APPROVED **[2023] IEHC 409**

THE HIGH COURT
JUDICIAL REVIEW

2014 No. 773 JR

BETWEEN

GERRY GEARTY
SEAN BEIRNE

APPLICANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS
THE DISTRICT COURT JUDGE FOR THE TIME BEING ASSIGNED TO THE DISTRICT COURT AREA OF LONGFORD
MINISTER FOR ARTS HERITAGE AND THE GAELTACHT
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 20 July 2023

INTRODUCTION

1. This judgment is delivered in respect of a challenge to the validity of Section 3 of the European Communities Act 1972 (as amended). In brief, the applicants contend that the Constitution of Ireland does not allow for the creation of an *indictable offence* other than by way of primary legislation. It is further contended that a statutory provision, which purports to allow members of the executive branch of government to make regulations which create indictable

offences, is invalid. The applicants rely, in particular, on the provisions of Article 15 and Article 38 of the Constitution of Ireland.

PROCEDURAL HISTORY

2. The applicants in the present proceedings are being prosecuted for alleged breaches of the domestic regulations which implement the Habitats Directive (Council Directive 92/43/EEC). The domestic regulations are entitled the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). These regulations will be referred to throughout this judgment by the shorthand "*the Natural Habitats Regulations*".

3. The Natural Habitats Regulations were made by the Minister for Arts, Heritage and the Gaeltacht in exercise of the powers conferred upon him by Section 3 of the European Communities Act 1972. As explained presently, this section had been amended in 2007 so as to confer an express power on a Minister of the Government to create an indictable offence.

4. The Natural Habitats Regulations purport to create a number of offences which are triable either summarily or by indictment. These include, relevantly, offences in respect of the refusal of entry to an authorised officer, and the obstruction or impeding of an authorised officer in the exercise of any of his or her functions. These are the offences of which the applicants stand charged.

5. The criminal proceedings against the applicants were last before the District Court on 2 September 2014. On that occasion, the presenting guard indicated that they had directions from the Director of Public Prosecutions that all matters could be disposed of summarily. The criminal proceedings have, in effect, been stayed pending the determination of these judicial review proceedings.

6. The applicants' case, as pleaded in the statement of grounds, had sought to challenge the validity of the Natural Habitats Regulations on the basis, principally, that the Minister had acted *ultra vires* his powers under Section 3 of the European Communities Act 1972 in purporting to create an indictable offence. Put otherwise, it had been argued that the Habitats Directive did not articulate principles and policies which would allow the Minister lawfully to make regulations which created an indictable offence. The challenge to the Natural Habitats Regulations is separate and distinct to the challenge made to the validity of the European Communities Act 1972. It represents a challenge to the validity of the secondary legislation, rather than to the parent legislation pursuant to which the secondary legislation had purportedly been made.

7. As it happens, at the time these proceedings were instituted in 2014, there were other proceedings in being which raised a similar type of challenge to the validity of the Natural Habitats Regulations. It was agreed that one such case would be heard first, with the other cases, including the present proceedings, being adjourned to await the outcome of the lead case.

8. The lead case is the subject of written judgments by both the High Court and the Court of Appeal. These judgments are discussed at paragraphs 37 to 41 below. The Natural Habitats Regulations were upheld as having been validly made pursuant to the European Communities Act 1972.

9. Confronted with these judgments, the applicants in the present case accept that they cannot now pursue a successful challenge to the Natural Habitats Regulation on the grounds that the Minister acted *ultra vires* in making the regulations pursuant to the European Communities Act 1972. The applicants seek, instead, to challenge the validity of the parent legislation itself.

10. The proceedings ultimately came on for hearing before me over three days on 22 June, 23 June and 6 July 2023, respectively. The parties had previously agreed a statement of facts and the case falls to be determined by those agreed facts.

11. It should be flagged that the respondents have raised two procedural objections, relating to pleadings and *locus standi*, respectively. These procedural objections are considered at paragraph 64 *et seq*. below.

OVERVIEW OF THE TRANSPOSITION OF EU LEGISLATION

12. European Directives, such as the Habitats Directive, are not normally directly applicable in the domestic legal order of a Member State, but instead require to be transposed by way of national legislation. (This is subject to a possible exception in the case of those provisions of a Directive which have "*direct effect*", but that concept is not immediately relevant to the present case.) The CJEU has consistently held that the provisions of a Directive must be implemented into the domestic legal order with "*unquestionable binding force*", and with the specificity, precision and clarity required in order to satisfy the need for legal certainty. (See, for example, *Commission v. Ireland* (Case C-50/09) EU:C:2011:109, [2011] E.C.R. I-873.)

13. The introduction of national implementing legislation is, therefore, necessary to transpose directives into the domestic legal order. EU law is largely indifferent to whether such national legislation is primary or secondary legislation, provided that it is legally binding. The distinction between primary and secondary legislation is, however, a matter of great significance under Irish constitutional law. This significance arises as a consequence of the fact that legislative power

is exclusively vested in the Oireachtas. Article 15.2.1° of the Constitution of Ireland reads as follows:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

14. It is well established in the case law that this does not preclude the delegation by the Oireachtas of a power to make secondary legislation. This is subject to the proviso that the parent legislation must contain a sufficient statement of "*principles and policies*" to guide the delegate in making the secondary legislation.

15. This approach has been applied, in modified form, to secondary legislation which is made for the purposes of implementing EU legislation. In effect, the EU legislation is treated as the parent legislation. It is constitutionally permissible to employ secondary legislation to implement EU legislation provided that the secondary legislation does no more than fill in the details of "*principles and policies*" contained in the EU legislation. If, however, the European legislation leaves over significant policy choices to the Member States, then primary legislation may be required as a matter of constitutional law.

16. The precise mechanism by which transposition of EU legislation is achieved is via the European Communities Act 1972. The Act authorises the use of secondary legislation to give effect to EU legislation, including European Directives. Section 2 provides that acts adopted by the institutions of the European Union (and by the institutions of what was formerly the European Communities) shall be part of the domestic law of the State under the conditions laid down in the Treaties governing the European Union.

17. Section 3 of the European Communities Act 1972 has been amended by the European Communities Act 2007 and the European Union Act 2009. The first two sub-sections of Section 3 remain unchanged and read as follows:

> "(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)."

18. As appears, regulations under the section can, in principle, be used to repeal or amend other legislation, including primary legislation.

19. The Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 held that these powers are constitutional by reference to what was then Article 29.4.5° of the Constitution of Ireland. See pp. 351–352 of the reported judgment as follows:

> "The power to make regulations contained in section 3, sub-s. 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."

20. In its subsequent judgment in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, the Supreme Court reiterated that there are limits to the entitlement to make regulations under the European Communities Act 1972. In particular, if regulations went further than simply implementing details of principles or policies to be found in a European Directive or European Regulation, and instead determined such principles or policies, then such regulations would be *ultra vires*.

21. Fennelly J. summarised the findings in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 as follows (at page 254 of his judgment in *Maher*):

> "*Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 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 from 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."

22. Keane C.J. stated in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, at pages 181 and 182 of the reported judgment, that it was "*almost beyond argument*" that the choice of a statutory instrument—rather than primary

legislation—as a vehicle for implementing the detailed rules required under EU legislation was not in any sense "*necessitated*" by the obligations of membership of what was then the European Community (now the European Union).

23. Keane C.J. went on to state, at page 183 of the reported judgment, that the "*essential inquiry*" must be as to whether the making of the impugned regulations was in breach of Article 15.2. This involved an application of the test in *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381, treating the relevant EU legislation as the "*parent legislation*":

> "However, in applying that test to a case in which the regulation is made in purported exercise of the powers of the first respondent under s. 3 of the Act of 1972, it must be borne in mind that while the parent statute is the Act of 1972, the relevant principles and policies cannot be derived from that Act, having regard to the very general terms in which it is couched. In each case, it is necessary to look to the directive or regulation and, it may be, the treaties in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation."

24. As illustrated by the case law, whereas the "*principles and policies*" test can be shortly stated, its application in practice is not always straightforward. Even in the leading case of *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 itself, Keane C.J. expressed himself, at page 185, as having experienced "*some difficulty*" in arriving at a conclusion as to how the issue was to be resolved in the circumstances of the case, but was ultimately persuaded by a detailed analysis of the relevant European Regulation in question that the choices as to policy available to the Member States had, in truth, been reduced almost to "*vanishing point*".

25. More recently, the "*principles and policies*" test has been described as "*not without its difficulties*" and as "*somewhat elusive*" in *O'Sullivan v. Sea Fisheries*

Protection Authority [2017] IESC 75, [2017] 3 I.R. 751 (at paragraphs 32 and 39). O'Donnell J., delivering the judgment of the Supreme Court, emphasised that the entire concept of subordinate regulation depends upon and contemplates a delegate making decisions between a range of options (at paragraphs 40 and 41):

> "However, it is in my view an error to approach the issue on the basis that the parent legislation must be scoured to provide detailed guidance for the subordinate rule maker. As observed in *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1, every delegate must make some choice. If the parent legislation dictated the outcome, then there would be no benefit gained by the delegation of the task to the subordinate: the parent legislation could, and therefore should, include the provision in the first place. Thus the entire concept of subordinate regulation depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision maker considers is the best solution in the circumstances. The question is the scope of the decision-making left to the subordinate rule maker.
>
> The test can be approached negatively. Is the area of rule-making delegated so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1°? This involves a consideration of a number of factors including the function of the parent legislation and the area in which the subordinate has freedom of action. An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily adjusted within the scope left to the subordinate, in the light of changing circumstances. To take a simple example, if a body is given authority to fix all the terms of a licence, that is a power which may on its face appear unlimited, and it may be necessary to consider if there are sufficient policies and principles in the parent legislation to narrow the scope of subordinate decision-making, and guide the decision maker. If however the

> delegation is merely to fix a licence fee within a minimum and maximum already identified, it may follow that the Oireachtas has already contemplated a range of possible outcomes and considered them compatible with the statutory objective, and was content to leave the decision as to what precise point within that scale was the most appropriate, in the light of changing circumstances, to a subordinate body. It would not be necessary to look in addition for detailed principles and policies to guide that task."

26. O'Donnell J. also drew attention to the fact that Section 3 of the European Communities Act 1972 had set its own test. Regulations under the section may contain "*such incidental, supplementary and consequential provisions*" as appear to the Minister making the regulations to be necessary. O'Donnell J. indicated that it can be useful to approach the question in this way.

27. The judgment went on then to analyse the EU Regulations at issue. The Supreme Court held, at paragraph 43, that the choices remaining to the Member States were "*severely limited*" in terms of the overall regulatory scheme. A choice does not imply a capacity to determine policy. The matters dealt with under the secondary legislation were "*incidental, supplemental and consequential*" to the provisions of the EU Regulations and raised no issue of broad policy that required a determination by the Oireachtas.

28. The Supreme Court has most recently considered the proper approach to delegated legislation in *Naisiúnta Léictreach Contraitheoir Éireann v. The Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1. MacMenamin J., delivering the majority judgment, emphasised, at paragraphs 53 to 61, that the essential task is to determine whether the Oireachtas had failed to comply with its constitutional duty as sole legislator. Any gauge must be seen as one derived from the words of Article 15.2.1° itself. An identification of principles and policies cannot, therefore, be seen as a "*form of free-standing vantage-point*"

permitting a court to engage in what might be seen as a critique of the essential substance or policy, in a political sense, of what the Oireachtas chooses to provide for in legislation. MacMenamin J. went on to acknowledge that the thinking behind a "*principles and policies*" approach is fundamentally important to the protection of the principle of separation of powers. The underlying intent is to ensure that delegated bodies, or the executive, do not trespass on the constitutional power of one of the vital organs of the State, that is, the Legislature, by ousting its exclusive role, by such delegate-body itself engaging in "*legislation*".

29. MacMenamin J. also approved of the "*negative recasting*" of the test which had been presaged in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751. This involves an approach whereby, rather than seeking a detailed statement of all of the principles and policies in the parent legislation, a court should ask the question as to whether the absence of such principles and policies actually trespasses on the power of the Oireachtas. For this purpose, a focus on the breadth or narrowness of the delegation may be a useful heuristic. This may involve an approach whereby, within a narrow area of delegation, a court should consider whether the Legislature has considered the possible choices and found them all to be acceptable.

APPROACH TAKEN TO CREATION OF INDICTABLE OFFENCES

30. The European Communities Act 1972, as originally enacted, precluded the creation of indictable offences by way of delegated legislation under the Act. This was provided for as follows at sub-section 3(3):

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

31. The rationale underlying this preclusion has been described as follows by Denham J. in her concurring judgment in *Browne v. Ireland* [2003] 3 I.R. 205 (at 242/43):

> "Thus, the primary legislative provision for implementing Community Regulations, the European Communities Act 1972 specifically states a principle and policy that regulations made by the minister enabling the implementation of Community law shall not create an indictable offence. It is an important principle of the legislation, it limits the power of the minister, and the legislature is retaining to itself the power to create indictable offences. Such a principle recognises the significance of indictable offences and that they should be established by the Irish parliament. This recognition by a member state of its parliament is entirely consistent with Community law: the method of implementation is for the member state. In such a situation a balance is achieved: the importance of major institutions in the State and in the Community receive appropriate recognition.
>
> 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."

32. As appears, the judgment characterises the preclusion on the creation of indictable offences other than by primary legislation as a "*recognition*" by the (then) Legislature of the significance of indictable offences. Relevantly, however, the judgment goes on to state that the Legislature is not barred from "*revisiting*" the issue. In the next paragraph, Denham J. states that 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. It is apparent from this statement that the judge contemplated that an indictable offence could be created by delegated legislation, provided that this was

expressly prescribed in the parent legislation. Any such power would, of course, be subject to the principles and policies test.

33. Similar sentiments were expressed by the same judge in *Kennedy v. Attorney General* [2005] IESC 36, [2007] 2 I.R. 45, [2005] 2 I.L.R.M. 401 (at paragraph 31):

> "The Act of 1972 specifically states a principle and a policy that regulations made by a minister enabling Community law shall not create an indictable offence: 'Section 3(3) Regulations under this section shall not create an indictable offence'. It is an important principle and policy of the legislation. It is a limitation on the power of a minister. It retains to the Oireachtas the power to create indictable offences. This recognition of the power of the Oireachtas is consistent with Community law, as the method of implementing Community law is a matter for the member state. This principle and policy may be revisited by the Oireachtas. However, in view of the expressed policy in the Act of 1972, any change in that policy should be clear from the words of a statute. There should not be an ambiguity. […]."

34. This policy was subsequently revisited by the Oireachtas. The European Communities Act 1972 was amended by the European Communities Act 2007 and the European Union Act 2009. The amended sub-section 3(3) of the European Communities Act 1972 reads as follows:

> "Regulations under this section may—
>
> (a) make provision for offences under the regulations to be prosecuted on indictment, where the Minister of the Government making the regulations considers it necessary for the purpose of giving full effect to—
>
> (i) a provision of the treaties governing the European Union, or
>
> (ii) an act, or provision of an act, adopted by an institution of the European Union, an institution of the European Communities or a body competent under those treaties, and

> (b) make such provision as that Minister of the Government considers necessary for the purpose of ensuring that penalties in respect of an offence prosecuted in that manner are effective and proportionate, and have a deterrent effect, having regard to the acts or omissions of which the offence consists, provided that the maximum fine (if any) shall not be greater than €500,000 and the maximum term of imprisonment (if any) shall not be greater than 3 years."

35. It is the constitutional validity of these provisions which the applicants seek to challenge in these proceedings.

36. These provisions have to be read in conjunction with Sections 3A and 4 of the European Communities Act 1972.

CHALLENGE TO THE DOMESTIC REGULATIONS

37. As explained earlier, the present proceedings had been adjourned pending the outcome of a separate challenge to the validity of the Natural Habitats Regulations in proceedings entitled *O'Connor v. Director of Public Prosecutions*. One of the main issues raised in those proceedings was whether the creation of an indictable criminal offence was within the principles and policies of the Habitats Directive.

38. The High Court (O'Malley J.) upheld the validity of the Natural Habitats Regulations for the following reasons: see *O'Connor v. Director of Public Prosecutions* [2015] IEHC 558, [2015] 2 I.R. 71 (at paragraphs 87 to 89):

> "What then are the 'principles and policies' of the Habitats Directive? As far as is relevant to this case, it seems to me that that question is answered by reference to art. 6(2). The State is obliged to take all appropriate steps to prevent deterioration in listed sites, of which Moanveanlagh Bog is one.
>
> 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.
>
> 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. The fact that it 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 Habitats 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 Habitats Directive."

39. This finding was upheld by the Court of Appeal: *O'Connor v. Director of Public Prosecutions* [2017] IECA 101, [2020] 2 I.R. 593. The Court of Appeal stated that, in considering whether or not criminal sanctions come within the principles and policies of the Habitats Directive, it seemed 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.

40. The Supreme Court refused leave to appeal against the decision of the Court of Appeal: *O'Connor v. Director of Public Prosecutions* [2018] IESCDET 92:

> "What is in issue here is whether the promulgation of the S.I. was 'necessitated' by membership of the EU. This promulgation occurred to uphold the Habitats Directive which itself is part of EU law. The promulgation of the S.I., and the fact that it is now an indictable offence, are all matters which are covered by statute, or have been

> considered and dealt with in the jurisprudence of this Court. The application does not raise a point of general public importance, nor does it raise an issue which it is in the interests of justice for this Court to determine. The situation is, rather, that the applicant has been charged with an offence, the constitutionality of which has not been challenged. On the basis of established case law, the Minister acted *intra vires* in promulgating this S.I. which created the offence, the constitutionality of which is not challenged. A trial on indictment for a breach of the offence is now permitted in law. There is no constitutional challenge to s.3 of the Act of 2007, and the unchallenged facts as found in the High Court and approved in the Court of Appeal demonstrate that the promulgation of the Statutory Instrument was necessitated by membership of the European Union."

41. Of course, the determination of an application for leave to appeal is not intended to have a precedent value for other cases. The only reason that the determination is cited here is to highlight the fact that *O'Connor v. Director of Public Prosecutions* did not involve a challenge to the European Communities Act 1972. As discussed presently, this is significant in considering the objection that the applicants lack *locus standi*: see paragraphs 68 to 71 below.

DISCUSSION

42. The primary focus of these proceedings, as initially conceived, had been a direct challenge to the validity of the secondary legislation, i.e. the Natural Habitats Regulations. This avenue of attack has since been closed off to the applicants by the judgment of the Court of Appeal in *O'Connor v. Director of Public Prosecutions* [2017] IECA 101, [2020] 2 I.R. 593. The applicants have sought to reorientate their case to one which challenges the validity of the parent legislation, i.e. the European Communities Act 1972. The logic of this attempted pivot being that if the primary legislation is declared to be invalid then the Natural Habitats Regulations must also be set aside as a nullity.

43. Accordingly, the only ground relied upon at the hearing before me is that pleaded at paragraph E.16 of the statement of grounds:

> "Section 3(3) of the 1972 Act enables the creation of an indictable offence where the Minister 'considers' it necessary for the purpose of giving full effect to European Union law. This power is not limited to where the making of an indictable offence is necessitated by the State's membership of the European Union within the meaning of Article 29.4.6° of the Constitution. The discretion given to the Minister to create an indictable offence even where such is not necessitated by the State's obligations of membership of the European Union constitutes an impermissible delegation of law making power by the Oireachtas to the third respondent, contrary to Article 15 of the Constitution."

44. The applicants sought to elaborate upon this ground as follows at the hearing. It is argued that under the domestic constitutional order an indictable offence may only ever be created by primary legislation. This constraint is said to follow as a consequence of the significance afforded under Article 38 of the Constitution to the distinction between minor and non-minor offences. It is a matter for the Oireachtas alone to decide to create a non-minor offence. On this argument, the creation of an indictable offence by way of secondary legislation will always represent a breach of Article 15.2.1° of the Constitution. This supposed breach may only be shielded from challenge if it can be said that the creation of an indictable offence is "*necessitated*" by the State's membership of the European Union within the meaning of Article 29.4.6° of the Constitution. It is next argued that the creation of an indictable offence can never be said to be "*necessitated*" in circumstances where the European Union does not have criminal competence.

45. This argument was modified during the course of the hearing. Counsel accepted that, following the ratification of the Lisbon Treaty, the EU now has competence, under Article 83 TFEU, to establish minimum rules with regard to the definition of criminal offences and sanctions by way of Directives. Counsel appeared to

accept that an indictable offence might validly be created by way of delegated legislation in circumstances where an EU Directive, adopted in accordance with Article 83 TFEU, is prescriptive as to the penalty to be imposed and the empowering primary legislation makes it clear that the Minister may not go beyond the maximum penalty prescribed by the EU Directive.

46. The first point to make in respect of these arguments is that, even if correct, they would not support a declaration of invalidity. This is because sub-section 3(3) of the European Communities Act 1972 is capable of being read in a manner which would achieve a constraint of the type contended for by the applicants. The fact of the matter is that there are a number of pieces of EU legislation which are prescriptive of penalty. Indeed, counsel for the applicants helpfully furnished me with a list of EU Directives adopted pursuant to Article 83 TFEU. The point can be illustrated by reference to one of these EU Directives, namely Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography. This Directive requires, *inter alia*, Members States to create an offence of knowingly attending pornographic performances involving the participation of a child. The Directive further provides that such offence be punishable by a maximum term of imprisonment of at least 2 years if the child has not reached the age of sexual consent. This requirement has been implemented into the domestic legal order by way of regulations made pursuant to Section 3 of the European Communities Act 1972, namely, the European Union (Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography) Regulations 2015 (S.I. No. 309 of 2015). It could scarcely be contended that in such circumstances the creation of an indictable offence by way of delegated legislation is unconstitutional. The Irish State has no discretion

but to create the offence with the minimum penalty prescribed. To adopt the language of Denham J. in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329, to require the Oireachtas to legislate in such a situation would be sterile and artificial.

47. The more fundamental point is that the applicants' arguments do not accord with the case law on the interaction between Article 15.2.1° and Article 29.4.6°. As discussed at paragraphs 12 to 29 above, the case law indicates that the use of secondary—as opposed to primary—legislation will rarely, if ever, be "*necessitated*" by EU law. If there has been a breach of Article 15.2.1°, therefore, same will not be shielded by Article 29.4.6°. The essential question is whether the delegation of a power to create an indictable offence involves an impermissible abdication by the Oireachtas of its legislative function. The resolution of this question requires consideration of the breadth of the power delegated and whether there is an adequate statement of principles and policies to guide the exercise by the delegate or subordinate of the discretion conferred upon them. Here, a Minister of the Government has, by virtue of the amendments introduced under the European Communities Act 2007, been conferred with a discretion to create a criminal offence whether summary or indictable. This is, certainly, a broad discretion. The options which might, in theory, be open to the Minister range from not creating an offence at all, through to the creation of a summary offence, and onwards to the creation of an indictable offence with a maximum penalty of three years' imprisonment and a monetary fine of €500,000. In practice, however, the actual area of discretion will be greatly curtailed by the terms of the particular piece of EU legislation being implemented. It is also curtailed by the imperative, under sub-section 3(3)(b) of

the European Communities Act 1972, that the penalty be effective and proportionate and have a deterrent effect.

48. It should be reiterated that the applicants accept that it is constitutional to confer a power upon a Minister of the Government to create a criminal offence, and further accept that a power to stipulate a penalty of 12 months' imprisonment is permissible. The applicants' complaint is directed, instead, to the power to go beyond 12 months to three years and to impose a fine of €500,000.

49. It is correct to say that, prior to the Lisbon Treaty, neither criminal law nor the rules of criminal procedure fell within the European Community's general competence. Crucially, however, it had been established, well before the adoption of the Lisbon Treaty, that the penalties for an infringement of European law must be effective, proportionate and dissuasive. See, for example, Case 68/88, *Commission v. Greece* [1989] E.C.R. 2965 (at paragraphs 23 and 24):

> "It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.
>
> For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."

50. The division of competence between the Member States and what was then the European Community has been summarised accurately as follows by the

Advocate General in Case C-440/05, *Commission v. Council* (at paragraphs 111 and 112 of his opinion):

> "The delimitation of powers as outlined, according to which the Community can require the imposition of effective, proportionate and dissuasive criminal penalties but must leave the determination of their type and level to the Member States, has also the advantage of being clear-cut. I doubt that it would be at all practicable to differentiate further with regard to the degree of detail in which the Community may determine penalties.
>
> To sum up, it may be said that according to Case C-176/03, as I read it, the Community legislature can, whenever criminal measures are necessary to ensure the full effectiveness of Community law and essential to combat serious offences in a particular area, require Member States to penalise certain conduct and to adopt in that regard effective, proportionate and dissuasive criminal sanctions."
>
> *Footnotes omitted

51. Having regard to this jurisprudence, it is incorrect for the applicants to suggest that there are no circumstances in which it would be necessary for the Irish State to impose significant criminal sanctions in order to give effect to the provisions of an EU Regulation or EU Directive. The exigencies of the EU legislation may be such that there is no meaningful discretion left to the Member State. This is not confined to EU legislation which has been adopted pursuant to Article 83 TFEU.

52. As emphasised in the recent case law of the Supreme Court (discussed earlier), the essential task, in the context of Article 15.2.1°, is to determine whether the Oireachtas has failed to comply with its constitutional duty as sole legislator. If the area of discretion remaining to the Irish State has narrowed to the nomination of a criminal sanction which lies on a spectrum between 12 months and 3 years, then this is something which can legitimately be delegated to the executive branch of government. This delegation has been properly delimited: the

legislative branch has prescribed the maximum penalties (both in terms of monetary fines and imprisonment) and sub-section 3(3)(b) of the European Communities Act 1972 further limits the discretion conferred on the Minister by requiring that the penalties imposed are effective and proportionate and have a deterrent effect. The regulations are also subject to the safeguards stipulated under Sections 3A and 4 of the European Communities Act 1972.

53. The applicants must, as a result of *O'Connor v. Director of Public Prosecutions*, posit their case at a high level of abstraction. They cannot argue that the European Communities Act 1972 facilitated an impermissible delegation of legislative power by allowing the Minister to render a breach of the Natural Habitats Regulations an indictable offence. The Court of Appeal has held that the creation of an indictable offence was justified by the principles and policies of the Habitats Directive.

54. The fact that the principles and policies are to be found in relevant EU legislation, rather than solely in domestic legislation, makes the applicants' task all the more difficult. The present case can be contrasted with one where the parent legislation has no EU law element. There, a claimant only has to establish that no adequate statement of principles or policies is to be found in the parent legislation itself. Here, the applicants must demonstrate that there is no EU legislation currently in force which articulates a policy that requires an effective, proportionate and dissuasive penalty.

55. Put otherwise, the applicants are forced to argue that there may be other hypothetical circumstances in which the creation of an indictable offence would not be supported by the principles and policies of the particular EU legislative measure being implemented. The flaw in this argument is that it cuts against the

presumption of constitutionality. The presumption of constitutionality carries with it the implication that all proceedings, procedures, discretions and adjudications which are permitted or prescribed by an Act of the Oireachtas are intended by the national parliament to be conducted in accordance with the principles of constitutional justice (*East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317). The Supreme Court has held, in the specific context of the unamended version of Section 3 of the European Communities Act 1972, that it is further implied that a Minister of State shall not contravene any provisions of the Constitution in exercising the power of making regulations pursuant to the section. See *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 (at 352/53) as follows:

> "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."

56. It follows, therefore, that if and insofar as the applicants may seek to conjure up hypothetical examples of regulation-making that might appear to breach Article 15.2.1° of the Constitution, this would go to the validity of the (hypothetical) regulations, as secondary legislation, rather than to the validity of the primary legislation. Put otherwise, the provisions of the amended sub-section 3(3) of the European Communities Act 1972 are capable of being given a compliant interpretation, by confining the power to create an indictable offence to circumstances where same is justified by reference to the principles and policies of the particular EU legislative measure being implemented. This is so even where the EU legislative measure is not prescriptive but leaves open some limited discretion as to the precise detail of the offence and sanction. It is inherent in the notion of the delegation of legislative power that the delegate or subordinate must have *some* discretion. Thus the fact that a Minister of the Government has some limited choices to make is not fatal. A choice does not imply a capacity to determine policy. It is sufficient that the discretion is guided by the EU legislative measure in question and is constrained by the maximum penalties prescribed under the parent legislation.

57. In reaching this conclusion, I have carefully considered the applicants' criticism of what they characterise as the subjective language of sub-section 3(3) of the European Communities Act 1972. In particular, the objection is made that the statutory power to make provision for offences to be prosecuted on indictment arises where the Minister making the regulations "*considers it necessary for the*

purpose". This, it is submitted, is a subjective test and the applicants contrast this unfavourably with the more objective test prescribed under sub-section 3(1).

58. The applicants' position is summarised as follows in their written legal submissions:

> "The formula set out in the impugned subsection is very close to that used in subsection (2). There is no objective test. The member of the Executive is not empowered to create indictable offences by regulation and/or to fix the punishment they should attract to enable Union law to have full effect in the State; rather he/she is permitted to do so when he/she 'considers it necessary' for that purpose. Having regard to what appears to be the unprecedented nature of the power being conferred on Government Ministers under subsection (3) of section 3, it is not clear why the Oireachtas used language more appropriate to the conferral of a power to make incidental/supplementary provisions.
>
> The applicants respectfully submit that for that reason alone, subsection (3) is incompatible with Article 15 of the Constitution."

59. With respect, these various criticisms are unfounded. The making of ministerial regulations is amenable to judicial review, and a purported exercise of the power under sub-section 3(3) is liable to be set aside where the particular regulations go beyond the principles and policies in the relevant EU legislative measure. The High Court's judicial review jurisdiction is not ousted by the use of the formula "*where the Minister of the Government making the regulations considers it necessary*". This has been explained as follows by the High Court (O'Malley J.) in *O'Connor v. Director of Public Prosecutions* [2015] IEHC 558, [2015] 2 I.R. 71 (at paragraph 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 of the Act of 1972 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 E.U. measures intended to be implemented."

60. It follows that—rather than defer to the opinion of the Minister—the High Court when reviewing the legality of regulations made under the European Communities Act 1972 will consider the Directive or Regulation in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Union legislation.

61. Finally, the applicants also sought to advance an argument based on the principle that there should be certainty in the criminal law. Counsel for the applicants cited the judgment in *People (DPP) v. Cagney* [2007] IESC 46, [2008] 2 I.R. 111 as authority for the proposition that it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely was prohibited and what was lawful. Counsel submitted that this principle extended to a requirement that there be legal certainty that an offence had been validly created. Counsel asked, rhetorically, how a person reading the Natural Habitats Regulations, along with the Habitats Directive, would know whether the offence for which they are being prosecuted had been validly created.

62. With respect, the objective of the requirement for legal certainty in the definition of criminal offences is to ensure that an individual knows, in advance, the type of acts or omissions which give rise to criminal liability, and what penalty will be imposed for the offence. Here, the offences with which the applicants are being prosecuted are certain and foreseeable. A person who chooses to breach

the Natural Habitats Regulations by obstructing or impeding an authorised officer is on notice that same comprises a criminal offence.

63. If a person wishes to challenge the validity of the legislation creating the offence, then they are entitled to do so, subject to their establishing that they have *locus standi*. In the interim, they are expected to comply with the legislation. The regulations are presumed to be valid unless and until set aside. There is no requirement that there must be certainty or foreseeability as to whether such a challenge to the legislation will succeed.

PROCEDURAL OBJECTIONS: STANDING AND PLEADING

64. The respondents have raised a number of procedural objections as follows. First, it is submitted that the applicants' case, as advanced at the hearing, goes beyond that pleaded in the statement of grounds. Secondly, it is submitted that the applicants do not have *locus standi* (standing) to pursue a challenge to the parent legislation in circumstances where the secondary legislation has already been held by the Court of Appeal to be *intra vires*.

65. Logically, it has been necessary for me to decide whether these procedural objections are well founded in advance of my embarking upon any determination of the merits of the case. This is because the breadth of the issues to be determined in the proceedings would be greatly reduced were the procedural objections to be upheld. For ease of exposition, however, I have deliberately postponed setting out my ruling on the procedural objections until this stage of the judgment. The discussion of the procedural objections which follows will, hopefully, be more understandable now that the reader has an appreciation of the circumstances of the case.

Pleading point

66. The only ground relied upon at the hearing before me is that pleaded at paragraph E.16 of the statement of grounds. The text of same has been set out above, at paragraph 43. The wording of this ground is sufficiently broad to allow the applicants to advance arguments by reference to Article 15.2.1° and Article 29.4.6° of the Constitution. Both of these articles are expressly referenced in the ground. Thus the applicants are entitled to pursue arguments, for example, by reference to the concept of "*principles and policies*" and to the "*necessitated*" requirement.

67. The applicants are not entitled to pursue arguments based on an alleged infringement of Article 38. There is no reference to that article, nor to the values which it protects, in the pleaded ground. For completeness, it should be recorded that, in any event, there does not seem to be any substance to the arguments, based on Article 38, which appear in the applicants' written legal submissions. As correctly observed by the respondents, all of the rights guaranteed by Article 38 will be observed in any trial on indictment of an offence created by the Natural Habitats Regulations. Put otherwise, the fact that the offences have been created by secondary legislation does not adversely affect the applicants' right to a jury trial and to all of the procedural safeguards attending such a trial. (As matters currently lie, it appears that the criminal proceedings will, in fact, be disposed of summarily).

Locus standi / Standing

68. The objection that the applicants do not have *locus standi* to challenge the European Communities Act 1972 can be summarised as follows. The applicants are only directly affected by Section 3 of the European Communities Act 1972

to the extent that it is the provision relied upon to make the regulations under which they are being prosecuted, i.e. the Natural Habitats Regulations. The Court of Appeal has held that the Natural Habitats Regulations are *intra vires* the European Communities Act 1972. The rationale underlying this holding is that the principles and policies articulated in the Habitats Directive justify the creation of an indictable offence. It is said to follow, therefore, that the applicants cannot rely on the making of the Natural Habitats Regulations as an instance of an impermissible delegation of legislative power. If and insofar as the applicants seek to speculate that, in other instances, the European Communities Act 1972 might be relied upon to make regulations which offend against Article 15.2.1° of the Constitution, they are seeking to rely on a *jus tertii*. Any such challenge should be taken by a person who is directly affected by any such regulations.

69. For the reasons which follow, I have concluded that the applicants do have standing to challenge the constitutionality of the European Communities Act 1972. There is a crucial distinction between (i) a challenge to the primary legislation which confers a power to make secondary legislation, and (ii) a challenge to the secondary legislation on the grounds that the making of same was *ultra vires* the primary legislation. This distinction was expressly referenced by the Supreme Court in its determination in the present case refusing leave to appeal. It does not follow as a corollary of the fact that the secondary legislation has been upheld as *intra vires* that the parent legislation will survive a constitutional challenge. The applicants seek to argue that the wording of the power to make regulations conferred by the Act is impermissibly broad. They also seek to argue that, even applying the presumption of constitutionality and

the double construction rule, sub-section 3(3) is incapable of being given a constitutional interpretation.

70. If these arguments were well founded, then the primary legislation would be invalid, and the Natural Habitats Regulations would fall as having been made pursuant to parent legislation which is invalid. It would be no answer to say that—even on the more restrictive version of the regulation-making power contended for by the applicants—an indictable offence might have legitimately been created for the purpose of giving effect to the Habitats Directive. The fact would remain that, if the applicants' arguments are correct, then sub-section 3(3) of the European Communities Act 1972 would be unconstitutional.

71. Put otherwise, it is no answer to an argument that legislation is impermissibly broad to cite a single instance of the legislation being applied in an unobjectionable manner.

CONCLUSION AND PROPOSED FORM OF ORDER

72. The provisions of Section 3(3) of the European Communities Act 1972 are capable of being interpreted and applied in a manner which is consistent with the requirements of Article 15.2.1° of the Constitution of Ireland. The Irish State, as a Member State of the European Union, is required to put in place effective, proportionate and dissuasive penalties for an infringement of European law. In some instances, the range of discretion left over to Ireland, as Member State, under a particular piece of EU legislation will be narrowed to the point that the Irish State will have no discretion but to create a criminal offence with significant sanctions. In such circumstances, it is permissible to delegate the function of implementing the particular EU legislation to the executive branch

of government to be done by way of secondary legislation, subject to the maximum penalties prescribed by Section 3(3) of the European Communities Act 1972. The range of discretion left over to the Minister of the Government, *qua* delegate, in such circumstances is narrow. A criminal offence must be created in order to give effect to the EU legislation. The delegate's discretion is confined to deciding on the detail of the offence subject to the maximum penalties prescribed by the Oireachtas, and the precise sanction will be guided by the principles and policies articulated in the relevant EU legislation.

73. The hypothesis that there may be individual instances where the exercise of the power conferred by the primary legislation might be exceeded by a Minister does not support a finding that the primary legislation should be condemned. The making of such Ministerial Regulations is amenable to judicial review, and a purported exercise of the power under Section 3(3) is liable to be set aside as *ultra vires* where the particular regulations go beyond the principles and policies in the relevant EU legislative measure. The High Court's judicial review jurisdiction is not ousted by the use of the formula "*where the Minister of the Government making the regulations considers it necessary*".

74. It follows, therefore, that the challenge to the validity of Section 3(3) of the European Communities Act 1972 must be dismissed. As this was the only ground pursued at the hearing, the application for judicial review will be dismissed. The proceedings will be listed before me, for final orders, on 27 July 2023 at 10.30 o'clock.

Appearances

Rosario Boyle SC and Anthony Lowry for the applicants instructed by Trayers & Company

Brian Kennedy SC, Conor Power SC and Emily Egan McGrath for the respondents instructed by the Chief State Solicitor

Approved Garrett Simons