

**THE HIGH COURT  
JUDICIAL REVIEW**

[2004 No. 1174 J.R.]

**BETWEEN****CLAUDE MICHEL JOSEPH LAVOLE AND CARVIDA LIMITED****APPLICANTS**

**AND  
DISTRICT JUDGE JOHN O'DONNELL,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS****Judgment of O'Neill J. delivered the 3rd day of March, 2005.**

1. In these proceedings the applicant has been given leave to apply for judicial review for the following reliefs:

1. An order of *certiorari* by way of application for judicial review quashing the order of the first named respondent dated the 7th December, 2004, purporting to detain the vessel pursuant to s. 234 of the Fisheries (Consolidation) Act 1959 as inserted by s. 13 of the Fisheries (Amendments) Act 1978 and amended by s. 12 of the Fisheries (Amendment) Act 1994.
2. A declaration by way of application for judicial review that the detention of the vessel pursuant to the order of the first named respondent of the 7th December, 2004, is invalid.
3. An order of *certiorari* by way of application for judicial review quashing the order of the first named respondent dated 5th December, 2004, purporting to detain the vessel pursuant to s. 233 A of the Fisheries (Consolidation) Act 1959 as inserted by s. 12 of the Fisheries (Amendment) Act 1978 .
4. A declaration by way of application for judicial review that the detention of the vessel pursuant to the order of the first named respondent of the 5th December, 2004, was invalid.
5. A declaration by way of application for judicial review that the first named respondent acted *ultra vires* and/or without justification detaining the vessel on the 5th and 7th day of December, 2004, respectively .
6. An injunction restraining the continued detention of the vessel.
7. A declaration by way of application for judicial review that the detention on the vessel on 5th and 7th December, 2004, respectively and the continued detention there afterwards was in breach of the applicant's constitutional rights, namely, his constitutional property rights and his rights to earn a livelihood.
8. If necessary a declaration that any bond furnished hereafter by the applicant for the release of the vessel be released.
9. Further and in the alternative an order directing the release of any bond furnished hereafter to allow the release of the vessel from detention.

2. At the outset of the hearing the applicant indicated that he was not pursuing any relief in respect of the order of the first named respondent made on the 5th December, 2004.

3. The grounds relative to the remaining reliefs sought set out in the statement of grounds are as follows:

3. The first named respondent acted *ultra vires* in detaining the vessel pursuant to s. 234 of the 1959 Act as inserted by the 1978 Act and amended by the 1994 Act following the expiration of 48 hours from the detention of the vessel pursuant to s. 233 A of the 1959 Act as inserted by the 1978 Act.
4. The first named defendant acted *ultra vires* in detaining the vessel until the proceedings had been adjudicated on by a District Judge under s. 4 A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Criminal Justice Act 1990 or s. 13 of the Criminal Procedure Act 1967 or under s. 2 (2) of the 1978 given that:

(a) there was no power under s. 234 of the 1959 Act as inserted by the 1978 Act and amended by the 1994 Act to detain the vessel until the proceedings have been adjudicated by a District Judge under s. 4A of the Criminal Procedure Act 1967,

(b) the applicant had not pleaded guilty and therefore s. 13 of the Criminal Procedure Act was not applicable,

(c) the charges against the applicant were to proceed by way of indictment.

5. Further, or in the alternative, there was an error on the face of the record in providing for the continuation of the detention of the vessel until the matter had been adjudicated upon by a District Judge under s. 4A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Criminal Justice Act 1999, or s. 13 of the Criminal Procedure Act 1967 or under s. 2 (2) of the 1978 Act, or otherwise having regard to the matters stated in paragraphs 4 (a), (b) and (c) above.

6. The first named respondent erred in law in holding that s. 20 (1) of the Interpretation Act 1937 permitted him to construe the reference to s. 8 on the Criminal Procedure Act 1967 as a reference to s. 4A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Criminal Justice Act 1999.

4. The first named applicant is the captain of a fishing vessel known as the "Carvida" which is an Irish registered vessel. The second named applicant is the owner of this vessel.

5. On 3rd December, 2004, the vessel was arrested in Killybegs in respect of alleged logbook offences by James Boyle, a fishing officer. Shortly after midnight Garda Michael McNicholas boarded the vessel and Mr. James Boyle was introduced to the first named

applicant. Garda McNicholas informed the first named applicant that he was detaining the first named applicant and the vessel and its crew at the port of Killybegs pursuant to s. 233 (1) (g) (2) of the Fisheries Consolidation Act 1959 (hereinafter referred to as the 1959 Act).

6. The first named applicant was not brought before the District Court until Sunday 5th December, 2004, because no District Judge was available on Saturday 4th December, because of a judicial conference in Dublin. On 5th December, 2004 the first named applicant was brought before the District Court in Donegal and an application was made for a 48 hour detention pursuant to s. 233A of the 1959 Act as inserted by s. 12 of the Fisheries (Amendment) Act 1978 (hereinafter referred to as the 1978 Act). Notwithstanding the objections by the first named applicant's solicitor the first named respondent made the 48 hour detention order from 11.45 am on 5th December, 2004.

7. At 8.05 am on 7th December, 2004, the first named applicant was arrested by Garda McNicholas and taken to Killybegs Garda Station where he was charged with a number of logbook fishery offences. The first named applicant was then brought before Letterkenny District Court at 11.35 am where Garda McNicholas gave evidence of arrest, charge and caution. The matter appears to have been allowed stand in the District Court List until 4.25 pm that afternoon. In the meantime the solicitor for the applicant and the solicitor acting for the State were in contact with the office of the third named respondent for the purpose of getting a bond agreed and in relation to other matters. The bond in question was successfully agreed in the sum of €165,000. The parties went back into court at 4.25 pm when the solicitor for the applicant made submissions as to why a detention order under s. 234 of the 1959 Act should not be made.

8. The submissions were in due course rejected by the first named respondent and an order was made detaining the vessel and its master, the first named applicant at the port of Killybegs by Garda McNicholas until the proceedings had been adjudicated on by a District Court Judge under s. 4A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Criminal Justice Act 1999 (hereinafter referred to as the Act of 1999). A bond of €65,000 was set in respect of the release of the vessel and the first named applicant was remanded on bail.

9. The matter was mentioned on a number of subsequent occasions in the District Court namely, 14th December, 15th December, and 17th December, 2004, so that concern over another case could be clarified.

10. On 21st December, 2004, the applicant applied to this court for leave to apply for Judicial Review and orders of certiorari and declarations as set out above.

#### **Relevant Statutory Provisions**

11. Section 233A of the Act of 1959 as inserted by s. 12 of the Act of 1978 as amended by s. 11 of the Fisheries (Amendment) Act 1994 reads as follows:

*"(1) Where a sea fisheries protection officer has, in the exercise of the powers conferred on him by section 233, detained a boat and the persons on board the boat at a port, any sea fisheries protection officer who suspects that a person on board the boat has committed an offence under a provision of Chapter II or III of this Part shall (unless he is proceeding under section 234), as soon as may be, apply to a judge of the District Court for an order authorising the continued detention of the boat and those persons, and the said judge may grant an order authorising such detention for a period of 48 hours if he is satisfied that the applicant sea fisheries protection officer has such a suspicion as aforementioned.*

*(2) Upon the expiration of the period of 48 hours-*

*(a) the boat shall be released unless an order providing for its further detention has been made under section 234 before the expiration of the said period of 48 hours, and*

*(b) each person on board the boat shall be released unless an order providing for his further detention has been made under the said section before the expiration of the said period."*

12. Section 234 of the Act of 1959 as inserted by s. 13 of the Act of 1978 and amended by s. 12 of the Fisheries (Amendment) Act 1994 reads as follows:

*"(1) Where a sea fisheries protection officer has in exercise of the powers conferred on him by section 233 detained a boat and the persons on board the boat at a port, any sea fisheries protection officer shall, as soon as may be, bring the master of the boat and any other persons on board the boat against whom proceedings for an offence under a provision of Chapter II or III of this Part have been, or are about to be instituted before a judge of the District Court and thereupon the said judge shall, if he is satisfied that such proceedings have been or are about to be instituted against the master and those other persons or any one or more of them, by order directed to a sea fisheries protection officer require such officer to detain at a specified port in the State the boat and each person (including the master) aforesaid in respect of whom he is so satisfied until such proceedings have been adjudicated upon by a judge of the District Court under section 8 of the Criminal Procedure Act, 1967, or under section 2 (2) of the Fisheries (Amendment) Act, 1978, or otherwise in the exercise of his summary jurisdiction."*

13. Section 8 of the Criminal Procedure Act 1967, before amendment read as follows:

*"(1) If the justice is of opinion that there is a sufficient case to put the accused on trial for the offence with which he has been charged, he shall send him forward for trial.*

*(2) If the justice is of opinion that there is a sufficient case to put the accused on trial for some indictable offence other than that charged, he shall cause him to be charged with that offence, proceed in accordance with section 7 (4), which shall have effect with the omission of the words "if he is sent forward for trial" in paragraph (a), and, unless section 13 applies, send him forward for trial.*

*(3) Subsections (1) and (2) are subject to the provisions of section 2 of the Criminal Justice Act, 1951, which relates to minor offences.*

*(4) If the justice is of opinion that a summary offence only is disclosed, and the Attorney General consents, he shall*

cause the accused to be charged with the summary offence and deal with the case accordingly.

(5) If none of the foregoing provisions applies, the justice shall order the accused to be discharged as to the offence under examination.

(6) An order of a justice sending an accused person forward for trial shall be in writing signed by the justice."

14. Section 10 (2) of the Criminal Justice Act 1999 provides as follows:

"(2) Sections 5 to 12 of the Act of 1967 are hereby repealed."

15. Section 9 of the Criminal Justice Act 1999 amends the Criminal Procedure Act of 1967 by the insertion after s. 4 of the following *inter alia*:

"4A(1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless-

(a) the case is being tried summarily,

(b) the case is being dealt with under section 13, or

(c) the accused is unfit to plead.

(2) The accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor.

(3) Where the prosecutor refuses to give a consent required under subsection (2) in relation to an indictable offence, the District Court shall strike out the proceedings against the accused in relation to that offence.

(4) The striking out of proceedings under subsection (3) shall not prejudice the institution of proceedings against the accused by the prosecutor.

(5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused."

16. Section 20 (1) of the Interpretation Act 1937 reads as follows:

"20.-(1) Whenever any statute or portion of a statute is repealed and re-enacted, with or without modification, by an Act of the Oireachtas, references in any other statute or in any statutory instrument to the statute or portion of a statute so repealed and re-enacted shall, unless the contrary intention appears, be construed as references to the portion of such Act of the Oireachtas containing such re-enactment."

17. For the applicant it was submitted by Mr. O'hOisín as follows:

1. There was no power to detain the vessel under s. 233A beyond 48 hours, the vessel was not released upon the expiry of the 48 hour period at 11.45 on the morning of 7th December, 2004. The detention order under s. 234 was not made until some four hours later. Section 233A requires that a vessel be released unless it is detained under s. 234 before the expiration of 48 hours, hence the detention order made under s. 234 was thereby invalid, there being no power to detain the vessel after 11.45 am on the 7th December, 2004.

2. Section 234 of the 1959 Act provides for a detention until the proceedings are being adjudicated by a judge of the District Court under s. 8 of the Criminal Procedure Act 1967. Section 8 of the 1967 Act was repealed by s. 10 (2) of the Criminal Justice Act 1999. Section 234 of the 1959 Act has not been amended since to take into account the repeal of s. 8 of the 1967 Act. There is no reference in s. 234 to s. 4A of the 1967 Act as inserted by s. 9 of the Criminal Justice Act, 1999.

3. Reliance cannot be placed by the State on s. 20 (3) of the Interpretation Act 1937 as permitting the construction of s. 8 of the 1967 Act as referring to s. 4A of the same Act, because s. 8 of the 1967 Act was not repealed and re-enacted. The amending provisions in s. 4 of the 1967 Act as inserted by s. 9 of the Criminal Justice Act 1999 bring about a sea change in criminal procedure in the District Court. It abolished the preliminary examination and with it the role of the District Court Judge in deciding whether there was a *prima facie* case against the accused before sending forward to trial. Section 4A is not a re-enactment of s. 8. It is a completely new mechanism tied into the obligation of the District Judge to send the accused forward for trial. The nature of the change in the procedure could not be described as a "modification". It is too fundamental a change to be considered a "modification". Hence it was submitted that where a person was being dealt with under s. 234 of the 1959 Act, a judge of the District Court would have had no jurisdiction to send that person forward for trial under s. 4A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Justice Act 1999 and consequently no lawful purpose could be served by a detention order under s. 234 and hence the detention order made under s. 234 was invalid and *ultra vires* the powers of the first named respondent.

18. For the respondents it was submitted by Mr. McDonough S.C. as follows:

1. Section 234 operates independently of s. 233 or 233A. Thus an order under s. 233A is not a necessary prerequisite of the valid making of a detention order under s. 234.

2. The proceedings commenced before the District Court at 11.35 am in the morning of the 7th December, 2004, with the evidence been given of the arrest, charge and caution of the first named applicant. The matter was therefore commenced at that sitting of the District Court on that day and the detention order was made during that sitting, later in the day at 4.25 pm. The reason for the delay in between was to enable the applicants to negotiate a bond which was successfully accomplished even though not subsequently taken up, and the applicant cannot now complain or take advantage of the fact that the time went beyond the 48 hours before the actual making of the detention order in s. 234.

3. Once the matter had commenced before the District Court within the 48 hours it could not be said that the time period could be defeated simply because the court proceeding necessarily took it beyond the 48 hour time limit. If this were to be the case it would be open to any applicant to filibuster the proceeding so as to defeat the time limit. Similarly it could not be said that an applicant could have his case cut short and hence denied natural justice so as to bring the proceeding to a conclusion within the 48 hour period. In any event the applicant acquiesced in the passage of time during the day.

4. The purpose of the 1999 Act was to repeal s. 8 of the 1967 Act and to replace it with s. 4A which is in similar terms save that it now takes account of the fact that there is no preliminary examination takes place in the District Court. The change in the substantive law is minimal in that under the new provision a judge does not have to have formed the opinion that there is sufficient or *prima facie* case to answer but rather must send the accused forward following service of the book of evidence unless certain specified conditions exist. The change is not in what the judge does but rather the conditions under which he or she does it. In that sense s. 4A is clearly a modified re-enactment of s. 8. In support of this submission reliance is placed on the case of the *Southern Health Board v. C.H.* [1996] 1 I.R. 219, and the case of *Michaels v. Harley House* [1997] 1 W.L.R. 967.

## Decision

19. In logical sequence the first question to be confronted is the effect on the validity of the order under s. 234 of the making of that order after the expiry of the 48 hour detention order made under s. 233A at 11.45 am on 7th December, 2004.

20. In my view s. 233A and s. 234 are independent of each other and do different things. For the purposes of the application of s. 233A what is required, is that a Sea Fisheries Protection Officer as a suspicion that a person on board a boat has committed an offence under the provisions of chapters II or III and as soon as may be thereafter applies to a judge of the District Court for an order authorising the continued detention of the boat and those persons, the original detention having been made under s. 233. Section 234 requires in a very different way, that where a Sea Fisheries Protection Officer has detained a boat under s. 233, any sea fisheries protection officer must bring the master of the boat and any other persons on board against whom proceedings for an offence under a provision of chapter II or III have been or are about to be instituted before a judge of the District Court and if the District Judge is satisfied that such proceedings have been or are about to be instituted, he can by order directed to the Sea Fisheries Protection Officer require that officer to detain the boat.

21. An obvious difference between these two sections are that s. 233A does not require anybody to be brought before the Court. This is a crucial difference.

22. If for example an order was made under s. 233A and if within the 48 hour period it was not possible to bring the master of the vessel or any other person concerned before a court perhaps because they had absconded, but, if, at a later time, beyond the expiry of the 48 hour period the master and other persons concerned were apprehended, charged with relevant offences and then brought before the District Court, it could not in my view be seriously suggested that the power to detain the vessel under s. 234 was defunct. It may very well be that in the meantime, after the expiry of the order under s. 232 A, the status of the vessel was as provided for in s. 233A, that of released from detention, but the fact that the vessel became released from detention after the expiry of 48 hours could not in my view prohibit a subsequent detention order under s. 234 being made, assuming the requirements of s. 234 were satisfied. It would of course be the case that after the expiry of the 48 hour detention the vessel would no longer be in lawful detention and could be removed, but if it was wasn't, I see no reason why an order under s. 234 couldn't be executed against the vessel.

23. In this case the detention order under s. 234 was made some four hours after the expiry of the 48 hour detention under s. 233A. In my view for the reasons set out above I do not think that that gap affected the legality of the section 234 order made at 4.25 pm in the afternoon on 7th December 2004. Undoubtedly during that four hour gap the vessel, by virtue of s. 233A, enjoyed the status of being released from detention and could lawfully have been removed by the applicants.

24. In reaching that conclusion I have formed the opinion that notwithstanding the commencement of the criminal proceeding by the giving of evidence of arrest, charge and caution before the expiry of the 48 hour period, and having regard to the reasons why the matter was not concluded then, but later in the day, that nonetheless it was not within the power of the District Judge or indeed of anyone either expressly or by implication from their conduct to extend what is a statutory time period. In my view having regard to the nature of the time limit involved, it is simply not possible having regard to its statutory nature to construe the statutory provision in question in the light of the circumstances that prevailed on 7th December, regardless of how compelling they may be, so as to permit what would in effect be an extension of that time limit.

25. I appreciate that that conclusion may very well expose a lacuna in this statutory scheme but if that be so it is for the Oireachtas to remedy the matter by amending legislation.

26. In any event having regard to the conclusions reached above concerning the independence of s. 234 from s. 233A, for the purpose of the legality of the order made under s. 234, the expiry of the 48 hour period at 11.45 on the morning of the 7th December does not matter.

27. This brings me then to the final question which arises from the submission of the applicant that there was no power to make a detention order under s. 234 because the District Court lacked jurisdiction to send the first named applicant forward for trial under the provisions of s. 4A as inserted by s. 9 of the Criminal Justice Act 1999 into the Criminal Procedure Act of 1967.

28. There is no doubt that s. 4 as inserted by the Criminal Justice Act 1999 into the Criminal Procedure Act of 1967 does bring about a very significant change, in that it eliminates the preliminary examination which heretofore took place under ss. 5, 6 and 7 of the Criminal Procedure Act 1967. However the sending forward for trial is an essential and unavoidable step in every criminal proceeding on indictment. The system for the administration of justice as we have known it for many years would not function without that essential step. What is changed now is that the District Judge does not have to form the opinion that there is a sufficient case to put the accused on trial. He or she must still however send the accused forward for trial to the appropriate court.

29. In my view the statutory provision governing that step as contained s. 8 of the 1967 Act and as contained in s. 4A as inserted by the Criminal Justice Act 1999 is essentially the same save that the District Judge does not know how to form the opinion that there is a sufficient case to put the accused on trial.

30. Such other changes as are provided for in sub-ss. 4 (2), (3), (4) and (5) may fairly be characterised as modifications and are not fundamental to the essential step of the sending forward for trial which is the core provision of s. 4A, as it was of the repealed s. 8.

31. That being so in my view s. 20(1) of the Interpretation Act 1937 does have application and hence the reference in s. 234 to s. 8 of the Criminal Procedure Act 1967 is properly to be construed as a reference to s. 4A of the Criminal Procedure Act 1967 as inserted by s. 9 of the Criminal Justice Act 1999.

**Conclusion**

32. I am of opinion therefore that the order made by the first named respondent detaining the vessel under the provisions of s. 234 of the Act of 1959 was a valid and lawful order.

33. Accordingly I must refuse this application for judicial review.