

C-77/20-1

COURT OF APPEAL

IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE
FUNCTIONING OF THE EUROPEAN UNION AND
IN THE MATTER OF A REFERENCE TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION

BEFORE
THE PRESIDENT
MR. JUSTICE EDWARDS
MS. JUSTICE DONNELLY

Registered at the Court of Justice under No.	1143009
Luxembourg.	14. 02. 2020
Fax / E-mail:	
Received on:	13.02.20
	Cecilia Strömholm Administrator

APPEAL NO 214/15

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC
PROSECUTIONS

RESPONDENT

AND

K. M.

APPELLANT

ORDER DATED THE 21ST DAY OF JANUARY 2020

FOR REFERENCE TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO
ARTICLE 267 OF THE TREATY

The appeal of the Appellant against the severity of a sentence imposed on him by the Cork Circuit Criminal Court on the 27th day of July 2015 following his conviction by a jury on the 16th day of June 2015 of the offence of carrying on board a sea fishing vessel within the exclusive fishery limits of the State (ie Ireland) equipment prohibited by Article 32(1) of Council Regulation (E.C.) Number 850/98 in contravention of Statutory Instrument No. 197/2013

CURIA GRIFFE
LUXEMBOURG
13. 02. 2020
Esqts

(otherwise known as the Sea Fisheries (Technical Measures) Regulations 2013)
contrary to s.14 of the Sea Fisheries and Maritime Jurisdiction Act 2006 coming
before the Court this day

And on reading the Notice of Appeal and the transcript of the
proceedings in the court of trial and the submissions on behalf of the respective
parties

And on hearing Counsel for the Appellant and Counsel appearing for
the Director of Public

THE COURT HAS DECIDED TO REFER to the Court of Justice
of the European Union pursuant to Article 267 of the Treaty on the Functioning of
the European Union as set out in the said Reference dated the 21st day of January
2020 the question set out in paragraph 47 of said Reference and request the said
Court of Justice to give a preliminary ruling thereon

AND IT IS ORDERED that the further hearing of the said appeal do
stand adjourned until after the said Court of Justice shall have given its preliminary
ruling on the said question


GERALDINE MANNERS

REGISTRAR OF THE COURT OF APPEAL

Conways Solicitors for the Appellant

Chief Prosecution Solicitor for the Director of Public Prosecutions



THE COURT OF APPEAL

Court of Appeal Record No: CA 214/15
Cork Circuit Criminal Court Record No: CYDP 0053/2015

BETWEEN/

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Prosecutor/Respondent

V

K. M.

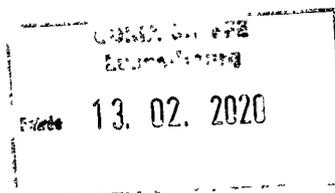
Defendant/Appellant

REQUEST FOR A PRELIMINARY RULING

ARTICLE 267 TFEU

To:
The Registrar,
Court of Justice of the European Union
L-2925 Luxembourg

The Court of Appeal of Ireland (The President, Mr. Justice George Birmingham with Mr Justice John Edwards and Ms Justice Aileen Donnelly) hereby refers the question set out at paragraph 47 below to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.



Parties to the Case:

1. The reference arises in the context of an appeal to the referring court against the severity of a sentence imposed in criminal proceedings.
2. The defendant in the proceedings at first instance, and the appellant before the referring court, is **Mr K.M.**, a Dutch national, and whose address for service in Ireland is care of **Conways Solicitors, Conway House, 35 South Terrace, Ballintemple, Cork, T12 E76X, Ireland.**
3. The prosecutor in the proceedings at first instance, and the respondent before the referring court, is the **Director of Public Prosecutions** (“the DPP”), who brings the proceedings on behalf of the people of Ireland. The DPP may be contacted care of **The Chief Prosecution Solicitor, Office of the Director of Public Prosecutions, Infirmary Road, Dublin 7, D07 FHN8, Ireland.**
4. For convenience the defendant/appellant will hereinafter be referred to simply as “the appellant” and the prosecutor/respondent will be referred to simply as “the respondent”.

Subject Matter of the Dispute and Relevant Findings.

5. The controversy giving rise to this reference arises out of an appeal against the severity of a sentence imposed on the appellant by Cork Circuit Criminal Court on the 27th of July 2015 following his conviction by a jury on the 16th of June 2015 of the offence of carrying on board a sea fishing vessel within the exclusive fishery limits of the State (i.e., Ireland) equipment prohibited by Article 32(1) of Council Regulation (E.C.) Number 850/98 in contravention of Statutory Instrument No 197/2013 (otherwise known as the Sea Fisheries (Technical Measures) Regulations, 2013) , contrary to s.14 of the Sea Fisheries and Maritime Jurisdiction Act, 2006.
6. The particulars of the offence pleaded in the indictment were that the appellant on the 11th of February 2015 was the Master of a UK registered fishing vessel, when the said vessel then carried on board equipment capable of grading by size Herring, Mackerel or Horse Mackerel automatically, and when such equipment was not installed or located on the said fishing vessel in such a way as to ensure immediate freezing or to prevent the return of marine organisms to the sea.
7. The sentence imposed following the appellant’s conviction comprised a fine of €500, forfeiture of catch valued at €344,000 and forfeiture of fishing gear valued at €55,000.

8. The focus of the appeal against the severity of this sentence has been on the forfeiture of catch and gear, rather than on the fine.

9. It was established in evidence at the appellant's trial that offending conduct which led to the appellant's conviction and the imposition of the sentence now under appeal was detected in the following circumstances.

10. The court heard evidence that, as pleaded, the appellant was the Master of the UK registered fishing vessel in question. On the 11th of February 2015 this vessel was intercepted at sea within Ireland's Exclusive Economic Zone ("EEZ") by an Irish Naval Service vessel, the LE Samuel Beckett, which was on patrol in the course of sea fisheries protection duty. A decision was made by the LE Samuel Beckett's captain, that the fishing vessel should be the subject of a random boarding and inspection. The evidence was that this decision was not prompted by any suspicion that the fishing vessel was engaged in illegal activity. Rather, it was decided to do so simply because that vessel had not previously been boarded and inspected while operating in the Irish EEZ. After the fishing vessel had been boarded by Irish Naval Service personnel, it was found that a grading machine was installed on that vessel, and that there was a chute from the said grading machine and the manual sorting area to a sump which discharged into another sump which could in turn be discharged into the sea. Based on the manner in which the equipment was set up, including the fact that it was not installed or located on the said fishing vessel in such a way as to ensure immediate freezing of catch or to prevent the return of catch to the sea, Naval Service personnel suspected that the fishing vessel had been engaging in a prohibited activity known as "high grading" which involves selecting the best fish from the catch and discarding the rest back into the sea.

11. The appellant was cautioned by Naval Service personnel that he was not obliged to say anything unless he wished to do so but that anything he did say would be taken down in writing and might be given in evidence. When questioned about the functioning of the grading machine, the appellant asserted that the vessel was not engaged in "high grading". The appellant was subsequently detained and the fishing vessel was ordered to proceed to Cork Harbour. Once in Cork Harbour, the vessel was delivered into the custody of An Garda Síochána.

12. The appellant was subsequently charged on the direction of the respondent with the offence for which he was tried and convicted; and for which he received the sentence the subject matter of the present appeal. He was permitted to remain at

liberty, albeit on a regime of bail, pending his trial, and indeed throughout his trial. The fishing vessel was released and allowed to depart from Cork upon the posting of a cash bond in the sum of €350,000.

13. Following the appellant's conviction and sentencing by Cork Circuit Criminal Court he appealed against both his conviction and the severity of his sentence to the Court of Appeal. He was unsuccessful in his appeal against conviction and that is the subject matter of a judgment of the Court of Appeal, bearing neutral citation [2018] IECA 317, and delivered on the 11th of October 2018. The appeal against the severity of his sentence then proceeded and the need for the present reference has arisen in the context of the hearing of that appeal.

14. The only evidence presented at the sentencing hearing, which was before the same judge as had presided over the trial, was a summary of the essential facts by a sea fisheries protection officer. These were not disputed. There was no evidence of any previous convictions. The appellant did not give evidence at the sentencing hearing, although he had an entitlement to do so if he wished. No evidence was adduced concerning the appellant's means, or that of the owners of the fishing vessel.

15. The transcript of the sentencing hearing is annexed as Annex No 1.

The legislative background to the central controversy

16. Commercial sea fishing is regulated in Irish domestic law by Part XIII of the Fisheries (Consolidation) Act 1959 ("the Act of 1959"). This enactment of this legislation predated Ireland's accession to the then EEC in 1972. However, following Ireland's said accession when it became subject to the nascent Common Fisheries Policy (CFP), established in 1970 by the original six EEC members, which was initially implemented by Council Regulation 2141/70, and as the CFP became increasingly complex and more sophisticated, the Act of 1959 was incrementally amended to take account of the CFP and an ever-increasing and complex body of European legislation underpinning it.

17. The extension by the EC of its fishing limits from 12 nautical miles to 200 nautical miles in 1976 prompted the enactment of the Fisheries (Amendment) Act 1978 which amended the Act of 1959 to take account of that, and further amendments to the Act of 1959 were effected by Fisheries (Amendment) Acts of 1983, 1994, 1997, 2001 and 2003.

18. However, by 2006 it was recognised that Ireland's sea fisheries legislative framework had become dated and unwieldy, so that a significant overhaul was required. The Sea Fisheries and Maritime Jurisdiction Act 2006 ("the Act of 2006") was enacted partly with this in mind, and it revised substantially Part XIII of the Act of 1959. While the Act of 2006 dealt with more than just sea fisheries the whole of Part 2 of that Act, containing seventy-five individual sections, spread across six chapters, is devoted to sea fisheries.

19. Section 28 of the Act of 2006, which is in Part 2, Chapter 4 (entitled *Matters relating to indictable fishery offences, proceedings, forfeiture*) of the instrument, deals with penalties and forfeiture for certain indictable fishery offences. – see Annex 2. The offences to which the section applies are identified in s.28(1) and it is uncontroversial that the offence of which the appellant was convicted comes within s.28(1)(a) on the basis that it is an offence under a provision of Chapter 2 specified in Table 1.

20. By the time of the enactment of the Act of 2006 the CFP was underpinned by a raft of European legislation, and continues to be the case. Much of it relates, and has always related, to specific aspects of the policy such as the setting of fishery limits, conservation measures and the setting of quotas for different species, the regulation of the modalities of sea fishing, the setting of specifications for vessels and their fishing gear, specifying the records to be kept by fishermen and their reporting obligations, and regulating the storage, transportation, processing and marketing of catch. A specific example directly relevant to an issue in the prosecution giving rise to this appeal is Council Regulation (EC) No 850/1998, Article 32 of which imposes restrictions on the use of automatic grading equipment – See Annex 3. However, at the core of each successive iteration of the CFP is a Council Regulation, known as the "Control Regulation" which provides for a Community control system for ensuring compliance with the rules of the CFP.

21. At the time of the enactment of the Act of 2006 the Control Regulation then in force was Council Regulation (EEC) No 2847/93. Title VIII of that instrument dealt with "Measures to be taken in the case of non-compliance with the rules in force" and was comprised of Articles 31 to 34 inclusive. Of relevance to the dispute the subject matter of this reference was that Article 31 of Regulation No 2847/93 provided, in sub-article 1, 2 and 3 thereof, as follows:

“1 . Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation.

2. The proceedings initiated pursuant to paragraph 1 shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.

3. The sanctions arising from the proceedings mentioned in paragraph 2 may include depending on the gravity of the offence :

- fines,
- seizure of prohibited fishing gear and catches,
- sequestration of the vessel,
- temporary immobilization of the vessel,
- suspension of the licence,
- withdrawal of the licence.”

22. Subsequent to the enactment of the Act of 2006 Council Regulation (EEC) No 2847/93 was repealed and replaced by a new Control Regulation, i.e., Council Regulation (EC) No 1224/2009 of 20 November 2009.

23. Title VIII of Council Regulation (EC) No 1224/2009, which is entitled ENFORCEMENT, is comprised of Articles 89 to 93 inclusive. Article 89 is the provision of relevance to the dispute giving rise to the reference. It bears the subtitle “Measures to ensure compliance” and provides, in sub-articles 1, 2 and 3 thereof, as follows:

“1. Member States shall ensure that appropriate measures are systematically taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons suspected of a breach of any of the rules of the common fisheries policy.

2. The overall level of sanctions and accompanying sanctions shall be calculated, in accordance with the relevant provisions of national law, in such way as to make sure that they effectively deprive those responsible of the economic benefit derived from their infringement without prejudice to the

legitimate right to exercise their profession. Those sanctions shall also be capable of producing results proportionate to the seriousness of such infringements, thereby effectively discouraging further offences of the same kind.

3. Member States may apply a system whereby a fine is proportionate to the turnover of the legal person, or to the financial advantage achieved or envisaged by committing the infringement.”

24. Article 90 provides for sanctions for serious infringements. The respondent has argued that an offence of the type committed by the appellant may be regarded as constituting a serious infringement as defined in the regulation. Our attention was drawn to the fact that Article 90 commences its provisions by highlighting the fact that the contraventions thereafter set out (at subparagraphs a), b) and c)) are to be viewed as “in addition to Article 42 of Regulation (EC) No. 1005/2008”.

25. Article 42 of Regulation (EC) No. 1005/2008 provides, under the heading “Serious infringements”:

“1. For the purposes of this Regulation, a serious infringement means:

a) The activities considered to constitute IUU fishing in accordance with the criteria set out in Article 3;

b) ...;

c)

2. The serious character of the infringement shall be determined by the competent authority of the Member State taking into account the criteria set out in Article 3(2).”

(IUU Fishing means Illegal Unreported and Unregulated Fishing)

26. If one turns to Article 3 of the same Regulation, one finds at paragraph 1(e) that fishing vessels shall be presumed to be engaged in "IUU fishing" if it is shown that, contrary to the conservation and management measures applicable in the fishing area concerned, it has “... *used prohibited or non-compliant fishing gear* ...”

27. We note further that Article 90.2 of Council Regulation (EC) No 1224/2009 provides that a natural person is punished by effective, proportionate and dissuasive administrative sanctions, in accordance with the range of sanctions and measures provided for in Chapter IX of Regulation (EC)No 1005/2008.

28. Further, Article 90.3 provides that the sanction be effectively dissuasive and, as appropriate, calculated on the value of the fisheries products obtained by

committing a serious infringement thereby setting, in the submission of the appellant, a maximum criterion for the sanction, which is required to focus on the value of the catch obtained by virtue of the breach of the control regime (but not the value of the gear).

29. Article 90.5 provides that effective, proportionate and dissuasive criminal sanctions may also be used.

30. Up to the time of the appellant's prosecution, conviction and sentencing, there had been no substantive amendment to the Act of 2006, and no amendment to s. 28 in particular, arising from modifications to the CFP effected by Council Regulation (EC) No 1224/2009.

The central controversy

31. The central controversy creating the need for the reference concerns whether s.28(5)(b) of the Act of 2006, which provides that in the case of an offence such as that of which the appellant has been convicted "*any fish and fishing gear found on the boat to which the offence relates or in any other place where they may be are as a statutory consequence of the conviction, forfeited*" is compatible with Council Regulation (EC) 1224/2009, and in particular Article 89 thereof which provides for the sanctioning of the particular infringement detected in this case.

32. The appellant has made the case before the Court of Appeal that Council Regulation (EC) 1224/2009 does not require the automatic imposition of such a sanction on a fishing vessel, in circumstances where the exercise of jurisdiction by the Irish legislature over a foreign fishing vessel fishing within Ireland's EEZ could only be under the umbrella of the relevant European legislation, in circumstances where the regulation of fishing exploitation is an exclusive competence of the European Union. It was submitted that there are no grounds for the Irish legislature creating disproportionately more onerous penalties for E.U. fishing vessels fishing illegally in the waters of the Irish EEZ compared with those detected of committing similar offences elsewhere in EU regulated waters, and any such provisions which overreach the penalty provisions contemplated by the EU regulation (in circumstances where the regulations are directly effective and do not require implementing legislation) must be ultra vires the requirements of European law. It was submitted that the forfeiture of the catch and gear, as an automatic statutory consequence of conviction on indictment of the relevant offence, is disproportionate having regard to the offending behaviour

in question, the provisions of Council Regulation (EC) 1224/2009 and the control regime under the CFP.

33. Our attention was drawn to Recital 7 to Council Regulation (EC) 1224/2009, which provides:

“This Regulation should affect neither special provisions contained in international agreements or applicable in the framework of regional fisheries management organisations nor any national control provisions which fall within the scope of this Regulation but go beyond its minimum provisions, provided that such national provisions are in conformity with Community law”

34. We were also referred to Recital 9 which places particular emphasis on the introduction of a new, common approach, which ensures a “level playing field” for the fishing sector.

35. Our attention was also drawn to Recital 38 which emphasises the importance of a harmonious approach to sanctions for breach of European Community fisheries laws where it states:

“Since action taken following infringements of those rules differs widely from one Member State to another, thereby causing discrimination and unfair competition rules for fishermen and given that the absence of dissuasive, proportionate and effective sanctions in certain Member States reduces the effectiveness of controls, it is appropriate to introduce administrative sanctions in combination with a point system for serious infringements to provide a real deterrent.”

36. Also, we were referred to Recital 39, and Article 92, in respect of the establishment of a points system for serious infringements.

37. It was submitted that s.28(5) of the Act of 2006 offends the principle of proportionality under the treaties of the European Union and Article 49(3) of the Charter of Fundamental Rights.

38. In support of this argument we were referred to Case 240/78 (“*The Atalanta Case*”) [1979] ECR 2137, particularly paragraphs 15 and 16 of the judgment; Case 203/80 *Casati* [1981] ECR 2595, particularly paragraph 27 of the judgment; Case C-262/99 *Louloudakis* [2001] ECR I – 5547, particularly paragraph 67 of the judgment; the decision of the Court of Justice (First Chamber) in its judgment delivered on 9 February 2012 in case C-210/10 entitled *Márton Urbán v Vám- és Pénzügyőrség*

Észak-alföldi Regionális Parancsnoksága, particularly paragraphs 23 and 24, and 53 to 55 thereof; Case C-188/09 *Profaktor Kulesza, Frankowski, Józwiak, Orłowski* [2010] ECR I-7639, particularly paragraph 29 thereof; and Case C-255/14 *Robert Michal Chmielewski v Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága*, particularly paragraphs 21 to 23 thereof..

39. The appellant contends that the Control Regulation, establishes a specific imperative on the national authorities to, when sanctioning breaches of the Regulation, to do so in a way which produces results which are “*proportionate to the seriousness of such infringements*” and which, while serving to “*effectively deprive those responsible of the economic benefit derived from their infringement*”, do so “*without prejudice to the legitimate right [of such persons] to exercise their profession*”. Hence article 90.2 of the Control Regulation requires that the sanctions “*shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions*”.

40. The appellant complains that there is no provision for a consideration of the particular circumstances of the offending provided for in the mechanism in the Irish legislation for the imposition of the forfeiture of catch and gear. He contends that on the particular facts of this case, a momentary delay in the freezing process of the fish between the grading machine and the freezer might be enough to merit conviction, with no provision for a consideration of the extent to which the particular protected interests the subject matter of the regulation were injured or damaged by the offending behaviour. He maintains there is no provision for adjusting the sanction to the seriousness of the infringement. Further, no provision is afforded to the potential effects on the livelihood of the accused, as a result of the said forfeiture.

41. The appellant says that the failure to provide the sentencing court with the power to adjust the penalty, as regards the financial consequences of the loss of the catch and gear, according to the factual circumstances of the prescribed infringement, also renders the Irish provision incompatible with the Control Regulation and general principles of European law, in circumstances where the Irish State was precluded from maintaining such a provision, given the terms of the said regulation.

42. In reply, the respondent has referred us to several European cases dealing with the principle of proportionality, including Case C-354/95 *The Queen v The Minister for Agriculture, Fisheries and Food, Ex Parte National Farmers Union and Others*,

particularly paragraphs 51 and 55; Case T-180/00 *Antipesca v Commission*, paragraph 78; Case C-94/05 *Emsland-Staerke GmbH v Landwirtschaftskammer Hannover*, particularly paragraph 53; Case No C-188/2011 *Hehenberger v Republic of Austria*; Case C-443/2013 *Reindl v Bezirkshauptmannschaft Innsbruck*, particularly paragraphs 38 to 43 inclusive; Case C-382/09 *Stils Met SIA v Valsts*, paragraph 44; and Case C-255/14 *Robert Michil Chmielewski*, particularly paragraphs 21 to 31 inclusive.

43. The respondent suggests that these judgments make clear that member states in providing a system of penalties under national law for breach of the relevant regulations:

- (i) May do so by providing for criminal sanctions;
- (ii) If a member state chooses to pursue such a method of enforcement, the member state is obliged to use measures which are “*effective, proportionate and dissuasive*”;
- (iii) Measures imposed by way of strict liability are not precluded;
- (iv) Measures must be sufficient to ensure the proper regulation of those participating in the fishing industry;
- (v) In principle such criminal sanctions may be accompanied by the forfeiture of fishing gear and the catch.

44. It was submitted that if a measure of national law is enacted which is disproportionate in the senses of being excessive and contrary to the Charter and the fundamental principles of EU law, there is jurisdiction vested in a national court to disapply that provision. That is a question for the national court. Where there is doubt a preliminary reference can serve to establish whether automatic forfeiture as provided for in s. 28(5)(b) of the Act of 2006 is precluded by the principles of proportionality enshrined in the Charter of Fundamental Rights and the fundamental principles of EU law.

45. While the appellant urges the referring court to find that the position under EU law is *acte claire*, and has submitted that a reference is unnecessary, we do not agree. We regard the law on proportionality to be highly nuanced and in the circumstances harbour considerable uncertainty and doubt as to the correct position under EU law. For these reasons we believe that it is appropriate to avail of the preliminary reference procedure.

46. For completeness, we also wish to state that we were referred by both sides to a number of Irish cases where the sanctioning and penalty provisions in domestic

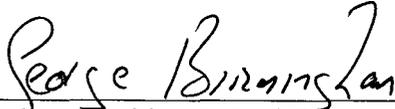
legislation regulating fisheries have been considered, and some cases in which mandatory sentencing provisions other than in the area of sea fisheries have been considered. The cases to which we were referred include *Montemuino v Minister for Communications* [2008] IEHC 157 and [2013] 4 I.R. 120; *Martinez v Ireland* (unreported, High Court, O’Neill J, 27th November 2008); *O’Sullivan v Sea Fisheries Protection Authority and others* [2017] 3 IR 751; and *Ellis v The Minister for Justice and Equality and others* [2019] IESC 30. See Annex 4.

The question referred

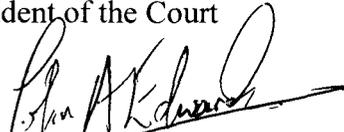
47. “In the context of the implementation of the Common Fisheries Policy and of the provisions of Article 32 of Council Regulation (EC) No 850/1998, and in the context of a criminal prosecution taken to enforce the provisions thereof, is a provision of National law which provides on conviction on indictment, in addition to a fine, for the mandatory forfeiture of all fish and all fishing gear found on board the boat to which the offence relates, compatible with the provisions of Council Regulation (EC) 1224/2009, and specifically Articles 89 and 90 thereof, and the principle of proportionality under the treaties of the European Union and Article 49(3) of the Charter of Fundamental Rights?”

Dated the 21st of January 2020.

Signed by the members of the Court of Appeal:



The Honourable Mr Justice George Birmingham,
President of the Court



The Honourable Mr Justice John Edwards



The Honourable Ms Justice Aileen Donnelly