Neutral Citation Number: [2005] IEHC 475

THE HIGH COURT
JUDICIAL REVIEW

[No. 399 JR 2005]

BETWEEN

SEAN QUINN

APPLICANT

AND

IRELAND AND ATTORNEY GENERAL AND MINISTER FOR AGRICULTURE FOOD AND RURAL DEVELOPMENT

RESPONDENTS

AND

BETWEEN

[No. 400 JR 2005]

DARRAGH QUINN

APPLICANT

AND

IRELAND AND ATTORNEY GENERAL AND MINISTER FOR AGRICULTURE FOOD AND RURAL DEVELOPMENT

RESPONDENTS

AND

[No. 482 JR 2005]

BETWEEN

NEIL TECTOR

APPLICANT

AND

IRELAND AND ATTORNEY GENERAL AND MINISTER FOR AGRICULTURE FOOD AND RURAL DEVELOPMENT

RESPONDENTS

Judgment of Mr. Justice Abbott delivered on the 24th August, 2005.

Factual Background

1. Each of the applicants in these proceedings have brought separate proceedings that, in all material respects, seek the same reliefs on the same grounds.

2. Each of the applicants, Seamus Quinn, Darragh Quinn and Neil Tector are alleged to have contravened various provisions of the Animal Remedies Regulations, 1996 (S.I. No. 179 of 1996) as amended by the Control of Animal Remedies and their Residues Regulations 1998 (S.I. No. 507 of 1998) and the Animal Remedies (Amendment) Regulations 2002 and/or provisions of the Regulations of 1998 as amended by the Regulations of 2002.

3. Seamus Quinn was served with 61 summonses in total reciting contravention of regulation 4 of the Animal Remedies Regulations 1996, contravention of regulation 6 of the Control of Animal Remedies Regulations, 1996 and contravention of regulation 3 (5) of the Control of Animal Remedies and their Residue Regulations 1998.

4. The second applicant, Darragh Quinn, was served with 47 summonses alleging contravention of regulation 4 and regulation 26 and regulation 33(2) of the Animal Remedies Regulations, 1996 and contravention of regulation 6 of the Control of Animal Remedies Regulations, 1996 and contravention of regulation 3(5) of the Control of Animal Remedies and their Residue Regulations, 1998.

5. The third applicant, Neil Tector, was served with two summonses alleging contravention of regulation 21 (1) of the Control of Animal Remedies and their Residue Regulations, 1998.

6. In each summons alleged against each applicant, it is alleged that in contravening a particular provision of the Regulations of 1996 or 1998, the applicant has committed an offence pursuant to section 20 of the Animal Remedies Act 1993 and that this offence is punishable under section 23 of the Act of 1993.

7. All have been granted leave to apply by way of application for judicial review.

8. The applicants are seeking declarations that the regulations of 1996, the regulations of 1998 and the regulations of 2002 are ultra vires the provisions of section 3(2) of the European Communities Act 1972 and a declaration that regulation 21(1) of the regulations of 1998 is in breach of section 4(1) of the Act of 1972 and thus null and void.

9. They are also seeking an order of prohibition by way of application for judicial review prohibiting the trial of the applicants at District Court in respect of the charges and prohibiting the respondent from further pursuing the prosecution in respect of the charges.

10. The applicants are also seeking an order pursuant to Order 84 Rule 20 (7) of the Rules of Superior Courts that the prosecution by the respondent in respect of the charges be stayed until the determination of the application for judicial review or until the Court otherwise orders.

11. The summonses that have been issued in respect of the applicants are contingent on or affected by the correct transposition into domestic law by the relevant transposing statutory instruments.

Relevant Legislation

The Animal Remedies Act 1993

12. The Act of 1993 is a consolidating piece of legislation which seeks to control and regulate the sale, possession and supply of animal remedies in the State.

13. Section 6 provides that it is an offence for any person to have in their possession and animal remedy except where this is authorised by the Act.

14. Section 8 confers on the Minister for Agriculture, Food and Forestry substantial regulation making powers in connection with the manufacture, sale and use of animal remedies. Section 8 expressly provides that such Regulations may include such as give effect to the requirements of past or future acts on the institutions of the European Communities in this area.

15. Section 8 provides:-

> "8.—(1) (a) Subject to subsection (6), the Minister may, after consultation with the Consultative Committee, make regulations relating to—
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> (a) …… (i) animal remedies…
>
> (2) (a) In this subsection "control" includes the prohibition or restriction, or the prohibition or restriction save under licence of or under the authority (by way of authorisation) or direction of the Minister or such other person or class of persons as may be specified in regulations made under subsection (1). (b) Without prejudice to the generality of subsection (1) or section 9, regulations made under that subsection may provide for—… (x) the purpose of giving effect or further effect to existing or future acts of the institutions of the European Communities which relate to—
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> (I) veterinary medicinal products, or
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> (II) residues of veterinary medicinal products in animals or foodstuffs, or
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> (III) any other matter in respect of which the Minister may make regulations in respect of any other provision specified in this subsection or in subsection (1).
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> "(3) Where the Minister makes regulations under this section which include or are for the purpose of giving effect to an act of one of the institutions of the European Communities then— (a) that fact, together with the institution and act concerned, shall be specified by the Minister when making those regulations, and
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> (b) the provisions of section 4 (inserted by the European Communities (Amendment) Act, 1973) of the Act of 1972 shall apply to those regulations as if they had been made under section 3 of the Act of 1972."

16. Section 20 sets out the circumstances in which a person is guilty of an offence involving breach of the Act of 1993 or Regulations. Section 23 sets out the penalties for offences committed under the Act.

17. Section 20 provides:-

> "20.—(1) A person shall be guilty of an offence under this section where the person contravenes (whether by act or omission)—
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> (a) section 6 or 16, or does or omits anything, the doing or omission of which is provided for by regulations made under this Act to be an offence to which this paragraph relates,
>
> (b) any provision of this Act other than a provision to which paragraph (a) relates, or does or omits anything, the doing or omission of which is provided for by—
>
> (i) this Act,
>
> (ii) regulations continued in force or deemed to have been made under this Act, or
>
> (iii) regulations made under this Act,not to be lawful or to be an offence (being an offence which is not an offence to which paragraph (a) relates), or
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> (c) a term or condition of any licence or authorisation or any direction".

18. Section 23 provides:-

> "23.—(1) A person who commits an offence under section 20 (1) (a) shall be liable—
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> (a) on summary conviction, to a fine not exceeding £1,000, or to imprisonment for a term not exceeding one year, or to both,
>
> (b) on conviction on indictment—
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> (i) in the case of a first offence under this section, to a fine not exceeding £100,000, or to imprisonment for a term not exceeding 10 years, or to both,
>
> (ii) in the case of a second or subsequent offence under this section to a fine not exceeding £250,000, or to imprisonment for a term not exceeding 10 years, or to both".(2) A person who commits an offence under section 13 (3) or subsection (1) or (2) of section 18 or paragraph (b) or (c) of subsection (1) of section 20 shall be liable—
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> (a) on summary conviction, to a fine not exceeding £1,000, or to imprisonment for a term not exceeding six months, or to both,
>
> (b) on conviction on indictment—

(i) in the case of a first offence under this section, to a fine not exceeding £25,000, or to imprisonment for a term not exceeding 5 years, or to both,

(ii) in the case of a second or subsequent offence under this section to a fine not exceeding £50,000, or to imprisonment for a term not exceeding 5 years, or to both".

European Communities Act 1972

19. The European Communities Act 1972, as amended at section 2 provides:- "2.—From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties".

20. Section 3 provides:-

"3.—(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) Regulations under this section may be made before the 1st day of January, 1973, but regulations so made shall not come into operation before that day".

21. Section 4 provides:-

"4.—(1) Regulations under this Act shall have statutory effect …"

Submissions

22. The applicants submit that they are each facing charges contingent on Regulations purportedly made under section 8 (2) (b)(x) of the Animal Remedies Act 1993 in respect of alleged breaches of the Regulations, the breaching of which by virtue of section 23 (2)(b) of the Animal Remedies Act 1993 constitutes an offence punishable on indictment. They argue that the Regulations of 1996, the Regulations of 1998 and the Regulations of 2002 are invalid in that the Minister is prohibited from creating indictable offences by virtue of section 3(3) of the European Communities Act 1972.

23. The applicants argue that the regulations in question were not intended to give effect to principles and policies set out by the Oireachtas in parent legislation. The regulations were intended simply to give effect to the principles and policies contained in the European legislation.

24. The applicants plead that if the said amendments to the said regulations are necessitated by European law, the said amendments are required to be transposed into domestic public law by the mechanism provided in the European Communities Act 1972 as amended. Consequently regulations 2, 26 and 56 of the Regulations of 1996 without the amendments provided in the purported Regulations of 1998 in particular regulation 26(1) and the purported Regulations of 2002, in particular regulation 3 are in breach of the requirements of European law and in particular Directive 2001/82/EC of the European Parliament and of the Council and are invalid and of no effect.

25. The applicants also submit that in view of the special role of the Oireachtas as the law making body under the Constitution and in view of the expressed policy on the creation of indictable offences in section 3(3) of the Act of 1972, any statute purporting to give power to a Minister to create an indictable offence should set out such power in plain and clear language. There should be no ambiguity. In this case the Animal Remedies Act does not express in clear and plain language that the Minister has power to create an indictable offence, in implementing community law. Thus the Minister acted *ultra vires.*

26. The respondents plead that the Regulations of 1996, 1998 and 2002, were properly made by the Minister pursuant to the provisions of Section 8 of the Animal Remedies Act 1993 and in particular Section 8 (2) (x) of that Act. The Minister does have a power expressly conferred on him by the Oireachtas to make regulations under section 8 for the purposes of giving effect to existing of future acts of the institutions of the European Communities relating to matters specified in Section 8(2)(x)(I)-(III) of that Act.

27. They also admit that offences under section 20 of the Act of 1993 are offences which may be tried summarily or, at the election of the Prosecution may be tried on indictment. However, here the Minister has in fact elected to have these charges tried summarily.

28. In addition, they plead that each of the applicants lacks standing to impugn the Regulations of 1996 and 1998 on the grounds that, in each case, the Minister has decided to prosecute the applicant summarily and not on indictment for the offences at issue.

29. I will consider each of these issues in turn.

30. It appears that there are several issued to be determined:

1. Standing.

2. Status of regulations made under European Communities Act 1972 as amended.

3. Status of European Acts given effect by the Act of 1993.

4. Whether the Act of 1993 permits the Regulations of 1996 as amended to create indictable offences.

5. Failure of the Regulations of 1996 as amended by the Regulations of 1998 and in certain cases the regulations of 2002 to create an offence.

Conclusions

1. Standing

31. The applicant, Sean Quinn, for instance in ground 4 of the statement of grounds in respect of this application states as follows:-

> "The applicant is facing criminal charges contingent on Regulations purportedly made under s. 8(2)(b)(x) of the Animal Remedies Act, 1993 in respect of the Animal Remedies Regulations 1996 (S.I. No. 179 of 1996), the Control of Animal Remedies and their Residues Regulations, 1998 (S.I. No. 507 of 1998) and the Animal Remedies (Amendment) Regulations 2002 (S.I. No. 44 of 2002), the breaching of which Regulations, by virtue of s. 23(2)(b) of the Animal Remedies Act, 1993 constitutes an indictable offence."

32. It is argued on behalf of the respondent that as the applicants are facing summary prosecution in the District Court, the possibility of the learned District Judge declining jurisdiction by reason of the offences not being minor offences capable of being dealt with summarily in the District Court is a mere theoretical possibility and that the applicants have not "sufficient interest in terms of Order 84 of the Rules of the Superior Courts to seek the reliefs sought by them. "The respondents urged that while the applicants argued that the District Judge may yet decline jurisdiction on the grounds that the charges do not disclose minor offences capable of being tried in the District Court, no evidence whatsoever has been adduced on behalf of the applicants which would suggest that there are reasonable grounds for such an apprehension. The applicants argue that in any event, (on the authority of the judgment of Blayney J. in the decision of the Supreme Court in *the Director of Public Prosecutions v. Logan* [1994] 3 I.R. 254, and, on the authority of the decision of the Court of Appeal in *Hastings and Folkestone GlassWorks Limited v Kalson* [1949] 1 K.B. 214 214), the offence is indictable by reason of the provisions of the Act of 1993 providing for punishment either on summary conviction or on indictment. I am of the opinion that this latter claim may have substance not because of the authority of the judgment of Blayney in the *Director of Public Prosecutions v. Logan* [1994] 3 I.R. 254, but by reason of what I consider to be an authorative analysis of the reasonably comparable, but not exactly similar framework, for the trial of offences which in certain circumstances may be indictable, in the judgment of the Court of Criminal Appeal in *Hastings and Folkestone Glassworks Ltd. v. Kalson* [1949] 1 KB 214. In my opinion, the judgment in *DPP v. Logan* dealt with the issue as to whether a prosecution under s. 42 of the Offences Against the Person Act 1861 was an indictable offence for the purposes of s. 7 of the Criminal Justice Act 1951 and clearly decided that it was not. The passage relied on from the judgment from Blayney J. in the report does not relate to the conclusion of Blayney J. but rather his recitation of the submissions made on behalf of the prosecution with which the Court ultimately did not agree.

33. In *Hastings and Folkestone GlassWorks Limited v. Kalson*, Asquith LJ observed at p. 220

> "An "indictable offence" without any qualifying context can mean nothing else but an offence in respect of which an indictment would lie: … [i]t is none the less indictable because, if the prosecution chose it could proceed in respect of it summarily".

34. Lord Asquith had previously on p. 219 analysed the manner in which criminal offences arise as follows:-

> "Criminal offences or offences against public law – for such alone are here in question – fall into three categories for the present purpose:
>
> (1) [o]ffences in respect of which proceedings by indictment alone will lie;
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> (2) offences in respect of which summary proceedings alone will lie;
>
> (3) offences which can be proceeded against in either way according to the circumstance of the case: that is, the decision of the court with consent of the accused, the election of the accused himself, or the election of the prosecution.

If categories (1) and (2) alone existed, the case would present no difficulty. The difficulty only arises from the existence of category (3). What offences fall within that third category? Here a sub-classification is necessary. The category splits in to three sub-categories:

> (a) [i]n some cases, a statute or regulation with statutory force provides (in effect) that an offence may be proceeded against either summarily or by indictment, at the election presumably of the prosecution. The Merchandise Marks Act, 1897, s. 2 sub-s 3 and the Dentists' Acts, afford examples of such offences.
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> (b) [t]he second sub-category consists of cases falling within s. 17 of the Summary Jurisdiction Act, 1879, which provides that where the offence is such that the offender is liable on summary conviction to be imprisoned for more than three months, he may, before the charge has gone into, claim to be tried by a jury on indictment, and that in that event the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and that the offence "shall be deemed to be an" indictable offence.
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> (c) [t]he third sub-category consists of offences specified in Sch II to the Criminal Justice Act, 1925, and provided for by s. 24 thereof. These are offences which before that statute could be tried by indictment only. By s. 24 of that Act a person charged with such an offence may be dealt with summarily, provided
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> (i) that the court thinks this "expedient":
>
> (ii) that the person charged, after being informed of his right to be tried by a jury on indictment, consents to be tried summarily …
>
> … The offence in the present case does not fall within sub-category (c) …It was not before the Act of 1925 triable on indictment only. Indeed it only came into existence in 1939. Nor again does it fall within sub-category (b), for it is not an offence which carries with it liability on summary conviction to a term of imprisonment for a period exceeding 3 months. It falls in fact within sub-category (a)".

35. Taking the framework of analysis of Asquith LJ and applying it to the present circumstances, it appears to me that the offences created by the combined effect of ss. 20 and 23 of Act of 1993 are most similar to if not exactly the same as category 3 subcategory (a) as highlighted by Asquith LJ in his judgment in Hastings. It appears that the Minister may prosecute in the District Court in respect of a summary prosecution or the DPP may prosecute on indictment in respect of the same offence. The decision as to which course

to follow is to be made solely by the prosecution either by the Minister alone or by the DPP on a complaint made by the Minister (or presumably by any other person) to him. The accused, and in particular, the applicants in this case, have no right of election, as they might have in relation to an indictable offence for the purposes of s. 7 of the Criminal Justice Act 1951, or in circumstances where minor offences dealt with summarily with the consent of both the accused and the Director of Public Prosecutions along the lines set out in such regulatory legislation of the Occasional Trading Act 1979 section 9 and Local Government (Planning and Development) Act 1982 section 9.

36. The applicants rely on the prohibition of s. 3 subs. (3) of the European Communities Act 1972 as follows:-

> "Regulations under this section shall not create an indictable offence".

37. In view of this wording, I find it impossible not to be forcefully persuaded by the suggestion of v Asquith LJ in Hastings and Folkestone Glassworks Limited. Kalson at p. 221 where he stated as follows

> "It is simpler and more satisfactory to adhere to the plain grammatical meaning and to say that "convicted of an indictable offence" means convicted (by whatever [T]ribunal) of an offence for which the offender could have been indicted".

38. Accordingly I find that notwithstanding the evidential deficiencies in the applicants cases regarding the issue of minor offence question, they have shown sufficient standing by virtue of my view of the meaning of indictable in s. 3 subs. (3) of the Act of 1972, at least to argue the non creation of an indictable offence by the Regulations of 1996, Regulations of 1998 and Regulations of 2002.

Status of Regulations made under the European Communities Act 1972 as amended

39. It is clear that a Minister of State may make Regulations pursuant to s. 3 of the Act of 1972, for the purpose of enabling the provisions of s. 2 of the Act applying the European Communities Law to the State to have full effect. Subsection 2 of s. 3 of Act of 1972 provides that the Regulations may contain provisions as appear to the Minister making the Regulations … including the provisions repealing amending … other law, exclusive of the Act of 1972. The use of the words "other law" is important in this context. On a general view of what the term "other law" means in this context would be that this category included regulations and statutory law and indeed other regulations made pursuant to s. 3 for the purpose of enabling s. 2 of the Act to have full effect, but which might require amendment by reason of changes of underlying legislation adopted in future acts of the institutions of the European Communities. The effect of the submissions of the applicants is to assert that Regulations made under s. 3 become part of the Act of 1972 by reason of the application of the principles set out in the judgment of the Supreme Court in the case *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591 deciding the validity of s. 2 of the Immigration Act 1999.

40. Section 2(1) of the Act of 1999 provides that:-

> " 2. (1) Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions of orders specified in the Schedule to this Act shall have statutory effects as if it were an Act of the Oireachtas".

41. It is argued on behalf of the applicants the use of the words "shall have statutory effect" in s. 4(1) paragraph (a) of the Act of 1972 as inserted by s. 1 of the European Communities Amendment Act 1973 is to append each and every regulation made under the Act of 1972 to the Act of 1972 in the same way, as it was held by the Supreme Court that effectively s. 2 of the Immigration Act 1999 appended every order made before the passing of the Act of 1992 under s. 5 of the Aliens Act 1935 subject to certain exceptions specified in the schedule of the Act of 1999. I cannot see how this proposition could be upheld on the basis of any principles of public law in the state or the interpretation of the plain meaning of the words used in the 1972 Act. I have come to this conclusion for the following reasons:-

> (1) whereas the words used in s. 2 of the Immigration Act of 1999 provides that the orders shall have statutory effect as if it were an Act of the Oireachtas (emphasis mine), the relevant provision of s. 4(1) paragraph (a) is the much shorter "regulations under this Act shall have statutory effect" without any reference to the law thereby described as being an Act of the Oireachtas
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> (2) The principles of legislating by reference stated and clarified in *Leontgava* clearly related to the incorporation into the Act of 1999 of a body of legislation or regulation which was in existence at the passing of the Act of 1999. Whereas it is envisaged by the Act of 1972 that while Regulations made under s. 3 of that Act may be for the purpose of giving full effect to existing acts adopted by the institution of The European Communities, they would also give full effect to future acts to be adopted by the institution of those Communities very many of which at the passing of the Act of 1972 would not have been in existence in conceptual - never mind draft-form.
>
> (3) The Regulations having statutory effect made under the Act of 1972, unlike Acts of the Oireachtas 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. Neither are they subject to the constitutional controls involved in the 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. Neither is the regulation having statutory effect made under the Act of 1972 capable of the constitutional control by way of Presidential referral of a bill passed by the Oireachtas under Article 26 for a decision on the question as to whether such bill or any specified provision or provisions of such bill is or are repugnant to the Constitution or any provision thereof.
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> (4) The dictum of Finlay Geoghegan J. in the High Court in *Leontjava* at pp. 612 – 613 would appear to be applicable:
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> > "The above provisions (of the Constitution) appear to make clear that a "law" in Article 25 is exclusively an Act of the Oireachtas, That being so it appears inevitably to follow that a "law" referred to in Article 15.2 is also confined to an Act of the Oireachtas."
>
> (5) This would appear to exclude (subject to the qualification regarding legislation with reference to independent texts outside the Bill as in the Immigration Act 1999 added by the Supreme Court judgment in that case), any regulation having statutory effect made under the Act of 1972 from being part of an Act of the Oireachtas whether that Act is the Act of 1972 or any other.

42. My conclusion is that for the applicants to suggest that regulations having statutory effect made under the Act of 1972, each legislatively appended to that Act so as to become part of same, is to ignore the entirely separate constitutional and legislative status of two different types of provisions each having statutory effect.

Status of European Acts given effect by the Act of 1993
43. The recital of the Animal Remedies Act 1993 specifically refers to the provision for the giving effect to Acts of the European Communities relating to Animal Remedies as a purpose of the Act.

44. Section 8(1)(a) empowers the Minister to make regulations relating to Animal Remedies and subsection (1) paragraph (a) and (b) deal generally with the nature of the regulations in general terms.

45. Section 8 (2) paragraph (b) provides:-

> "Without prejudice to the generality of subsection (1) or section 9 regulations under that subsection may provide for … (x) the purpose of giving effect or further effect to existing or future acts of the Institutions of the European Communities which relate to –
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> (I) veterinary medicinal products, or
>
> (II) residues of veterinary medicinal products in animals or foodstuffs, or
>
> (III) any other matter in respect of which the Minister may make regulations in respect of any other provisions, specified in this subsection or in subsection, (1). It is clear that such provisions empower the Minister to make regulations to give effect or further effect to existing or future acts of the institutions of the European Communities".

46. In the decision of the Supreme Court in *Browne v. Minister for Marine* [2003] 3 I.R. 205 it was stated by Denham J. at pp. 242-243:-

> "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."

47. Section 8 (3) provides that "[w]here the Minister makes regulations under this section which include or are for the purpose of giving effect to an act of one of the institutions of the European Communities then –

> (a) that fact, together with the institution and act concerned, shall be specified by the Minister when making those regulations, and
>
> (b) the provisions of s. 4 (inserted by the European Communities (Amendment) Act 1973) of the Act of 1972 shall apply to those regulations as if they had been made under s. 3 of the Act of 1972."

48. Apart from the annulling provisions in s. 4 of the Act of 1972 as amended subs. (1) provides that the Regulations to which it refers shall have statutory effect. It is clear to me that subs. (3) paragraph (b) applies the provisions of s. 4 of the Act of 1972 amended to the Regulations made by the Minister under the Act of 1993 in the same manner as they apply to Regulations made under s. 3 of the Act of 1972. The reference in s. 8 subs. (2)(b) to s. 3 of the Act of 1972 is not for the purpose of incorporating the regulation into the Act of 1972 or to incorporate the terms and conditions of the Act of 1972 into the Regulation: rather it is for the purpose of describing the mechanism by which the regulations made under the Act of 1993 are to have statutory effect. For the foregoing reasons, my conclusions are that regulations made by the Minister pursuant to his powers under s. 8 (2)(x) are instruments of European legislation in their own right and quite independent of the Act of 1972 apart from the application thereto of s. 4 the Act of 1972.

49. The use by the applicants in argument of the special provisions in s. 8(8) relating to prior regulations to justify the argument that somehow the regulations made under s. 8(2)(x) were "part of" the Act of 1972 just do not stand up, when it is considered that these detailed provisions are made by the Oireachtas to extend the possibility of charges arising from these regulations being dealt with on indictment under the Act of 1993. This purpose was admitted by the applicants in their arguments but in view of my conclusions in relation to the nature of regulations made under the Act of 1972 and separately under the Act of 1993 the provisions of subs. (8) cannot be used to substantiate an argument which has been already been rejected in this judgment when the plain meaning of the subsection is consistent with one of the major policies of the Act of 1993 which was to introduce the possibility of indictable charges arising in respect of Animal Food and Remedies Legislation.

Whether the 1993 Act permits the 1996 Regulations (as amended) to create indictable offences.
50. Section 20 combined with the provisions of s. 23 of the Act of 1993 have the combined effect of making a contravention of regulations made under s. 8 an offence which may be subject to penalties upon summary conviction or conviction on indictment such as the only construction of the plain meaning of the words of sections 20 and 23. However the applicants have argued that such construction must be placed in the context of the prohibition of s. 3(3) of the Act of 1972 on the creation of an indictable offence. Clearly this argument was based on the regulations made under s. 8 (2)(x) in particular being subject to s. 3(3) of the Act of 1972. As I have already concluded that s. 3 of the Act of 1972 does not apply to regulations made under the 1993 Act, I do not accept this argument. While further arguments were made to me that in circumstances where the Community Acts as set out with the necessary detail that the Minister may be empowered to create indictable offences without having that power expressly given to him by the enabling Act of the Oireachtas the issue of the suitability for such process applying to the European Community instruments involved in this case were not opened to the court in sufficient detail to enable me to formulate a final view in relation to the applicability of the obiter dictum of Keane CJ in Browne v. Attorney General and Others [2003] 3 I.R. 205 that in certain cases the creation of an indictable offence was necessitated by the obligations of membership of the European Communities and could effect the power of the Minister to make such a regulation, and it is unnecessary for me to do so.

The Effect of Annulment Procedures
51. Clearly under the Act of 1993 there are two annulment procedures involving the Oireachtas in respect of regulations made under the Act of 1993. The annulment procedures are differentiated between those applicable to community based secondary legislation and non community based secondary legislation and do not give rise to grounds to change my view in relation to the nature of the regulations made under s. 8 (2)(x) of the Act of 1993.

Failure of the Regulations of 1996 as amended by the Regulations of 1998 and in certain cases the Regulations of 2002 to create an offence.

52. It is argued on behalf of the applicants that insofar as it was necessary to amend the Regulations of 1996 by the Regulations of 1998 and in certain cases Regulations of 2002 in order to create an offence that the Regulations of 1998 and Regulations of 2002 being Regulations purporting to amend the Act of 1972 in the form of the Regulations of 1996 were contrary to s. 3 subs. (2) of the Act of 1972 excluding amendments of the Act of 1972 by regulations made thereunder. As I have already rejected the arguments relating to conferring on the 1996 Regulations a status under the Act of 1972 never mind being part of that Act, I cannot accept this argument. However the applicants also argued that the Regulations of 1998 and the Regulations of 2002 are null and void by reason of the fact that

> 1. The Minister on the principles set out in the judgment of Kelly J. in the High Court in *Albatros Feeds Limited v. Minister for Agriculture Ireland and the Attorney General* (Unreported, High Court, Kelly J., 7th March, 2005), is precluded from deciding that the Regulations already made such as the Regulations of 1996 have not transposed the Community Act into Irish law; and also that on the basis of presumption of constitutionality, when the Oireachtas have already been afforded an opportunity to annul the Regulations a new Minister cannot argue that statutory instrument which is deemed to have been enacted by the Oireachtas constitutes an unreasonable exercise of a statutory discretion on the part of the Minister who promulgated it.
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> 2. The Minister is precluded from giving further effect to the Community Acts by making regulations by reason of further effect cannot be given to the 1996 Regulations which were of no effect

53. Insofar as the first aspect of this argument is concerned, I consider that it is not applicable in the present case as the decision of the High Court in *the Albatros Feeds Limited* case dealt with the exercise by the Minister of an administrative decision which was based on a view of the Minister that the Community had not been transposed into Irish law by the relevant ministerial regulation. As regards the second aspect, in the light of the clear obligation under the Act of 1993 to give effect and further effect to Communities Acts by means of secondary legislation it, does not appear to me to be possible to say that a Minister, having failed to fully transpose a Community Act by a regulation, is bound to labour under that yoke until rescued by an appropriate amending Act of the Oireachtas. In any event the basis upon which the applicants argued this point was that the Regulations of 1998 for instance were "deemed to have been enacted by the Oireachtas". Regarding the applicants arguments based upon the influence of the Act of 1972 on Community Regulations, nowhere in the Act of 1993 is it stated that a Regulation is deemed to have been enacted by the Oireachtas. As the Regulations made under the Act of 1993 have as their legislative source the Act of 1993 subject to the application of s. 4 of the Act of 1974 Act as amended, regarding statutory effect and annulment in the manner described, there is no prohibition on the amendment of one such piece of secondary community legislation by another, especially when made under the one Act of 1993 and the same community policy area, as has been done in this case.

Conclusion

54. Having regard to the foregoing I find that the applicants are not entitled to any of the reliefs claimed and same are refused.