environmental protection."

The letter also reminded the recipient that the period of grace (derogation) granted in 1999 by the then Minister to allow a continuation of turf cutting by landowners and turbary right owners for their own domestic use had finished for Moanveanlagh Bog SAC. He further states that on 25th November, 2012 numerous newspaper articles were placed announcing the cessation of turf cutting and the establishment of a compensation scheme on raised bog SACs including Moanveanlagh Bog.

The legal background

8. The legal context of this application involves a consideration of the following:

1. Articles 15 and 29 of Bunreacht na hÉireann;

2. The European Communities Act, 1972;

3. The European Communities Act, 2007;

4. The European Union Act, 2009;

5. The Consolidated European Communities Act, 1972;

6. The European Communities (Birds and Habitats) Regulations, 2011, S.I. No. 477/ 2011;

7. Article 33 of the Treaty of the European Union;

8. Article 4(3) of the Treaty of the European Union;

9. Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna And Flora; OJL 2006 pp.7 – 50 as amended;

10. Council Directive 2008/99/EEC on the Protection of the Environment through criminal law.

9. The regulations and the relevant directives are clearly set out by O'Malley J. in the course of her judgment at paras. 7 – 23 inclusive. These are:-

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

"35. (1) A person who, without lawful authority-

(a) carries out, on land within or outside a European site, any plan or project or activity that may have a significant effect on, or adversely effect the integrity of, a European Site,

or

(b) enters or occupies any European Site, or brings onto or places or uses or releases in any European Site any animal or object, including but not limited to-

(i) any off-road vehicle, recreational watercraft, plant and equipment, tractor or engine,

(ii) machinery for the extraction or mining of natural resources including, but not limited to trees, vegetation, minerals, rock, soil, gravel, sand, turf or peat, where such action or the use or presence on the European Site of such an animal or object is likely to have a significant effect on, or adversely affect the integrity of, a European Site,

Shall be guilty of an offence."

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

9. It is not disputed that Moanveanlagh Bog, a raised bog which has been designated as a Special Area of Conservation, comes within the definition of a "European site" set out in the regulations.

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

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

11. A court imposing sentence is obliged, pursuant to regulation 67(3), to have regard in particular "…to the risk or extent of injury to the environment arising from the act or omission constituting the offence, and to the polluter pays principle."

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

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

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

The Directives

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

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

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

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

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

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

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

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

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

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

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

> "(3) Experience has shown that the existing system of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.
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> […]
>
> (5) In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.
>
> […]
>
> (10) This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment…
>
> (12) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment…"

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

The power of the Minister to provide for criminal offences

10. Section 3(3) of the European Communities Act, 1972 limited the Minister's powers to the creation of summary offences but this limitation was removed by s. 2 of the European Communities Act, 2007 which gave the Minister power to create an indictable offence subject to a maximum period of imprisonment of 3 years and/or a maximum fine of €500,000.

Relevant authorities

11. In the course of their oral and written submissions both parties referred to the following judgments of the Supreme Court:

(i) Meagher v. Minister for Agriculture [1994] 1 I.R. 329;

(ii) Maher v. Minister for Agriculture [2001] 2 I.R. 139;

(iii) Browne v. Minister for the Marine and Natural Resources [2003] 3 I.R. 205; and,

(iv) Bederev v. The Attorney General and The DPP [2016] IESC 34, delivered 22nd June, 2016.

12. In the course of his judgment in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 Finlay C.J. stated at pp. 351 – 353 of his judgment the following:

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

13. In the course of the hearing in *Meagher*, the applicant had also argued that the provisions of the regulations in respect of the time limits and search powers were ultra vires of the powers conferred to the Minister. In the course of giving judgment on this matter Blayney J. stated as follows at p. 359:

> "The directive clearly required…that offences had to be created and obviously…it had to be possible for these offences to be effectively prosecuted. Accordingly the implementation of the directive required that the Regulations should provide for an adequate time for the preparation of the prosecutions. It was not necessary that the directive should itself fix a time. It was a matter for the State to decide on the length of time required to enable the prosecution to be brought and that is what the Minister has done in providing for a period of two years.
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> […]
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> [Article 189 of the Treaty of Rome] obliges the State to implement the directive and equally obliges the State, in exercise of the discretion given to it, to choose an appropriate method of implementation. If the State were free not to implement the directive, then clearly, if it were to do so, it would be a voluntary act not necessitated by the obligations of membership and would not be protected by Article 29, s.4, sub-s.5 of the Constitution. But the State is not free. It is obliged to implement the directive and so is obliged to choose a method of implementation and, provided the method it chooses is appropriate for the purpose of satisfying the obligation of the State and the measures it incorporates do not go beyond what is required to implement the directive, it is correctly characterised as being necessitated by the directive."

14. Finally, Denham J. in the course of her judgment at pp. 365 – 366 stated:

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

15. In considering this matter Denham J. considered that the appropriate test was that set out in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381:

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

16. Keane C.J. stated at p. 178 – 179 of his judgment in *Maher v. The Minister for Agriculture* [2001] 2 I.R. 139 having referred to the passage already quoted from the judgment of Finlay C.J. in Meagher:

> "As that passage indicates, there are two broad categories of cases in which a regulation made in purported exercise of the powers conferred by s. 3 might be found to be *ultra vires* the powers conferred on Ministers by section 3. The first category would be cases in which the making of the regulation was found not to be "necessitated" by the obligations of membership referred to in Article 29.4.5 and to have violated some constitutional right of the plaintiff. The challenge in such a case would be no different from the challenge mounted to an Act of the Oireachtas allegedly necessitated by the obligations of membership which *prima facie* violated a constitutional right of the plaintiff. The second category of cases in which such a challenge could be successfully mounted to a regulation is where the implementation of a directive or defined parts of an European Community or European Union Regulation by ministerial regulation rather than an Act of the Oireachtas would be in conflict with the exclusive legislative role of the Oireachtas under Article 15.1 and would not be saved by the provisions of Article 29.4.5. That would arise in a case where the ministerial regulation went further than simply implementing details of principles or policies to be found in the directive or regulation in question and determined such principles or policies itself and the making of the regulation in that form, rather than in the form of an Act of the Oireachtas, could not be regarded as necessitated by the obligations of membership. That this is what was intended to be conveyed by that passage in the judgment of the court is, I think, made clear when one comes to consider the judgments of the court on the vires issue in that case and, in particular, the judgment of Denham J."

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

> "*Meagher v. Minister for Agriculture*… is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1 of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the court and that of Denham J. expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The "principles and policies" test applies *mutatis mutandis* where the delegated legislation represents an exercise of a power or discretion arising form Community law secondary legislation. It applies with particular clarity to the case of directives where Article 249(EC) leaves the choice of forms and methods to the member states. The question will not arise so frequently in the case of regulations since they are directly applicable without the need for national implementing measures."

17. O'Malley J. at first instance in this case notes that in Maher it was held that the choices as to policy left to the member states by the Regulation had been reduced "almost to vanishing point". Again of relevance is that part of the judgment of Keane C.J. in *Browne v. The Minister for the Marine* [2003] 3 I.R. 205 at p. 218 wherein he states:

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

European Community measures…"

18. Finally MacMenamin J. in the course of a concurring judgment in *Bederev* states at para. 2, p.2 of his judgment:

> "First, I would wish to record my entire concurrence with Charleton J.'s observations to the effect that, when engaged in a principles and policies analysis, the task of a court is to analyse what is in the statute. I do not think it is part of that analysis to consider evidence adduced as to how the statute in question is administered by the relevant authorities. It is the statute which must be looked at in order to analyse whether the principles and policies are sufficiently identified."

In the course of the discussion on these issues Charleton J. stated:

> "Under the Constitution, the delegation of powers to a body to make any subsidiary instrument is only permissible where the objective to be achieved is discernible from the text of the primary legislation and the extent of the power to be exercised is delimited… This is a matter of analysis as to degree… No such analysis is easy."

Ireland, the European Commission and the Court of Justice

19. On 3rd June, 2010 in response to a question raised in the European Parliament, the Commission stated in the course of its answer in June, 2010:

> "The Commission considers that there is an urgent need to put in place effective management and restoration measures for Ireland's protected raised bogs. The Commission notes that the 32 sites protected under the Habitats Directive represent less than 1% of privately owned bogland in Ireland. The continued cutting of turf by hand or machine even for domestic use on protected raised bogs would appear to be incompatible with their preservation. Not only will there be a need to stop damaging activities but Ireland will also need to take the necessary action for the restoration and management of these raised bogs. The Commission awaits a formal decision of the Irish authorities in relation to turf cutting of protected raised bogs and if necessary will pursue legal action to ensure that Ireland meets its obligations under the Habitats Directive."

20. In June, 2011 the Commission issued a reasoned opinion requiring Ireland to take urgent action to improve the implementation of legislation that protects peat bog habitats. At para. 27 of his affidavit Francis Donohoe states as follows:

> "The Commission also indicated that it was considering the use of 'interim measures' against Ireland. I say and believe that this would involve the Commission seeking a direction from the Court of Justice of the European Union to compel the State to prevent further damage to these sites through turf extraction. I say that the progression of this case to the Court of Justice or the use of 'interim measures' could cause considerable reputational damage to Ireland in terms of its ability to meet its obligations under Union law. It would also entail the risk of imposition of significant fines against the State. I say that the Court of Justice of the European Union has already found that Ireland has failed to properly implement in certain respects Directive 92/43/EEC in cases C-183/05 and C-418/04 and with the Commission's infringement proceedings in relation to turf cutting which are at an advanced stage Ireland runs the risk of a further adverse ruling of the Court of Justice if it fails to take the necessary action to actually curtail turf cutting and the consequent destruction of natural habitats."

He goes on then to point out that the Government has introduced a compensation and relocation scheme which had been heavily subscribed. He says that at the time of swearing of his affidavit 2,959 applications for compensation under the Cessation of Turf Cutting Compensation Scheme had been received in the Department including 33 in respect of Moanveanlagh Bog.

Submissions

21. The appellant submits that in the circumstances of this case the Minister was obliged to introduce primary legislation to give effect to the Habitats Directive as there was nothing in the Habitats Directive which says there should be criminal sanctions. The appellant maintains that it must be clear as a matter of principle or policy from the Directive that criminal sanctions were required by the Directive. Counsel for the appellant maintains that he can find support for his position from the fact that certain other Directives contain criminal sanctions, for example the Waste Directive and the Water Framework Directive. In addition he also submits that the 2008 Directive concerning criminal sanctions suggests that criminal sanctions were explicitly excluded from the Habitats Directive in the first place. According to counsel for the appellant the reasonable conclusion to draw from the 2008 Directive is that the Habitats Directive did not require criminal sanction.

22. Counsel for the appellant also takes issue with the finding of the trial judge at paras. 85 – 87 of her judgment wherein she states:

> "85. The applicants do not assert that any of their property rights have been infringed by the regulations and the sole question is whether the criminal offence with which they have been charged was lawfully created. The answer to this question depends on whether or not it was lawful to utilise the provisions of s. 3 of the Act of 1972.
>
> 86. It seems clear from the authorities discussed above that the validity of this method of legislation cannot depend purely on the opinion of the Minister that it was necessary to create the offence. The power conferred on a Minister to make regulations is only for the purpose of enabling s. 2 to have full effect. In assessing whether a particular measure fulfils that purpose regard must be had to the relationship between the regulations made by the Minister and the EU measures intended to be implemented.
>
> 87. What then are the principles and policies of the Habitats Directive? As far as it is relevant to this case it seems to me that question is answered by reference to Article 6(2). The State is obliged to take all appropriate steps to prevent deterioration in listed sites of which Moanveanlagh Bog is one."

23. Counsel for the appellant maintains that the High Court judge's characterisation of principles and policies was too broad and he further relies on the judgment of Denham J. in *Meagher v. Minister for Agriculture & Ors*. wherein she states at p. 365 of that judgment:

> "The Minister made the regulations under s. 3 of the Act of 1972. The directive is 'binding' on the State as to the result to be achieved. The principles and policies are set out in the directive. Under s. 3, sub-s. 2 the Minister's regulations may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary for the purposes of the regulations, including amending an Act (exclusive of the Act of 1972). Clearly incidental, supplementary

and consequential provisions are not foundation principles and policies.

If the directive left to the national authority matters of principle or policy to be determined then the 'choice' of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a 'result to be achieved' wherein there is now no choice between the policy and the national act. The policy of the directive must succeed. Thus where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy then it would require legislation by the Oireachtas.

[…]

If the regulations contained material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s. 3 unless the material was incidental, supplementary or consequential. In those circumstances if they were not incidental, supplementary or consequential the regulations would be an exercise of legislative power by an authority not so permitted under the Constitution. If it be within the permitted limits, if the policy is laid down in the directive and details only are filled in or completed by the regulations, there is no unauthorised delegation of legislative power."

24. In the course of submissions on behalf of the respondent counsel submits that what Blayney J. said in *Meagher* was that in order to give effectiveness to the principles and policies, member states were required to bring in criminal sanctions. Counsel for the respondent submitted that this was precisely what O'Malley J. did in her judgment in the present case. He further argued that to attempt to draw a distinction between effectiveness and principles and policies was to create a false economy because under EU law, member states were required to give full force and effect to Directives. It was therefore irrelevant whether or not the Habitats Directive failed to specify criminal sanctions.

Conclusion

25. The unchallenged affidavit evidence adduced on behalf of the respondent clearly demonstrates that Ireland is failing in her duty to protect and conserve Moanveanlagh Bog. The obligation of stewardship for the benefit of all members of the European Community is imposed on Ireland by the Habitats Directive. Not only does this affidavit evidence disclose the very real possibility of Ireland being subject to the risk of substantial fines for failing to ensure compliance but it also discloses the very real likelihood of reputational damage.

26. In an effort to bring about compliance the Minister introduced the indictable criminal sanction carrying penalties of up to three years imprisonment and a fine of up to €500,000 for particular breaches of the Directive. The appellant in this case now faces a criminal charge contrary to the Regulations introduced by the Minister in 2011.

27. The appellant maintains that because the Habitats Directive fails to specify that criminal sanctions can be imposed for a breach of the Directive, the Minister has no power to introduce criminal sanctions by way of statutory instrument as has been done in this case but rather the criminal sanctions must be introduced by primary legislation enabling the Oireachtas to scrutinise such legislation before its enactment. This approach, counsel maintains, is mandated by Article 15 of the Constitution. The appellant also relies in part on the enactment of the Criminal Sanctions Directive in 2008 in support of his contention that the Habitats Directive did not envisage criminal law sanctions. This latter claim however is seriously weakened when one takes into account Recital 11 of that Directive which states:

"This Directive is without prejudice to other systems of liability for environmental damage under Community law or national law."

So it is fair to deduce from this recital that this particular directive does not purport to amend the Habitats Directive. In considering whether or not criminal sanctions come within the principles and policies of the Habitats Directive it seems reasonable to ask how can Ireland otherwise meet her obligations under EU law to preserve raised bogs without effective criminal sanctions to back them up. In the course of her judgment O'Malley J. when asking this question stated:

"…As far as is relevant to this case it seems to me that that question is answered by reference to Article 6(2). The State is obliged to take all appropriate steps to prevent deterioration in listed sites of which Moanveanlagh Bog is one.

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

89. In those circumstances, it seems to me that the introduction of criminal sanctions almost 20 years after the Habitats Directive came into being can fairly be said to have been necessary for the proper implementation of that Directive."

28. O'Malley J. went on to state:

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

29. Section 2 of the European Communities Act, 2007 provides for the creation of indictable offences by way of ministerial regulation. In the course of his judgment in *Maher*, Keane C.J. referred to the earlier judgment of the Supreme Court in *Meagher* in which Finlay C.J. said that

> "The Court is satisfied that having regard to the number of Community law, acts done, or 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."

30. Having cited with approval the above passage from the judgment of Finlay C.J., Keane C.J. then went on to refer to two broad categories of cases in which a regulation made in purported exercise of the powers conferred by s. 3 might be found to be *ultra vires* the powers conferred on ministers by s. 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 and to have violated some constitutional right of the plaintiff. The second category of cases in which such a challenge could be successfully mounted to a regulation is where the implementation of a directive or defined parts of an European Community or European Union Regulation by ministerial regulation rather than an Act of the Oireachtas would be in conflict with the exclusive legislative role of the Oireachtas under Article 15.1 and would not be saved by the provisions of Article 29.4.5.

31. The regulations made by the Minister in this case on foot of which the appellant faces trial on indictment fall into neither of these categories. Accordingly I hold that the Minister acted *intra vires* when creating the indictable offence which is a necessary and proportionate measure required to ensure the proper implementation of the Directive. While Mr Lynne S.C. advanced a careful argument with great skill on behalf of the appellant I am unable to agree with his submissions and am obliged therefore to dismiss the appeal.