

**THE HIGH COURT****JUDICIAL REVIEW****2006 No. 936 J.R.****BETWEEN****JUAN M. MONTEMUINO****APPLICANT****AND****MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****Judgment delivered by Mr. Justice Feeney on the 30th day of May, 2008.****Factual background**

1.1 The applicant in this case is a Spanish national and fisherman and was acting as the master of an Irish sea fishing boat the M.V. Ocean Enterprise in December 2005. At that time the M.V. Ocean Enterprise was registered in the port of Tralee and was owned by Mr. Patrick Browne who had leased the boat to Mr. Brendan Rogers.

1.2 On the 8th December, 2005 the M.V. Ocean Enterprise was boarded by sea fishery protection officers as part of a routine inspection of fishing vessels. Arising out of the inspection the sea fishery officers formed the view that there had been a breach of the Fisheries (Consolidation) Act, 1959 as amended and the M.V. Ocean Enterprise was detained by court order for a period of 48 hours. A further order detaining the vessel was made on the 10th December, 2005 under the provisions of s. 234 (1) of the Fisheries Acts. On the same day a bank draft in the sum €88,000 was produced by Mr. Brendan Rogers, the lessee of the said vessel by way of security. The said sum by way of security was for any anticipated fine and expenses and also covered the estimated value of the entire catch. Upon the payment of the said draft the vessel was released from detention.

1.3 Initially the applicant, as master of the said vessel, was charged with two offences namely catching a fish species known as Fork Beard without a licence when a deep sea licence was required and secondly, failing to record the catch of Fork Beard in the official logbook. Ultimately criminal proceedings were brought only in respect of the second charge. On the 10th December, 2005 the applicant was arrested and charged with the offence, namely "that on the 8th December, 2005 within the exclusive fishery limits of the State when M. Montemuino being the master of the Irish registered sea fishing boat Ocean Enterprise Reg. No. T115 did fish in contravention of article 6 of the Council Regulation (EEC) No. 2847/93 as amended, and article 1 (a) of Commission Regulation 2807/83, as amended, by failing to fill in the logbook of the operations of the said sea fishing boat (in that you did fail to record the true quantity of Fork Beard caught and retained on board) in contravention of Regulation 4 of the Sea Fisheries (Control of Catches) Regulations 2003 (S.I. No. 345 of 2003) contrary to s. 224 B of the Fisheries (Consolidation) Act, 1959 as inserted by s. 5 of the Fisheries (Amendment) Act, 1983 and s. 232 of the Fisheries (Consolidation) Act, 1959".

1.4 On the 22nd February, 2006 the applicant was formally charged in respect of the offence outlined in the previous paragraph and the said charge was laid pursuant to s. 4 B (1) (a) of the Criminal Procedure Act, 1967. On the 3rd May, 2006 the applicant was sent forward for trial from the District Court to Tralee Circuit Criminal Court. Thereafter the applicant commenced these judicial review proceedings and the applicant's trial on indictment has been adjourned from time to time pending the determination of these proceedings.

1.5 There is no dispute in relation to the central facts giving rise to these proceedings. The applicant is facing one criminal charge on indictment under the provisions of the Fisheries (Consolidation) Act, 1959 as amended. That charge concerns the failure to record in the logbook of the operations of the M.V. Ocean Enterprise a quantity of a fish known as "the Greater Fork Beard", caught and retained on board. That species of fish is a non quota species but pursuant to the relevant regulations and in the particular Commission Regulation (EEC) No. 2807/83 there was an obligation in respect of any quantity of such species caught and kept on board in excess of fifty kilograms live weight to be recorded and entered in the vessels logbook. The logbook of the vessel did not contain any entry in respect of the Fork Beard which, was in fact on board the vessel on the 8th December, 2005. It is common case that the total value of the catch on board the vessel on that date was €31,057 and that the greater Fork Beard portion of that total catch had a value of some €600. Indeed it is stated in the affidavit to ground this application, sworn by Dermot Conway, at paragraph 9 as follows:-

"I say that my instructions from the applicant are that he accepts the facts as alleged against him in the book of evidence, and would in the normal course of events intend to plead guilty to the charge against him."

1.6 On the 8th day December, 2005 there was no fishing gear on the M.V. Ocean Enterprise. The applicant has been charged, on indictment, with one offence contrary to s. 224 B of the Fisheries (Consolidation) Act, 1959 as inserted by s. 5 of the Fisheries (Amendment) Act, 1983 and s. 232 of the Fisheries (Consolidation) Act, 1959. If convicted on indictment under that section the applicant herein is liable pursuant s. 224 B (3) of the Fisheries (Amendment) Act, 1983 to a fine not exceeding £100,000 (€126,973.80) and as a statutory consequence of such conviction to forfeiture of all or any fish and/or fishing gear found on the boat to which the offence relates.

1.7 The agreed facts are that the value of the greater Fork Beard caught and maintained on board the said vessel had an approximately value of €600 and that the value of the entire catch of fish on board amounted to €31,057. The criminal charge with which the applicant has been prosecuted may only be prosecuted on indictment and carries with it, in the event of a conviction, as a statutory consequence the mandatory forfeiture of all fish found on board the vessel. The issue of the forfeiture of the fishing gear does not arise as no fishing gear was present.

**The Legislation**

2.1 The Treaty of Rome provides that the European Communities' activities include a common policy in respect of fisheries. This has resulted in measures being adopted relating to the conservation of the resources of the sea which belong to the Community. The Community institutions exercise exclusive powers over the community fisheries policy. The Community has established a control system applicable to the common fisheries policy and as part of that control introduced a regulation binding in its entirety directly and applicable to all Member States by Council Regulation (EEC) No. 2847/93. The recitals in that Regulation identify that the success of the common fisheries policy "involves implementing an effective system of control covering all aspects of the policy". The recitals to the regulation further state "whereas, to ensure that all catches and landings are kept under surveillance, Member States must

monitor in all maritime waters the activities of Community vessels and all related activities allowing verification of the implementation of the rules concerning the common fishery policy". The Council Regulation further states in the recitals, as follows: "Whereas the management of fisheries by the fixing of TACs (Total Allowable Catches) requires detailed knowledge of the composition of catches, such knowledge being equally necessary for the other procedures provided for Regulation (EEC) No. 3760/92; whereas this requires the keeping of a logbook by each master of a fishing vessel". The recitals also state "Whereas, in order to ensure the conservation and management of all the resources used, the provisions relating to the logbook, the landings and sales declaration and the information concerning transshipments and registration of catches may be extended to stocks which are not subject to a TAC or quota". The recitals further state "Whereas the action taken following infringements may differ from one Member State to another; causing fishermen to feel unfairly treated; whereas the absence of dissuasive sanctions in certain Member States reduced the effectiveness of controls and whereas in the light of these observations, Member States should take all the necessary non-discriminatory measures to guard against and prosecute irregularities particularly by establishing a roster of sanctions which effectively deprive the wrongdoers of the commercial gain resulting from the infringements". The recitals also state "Whereas this regulation should not affect the national provisions on monitoring, which, while coming within its scope, go beyond its minimum provisions, provided however that such national provisions are in conformity with community law."

2.2 Pursuant to article 1 of Council Regulation 2847/93 and in order to ensure compliance with the rules of the common fisheries policy a Community system was established including in particular provisions for the technical monitoring of:- conservation and resource management measures; structural measures and a measure concerning the common organisation of the market. Article 6 of the regulation requires the keeping of a logbook by the masters of Community fishing vessels and Article 6.2 deals with the species of fish which require to be entered in the logbook. It is common case that the greater Fork Beard, although not a quota species, is a species of fish required to be entered in the logbook of vessels.

2.3 This judicial review is concerned with the nature and extent of the measures provided for, within this State. In particular it concerns a case of alleged non compliance of the recording and monitoring of catches in the logbook of operations.

Article 31 of the Regulation deals with the measures to be taken in the case of non compliance with the rules in force.

Article 31 states:-

- "1. Member States shall ensure that the appropriate measures be taken, including 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,
  - Seizures of prohibited fishing gear and catches,
  - Sequestration of the vessel,
  - Temporary immobilisation of the vessel,
  - Suspension of the licence,
  - Withdrawal of the licence."

2.4 The common fisheries policy as adopted by Regulation No. 2847/73 was implemented into national law. Section 224 B of the Fisheries (Consolidation) Act, 1959 as amended gives a specific power to the first named respondent, without prejudice to the generality of s. 3 (1) of the European Communities Act, 1972 to make regulations to give effect within the exclusive fishery limits of the State to any provision either of the treaties or any act adopted by an institutions of the European Communities to restrict, or, regulate, fishing in the waters of the Community. Regulation 2847/93 left to the individual Member States the measures to be taken in the case of non-compliance with the rules in force. Ireland complied with its obligations under the Regulation by the introduction of a statute providing for criminal proceedings. This was done by enacting the Fisheries (Amendment) Act, in 1983 which amended the Fisheries (Consolidation) Act, of 1959.

2.5 Section 224 B of the Fisheries (Consolidation) Act, 1959, as inserted by s. 10 of the Fisheries (Amendment) Act 1978, as amended by s. 5 of the Fisheries (Amendment) Acts 1983 gave power to the Minister to make regulations to give effect to community law within the exclusive fisheries limits of the State. Section 224 B provides as follows:

- "(1) Without prejudice to the generality to s. 3 (1) of the Act of 1972, the Minister may by regulations make provision to give effect within the exclusive fishery limits of the State to any provision either of the Treaties or any Act adopted by an institution of the European Communities which authorises any or all of the Member States of European Communities to restrict, or otherwise regulate in a manner specified in the provision, fishing in waters, or in part of waters, under its or their sovereignty or jurisdiction.
- (2) Regulations under this section may include such incidental, supplementary and consequential provisions as appear to the Minister to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).
- (3) A person who fishes or attempts to fish in contravention of regulations under this section shall be guilty of an offence and shall be liable on conviction on indictment to a fine not exceeding £100,000, and as a statutory consequence of the conviction, to forfeiture of all or any of the following found on the boat to which the offence relates (a) any fish, (b) any fishing gear.ö

2.6 Regulations were made pursuant to s. 224 B of the Fisheries (Consolidation) Act, 1959 in 2003. Those Regulations were the Sea Fisheries (Control of Catches) Regulations 2003 (S.I. No. 345 of 2003). It is an alleged breach of Regulation 4 of the 2003 Regulations which forms the subject matter of the criminal charge against the applicant herein. Section 224 B provides exclusively for prosecution by way of indictment. At the time of the commission of the alleged offence herein a prosecution could only be brought on indictment as there was no summary offence provided for in Irish law.

2.7 The nature and the extent of the power given to the Minister, under s. 224 B was considered by the Supreme Court in *Browne v. Ireland* [2003] 3 I.R. 205. Denham J. in her judgment (at p. 240) stated in relation to s. 224 B:

"This is a specific power given to the second named respondent (the Minister), expressly stated to be without prejudice to the generality of s. 3(1) of the Act, of 1972, to make regulations and to give effect within the exclusive fishery limits of the State to any provision of either the Treaties or any Act adopted by an institution of the European Communities to restrict or regulate fishing in the waters of the community. Section 224 B(2) mirrors s. 3(2) of the Act, 1972. Provision is made in subs. 3 expressly for an indictable crime. Thus, here the legislature expressly created machinery and gave power to the second named respondent (the Minister) to implement community law by regulation and to create an indictable offence."

2.8 It is that indictable offence and the penalties and statutory consequences arising on conviction, as provided for in s. 224 B, which are central to the challenge advanced by the applicant in these proceedings.

### **Judicial Review Application**

3.1 The applicant has been granted leave to seek judicial review seeking a number of orders, namely:-

- (1) A declaration that the Sea Fisheries (Control of Catches) Regulations 2003 (S.I. No. 345 of 2003) is invalid having regard to the provisions of the Constitution of Ireland;
- (2) If necessary, a declaration that s. 224 B(3) of the Fisheries (Consolidation) Act, 1959, as inserted by s. 5 of the Fisheries (Amendment) Act, 1983 is invalid having regard to the provisions of the Constitution of Ireland;
- (3) If necessary, a declaration that the Sea Fisheries (Control of Catches) Regulations 2003 (S.I. No. 343 of 2003) fails to respect the rights of the applicant in E.C. law and is null and void;
- (4) If necessary, a declaration that s. 224 B(3) of the Fisheries (Consolidation) Act, 1959, as inserted by s. 5 of the Fisheries (Amendment) Act, 1983 fails to respect the rights of the applicant in E.C. law and is null and void.

In the event of the applicant succeeding in his judicial review application and in obtaining any of the above declarations, then the applicant also seeks an order of prohibition prohibiting the third named respondent, the Attorney General, from taking any further steps in the criminal proceedings against the applicant currently before Tralee Circuit Criminal Court.

3.2 The applicant identifies that the mandatory statutory consequence of conviction of the offence for which he has been returned for trial before Tralee Circuit Court would be the forfeiture of all fish found on his boat on the 8th December, 2005, and it is claimed that such consequence would be wholly disproportionate to the offence alleged against him. The applicant's solicitor, Dermot Conway, avers in paragraph 9 and 10 of the grounding affidavit sworn on the 28th July, 2006, as follows, namely:-

"I say that in the applicant's situation, if he does so plead guilty and is convicted, this has the result, that notwithstanding the fact that the offence alleged against him relates to only €600.00 out of a total catch of €31,057.00, the entirety of the €31,057.00 will be forfeited. Whilst the trial Judge will have a discretion as to the amount of the fine to be imposed, and can take into account the percentage of the fish involved when determining the appropriate fine, the trial Judge has no discretion as to the forfeiture. Such a forfeiture is a statutory consequence of conviction, and such an order is made by the trial Judge at the sentence hearing. ....I say that it is clear that the said forfeiture is wholly and exceptionally disproportionate to the offence alleged against the applicant."

The applicant contends that the mandatory statutory consequence of the forfeiture of the entire catch provided for by statute fails to respect the principle of proportionality under Article 40.1 of the Constitution and that also the applicant's right to a trial in due course of law, pursuant to Article 38 of the Constitution is breached as a result of the alleged disproportional nature of s. 224 B of the 1959 Act, in that such Section mandates a trial on indictment. The applicant further contends that the mandatory statutory consequence of the forfeiture of the entire catch which follows upon a conviction offends against the principle of proportionality in EC law.

3.3 The applicant further claims, in the amended statement required to ground the application for judicial review, that there is discrimination between producers on the grounds of nationality contrary to Article 12 (ex-Article 6) of the EC Treaty. The applicant further claims that part XII of the Fisheries (Consolidation) Act, 1959 as amended, in providing solely for the trial of certain offences on indictment, breaches Article 12 (ex-Article 6) of the EC Treaty in that it permits of discrimination on grounds of nationality. Neither of these two grounds in relation to Article 12 were expanded upon in argument before this Court.

3.4 The central claim put forward on behalf of the applicant is that the principle of proportionality provided for both within Irish Constitutional law and by the relevant principles of EC law has been breached in that the sanction which the Circuit Court would be obliged to impose would be wholly disproportionate to the gravity of the infringement. The applicant claims that in applying a uniform national system of criminal enforcement, which does not distinguish between consequences proportionate to the seriousness of the alleged infringement, that there has been a breach of the applicant's constitutional rights and further that the mandatory statutory consequences of forfeiture which would follow upon conviction offends against the principle of proportionality as provided for in community law.

### **Respondents' preliminary submission that forfeiture is not a penalty and that forfeiture is a sanction *in rem*:-**

4.1 The respondents assert that the mandatory statutory provisions providing for the forfeiture of an entire catch is not a penalty but rather a consequential order in the nature of a "secondary punishment". The respondents claim that the forfeiture of the entire catch is a consequential order which flows from conviction and that the primary punishment and penalty is the fine to be imposed, the level of which is at the discretion of the Judge.

4.2 In making this argument the applicant relies upon the case of *Conroy v. the Attorney General* [1965] I.R. 411 which dealt with the provisions of s. 49 of the Road Traffic Act, 1961. That Section provided that where a person was convicted of a specified offence

that the Court shall make an order declaring him to be disqualified for holding a driving licence. The Supreme Court in considering whether the offence in question in that case was minor refused to take into account the mandatory disqualification which followed upon a conviction of an offence under s. 49 of the Road Traffic Act, 1961. In giving the judgment of the Supreme Court, Walsh J. stated (at p. 441) as follows:-

"In the opinion of this Court, so far as punishment is concerned, the punishment which must be examined for the purpose of gauging the seriousness of an offence is what may be referred to as "primary punishment." That is the type of punishment which is regarded as punishment in the ordinary sense and, where crime is concerned, is either the loss of liberty or the intentional penal deprivation of property whether by means of fine or other direct method of deprivation....

In so far as it (disqualification) may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character."

4.3 In a later decision in the High Court, Murphy J. relied upon the *Conroy* case when considering the issue of the forfeiture of gaming equipment consequent upon a conviction for an offence under the Gaming and Lotteries Act, 1956 (2). That case was *Cartmill v. Ireland* [1987] I.R. 192 and Murphy J. stated (at p. 199):-

"In my view the reasoning of the Supreme Court in the *Conroy* Case [1965] I.R. 411 is similarly applicable here.

In fact it seems to me in the present case that there are even more compelling grounds for distancing the primary punishment which may be imposed by a District Justice from the unpleasant consequences which would undoubtedly flow from the exercise of the discretion conferred upon him to forfeit the equipment of the accused. It was clearly recognised in the *Conroy* Case [1965] I.R. 411 that there may be good executive and administrative reasons for depriving a citizen of the right to use equipment or exercise functions which are themselves valid and proper because the citizen has displayed an incapacity or unwillingness to use the equipment or discharge the functions in a proper manner. How much more should there be an administrative or executive power to deprive a citizen of equipment, in the present case gaming instruments, which are inherently designed for the commission of a criminal offence?"

4.4 The applicant relies upon the decision of McWilliam J. in *Kostan v. Ireland* [1978] I.L.R.M. 12 where the Court held that the forfeiture of fishing gear under the 1959 Fisheries (Consolidation) Act, was "intended to be a penalty". McWilliam J. stated (at p. 14):-

"Nor can I see that there is any analogy between disqualification from holding a driving licence or from holding office and the forfeiture of fish and gear on conviction for illegal fishing. The only issue appears to me to be whether the forfeiture is a primary or direct punishment or a more remote consequence of the conviction, and I would refer to the observations of Walsh J. at part 442 of *Conroy's* case, mentioned above. The forfeiture required under this section appears to me to be and to be intended to be a penalty and it also appears to me to be a direct consequence of a conviction under the section."

4.5 This Court is satisfied that the approach identified by McWilliam J. in *Kostan* that the forfeiture of fish and gear on conviction under the Fisheries (Consolidation) Act, 1959, is and is intended to be a penalty is the correct approach. Such forfeiture is a direct consequence of a conviction under the Act. The forfeiture of fishing gear provided for under the Fisheries (Consolidation) Act, 1959, cannot be equated with the mandatory disqualification from holding a driving licence. As pointed out by Walsh J. in the *Conroy* case, such mandatory disqualification was neither a loss of liberty or the intentional penal deprivation of property. It was in those circumstances that it was held that in so far as the disqualification might be classed as a punishment that it was not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character.

In the *Cartmill* case Murphy J. applied the approach identified by the Supreme Court in the *Conroy* case on the basis that the forfeiture of the gaming equipment and the statutory provision therefore must be viewed in the circumstances of an administrative or executive power to deprive a citizen of equipment of gaming instruments which are inherently designed for the commission of a criminal offence.

This Court is in agreement with the approach identified by McWilliam J. in the *Kostan* case to the effect that there is no analogy between disqualification from holding a driving licence or from holding office and the forfeiture of fish and gear on conviction for illegal fishing. This Court is also satisfied that there is no analogy between forfeiture of gaming instruments used for the commission of a criminal offence and the forfeiture of fish and gear under the Fisheries (Consolidation) Act, 1959. The Court is satisfied that the forfeiture in issue in this case is a primary or direct punishment and the intentional deprivation of property. The Court is satisfied that the forfeiture required on conviction under the relevant section appears to be and to be intended to be a penalty and a direct consequence of a conviction under the section. The Court is therefore satisfied that the forfeiture in issue in this case is a penalty.

4.6 The respondents further contend, as a preliminary submission, that the basis upon which the application for relief is brought by the applicant is fundamentally misconceived in that the forfeiture in issue is a sanction *in rem*. The respondents claim that the applicant is the person who is liable to be convicted for the offence in question but that he is not the person who will suffer the consequential loss of the catch. It is claimed that such loss will be suffered by the lessor of the vessel, being the person by whom the applicant is employed as master of the vessel in question. This Court is satisfied that the factual basis necessary to make out such an argument has not been established. It has not been shown, for the purpose of this application, that the applicant has no interest in the catch or its value, nor has it been shown that the applicant would suffer no loss if there was to be a mandatory forfeiture of the fish. The respondents contended that the sanction challenged in these proceedings, the mandatory forfeiture of the fish found on the M.V. Enterprise, is a sanction *in rem* and that it is a sanction which attaches to property and not necessarily to the individual found in possession thereof. The use of the words 'not necessarily' by the respondents confirms this Court in its view that it has not been established, for the purposes of this application, that the applicant would not suffer a penalty as a direct consequence of a forfeiture of the fish if convicted. The respondents have not established, to this Court's satisfaction, that a forfeiture order for the catch would not have the consequences of depriving the applicant herein of property in respect of which he has an interest. The respondents have failed to establish that the applicant is not the person who will suffer the consequential loss of the catch.

4.7 The Court is satisfied that the respondents have failed to establish that the forfeiture in issue herein is not a penalty and have also failed to establish that the forfeiture in this case is a sanction *in rem* in respect of which the applicant does not have an interest and the Court therefore rejects the two preliminary submissions made on behalf of the respondents.

## **Proportionality**

5.1 It is the applicant's contention that the sanction of the forfeiture of the entire catch on the facts of this case would amount to a penalty which is disproportionate. The mandatory statutory provision providing for forfeiture under s. 224 B of the 1959 Fisheries (Consolidation) Act, offends against the principle of proportionality. It is claimed that the requirement of proportionality arises both under the Constitution and in European Community Law.

5.2 The principle of proportionality was considered by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593. In that case the constitutionality of s. 52 of the Offences Against the State Act, 1939, was considered in circumstances where that Section required a person arrested to give an account of his movements. The issue before the Court was whether such a provision amounted to a legitimate restriction on the privilege against self incrimination and the right to remain silent. In considering the matter, Costello J. applied a test which is now referred to as the rationality test (at p. 607):-

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights are proportional to the objective."

The Supreme Court considered the application of a form of proportionality test in the case *The Employment Equality Bill*, 1996 (1997) 2 I.R. 321 at p. 383 in the following terms when Hamilton C.J. stated:-

"In effect a form of proportionality test must be applied to the proposed section.

- (a) Is it rationally designed to meet the objective of the legislation?
- (b) Does it intrude into constitutional rights as little as reasonably possible?
- (c.) Is there a proportionality between the Section and the right to trial in due course of law and the objective of the legislation?...or to put it a slightly different way, s. 63, sub-s. 3, when read in the context of the Bill is a failure to protect the constitutional rights of the citizen and not warranted by the objectives which it sought to secure."

5.3 The principle of proportionality has not only developed in Irish law but also is a long established principle in community law. The approach identified in community law mirrors the proportionality test identified by Hamilton C.J. in the *Employment Equality Bill* 1996 case. The principle of proportionality has been identified as being of fundamental importance in community law. This principle is referred in the text book entitled *Judicial Protection in the European Community* (Sixth Edition) Schermers and Waelbroeck (in paragraph 180 at pages 100 and 101) in the following terms:-

"In order to establish whether a provision of Community law is consonant with the principle of proportionality, it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement. Any measure constituting a charge, whether or not it is in itself tolerable, infringes the proportionality between the charge and the result to achieve, when that objective cannot be attained by the method employed or when, in order to attain it, there are other methods which may be more conveniently applied. In general, where there is a choice between several appropriate measures, recourse must be had to the least restrictive and the disadvantage caused must not be disproportionate to the aims pursued."

In expressly considering criminal penalties and proportionality under EU law and based on the case law, the position was identified in the textbook "The General Principles of EU law" (Second Edition) by Takis Tridimas (at page 234) in the following terms:-

"Penalties of whatever nature imposed for breach of national provisions which restrict the fundamental freedoms are subject to a strict test of proportionality. The Court stated in *Casati* (Case 203/80 [1981] ECR 2595, para 27):-

"In principle, criminal legislation and the rules of criminal procedure are matters for which the member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom."

5.4 The issue of proportionality and the general principles of sentencing, including mandatory sentences, was considered in detail by Irvine J. in *Whelan v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, High Court) and the linked case of *Lynch v. the Minister for Justice, Equality and Law Reform & Ireland and the Attorney General* (judgment delivered 5th October, 2007) commencing on page 25 of that judgment. Irvine J. as part of an extensive review of the case law stated (at pages 22 and 23) as follows:-

"There is nothing constitutionally unacceptable, on the present case law, in the Oireachtas deciding to prescribe general rules which reflect its views, as democratically elected representatives of the public, as to the degree of seriousness to be attributed to different types of offences. The legislature gives indications as to the degree of seriousness with which it views various offences by specifying in many cases the maximum, minimum or as in the present case, the mandatory sentence to be imposed following conviction.

If one is to admit of the argument that mandatory sentencing in relation to any criminal offence is unconstitutional, one would have to give serious consideration as to the extent to which the legislature would be in a position to provide either maximum or minimum sentences in any legislation dealing with criminal offences without risking constitutional infringement. Further, the same argument would have to raise questions as to the role of the executive, post sentence, where, as outlined above, the executive effectively has power to alter the sentence imposed by the trial judge through a range of measures including commutation, remission or early release of prisoners because of good behaviour or on foot of a Temporary Release Order. Once again, it could be alleged that for the executive to invoke any of these measures must be

unconstitutional because de facto the prison sentence initially imposed is likely to be varied somewhat by executive intervention of one type or another."

Irvine J. went on to state (at page 24) of her judgment:-

"The court accepts the defendants argument in the instant case that the Oireachtas, in a vast array of legislative provisions, intrudes upon the discretion of the court. In this particular case the intrusion is the provision of the mandatory sentence. In other cases, the Oireachtas intrudes by requiring mandatory consequential orders to be imposed following upon conviction. One such example is where a holder of an intoxicating liquor licence is convicted of certain offences contrary to Part IV of the Intoxicating Liquor Act, 1988. In such a case the District Court must, in addition to any penalty imposed, make a temporary closure order. In other cases the legislature provides that particular statutory consequences will automatically attach to a judicial decision without the requirement of an order of the court, one such example being the twelve month disqualification from holding a driving licence where a driver is convicted of drink driving offences under s. 26 of the Road Traffic Act, 1961.

If the plaintiffs are correct that any mandatory provision in legislation transgresses upon the constitutional role of the judiciary, it is difficult to see how the legislature can legitimately, as it does in so many cases, direct the court in legislation as to how certain evidence must be treated by the court at trial."

Irvine J. went on to consider whether a mandatory life sentence imposed following a criminal conviction for murder offended the principles of proportionality (at page 30) and stated:-

"The court has already held in *Deaton* (*Deaton v The Attorney General and the Revenue Commissioners* [1963] I.R. 170) that mandatory sentences do not offend the Constitution and it is difficult to see therefore how the doctrine of proportionality discussed in the above cases avail the plaintiffs in any case where a mandatory sentence is prescribed. This Court considers that the type of proportionality as discussed by Flood J., Denham J. and Hardiman J. was the need for proportionality as part of sentencing policy where a trial judge is vested with a discretion as to the sentence that may be imposed. That concept of proportionality seems somewhat different to the concept of constitutional proportionality which truly arises for consideration in this case. Constitutional proportionality in the context of the mandatory life sentences imposed upon the plaintiffs herein necessarily involves the court in determining whether the offence of murder, irrespective of its gravity in any particular case, can justify the legislature fixing a punitive mandatory life sentence to apply in all cases. In other words, can the deprivation of liberty provided for in s. 2 of the Criminal Justice Act, 1990 be justified in every single case by virtue of the objectives which the legislature seeks to maintain by the enactment of such provision?"

5.5 The approach adopted by Irvine J. highlights the requirement for a Court in considering constitutional proportionality to do so by reference to the objectives which the legislature seeks to maintain by the enactment of a mandatory provision. In considering whether a mandatory provision satisfies the constitutional proportionality test, the Court will do so consistent with the proportionality test identified by Costello J. in *Heaney v. Ireland* in so far as it relates to a criminal penalty. The Court will consider whether the objective which was sought to be achieved by the legislature in adopting the mandatory statutory provisions providing for forfeiture under s. 224 B of the 1959 Fisheries (Consolidation) Act was proportionate to the objectives of the legislation. The Court will also consider whether the mandatory forfeiture provision can be deemed to be rationally connected to the objective and not to be arbitrary, unfair or based on irrational considerations. The Court in considering whether or not the mandatory forfeiture impairs a right as little as possible must do so having due regard to the fundamental constitutional doctrine of the separation of powers and the requirement for measures to have the effect of discouraging further offences of the same kind.

5.6 The Supreme Court considered the issue of a fixed penalty in the case of *Osmanovic v. Director of Public Prosecutions* [2006] 3 I.R. 504 where Murray C.J. stated (at page 514):-

"There is no question, therefore, of either the legislature or the executive fixing the punishment. Only the court exercising its judicial power does that. This court cannot accept that because there is a legislative prescription in relation to the fine option there is a breach of the principle of separation of powers. It is quite clear from the judgment of Ó Dálaigh C.J. in *Deaton v. The Attorney General and the Revenue Commissioners* [1963] I.R. 170 that the Oireachtas does have powers to lay down general parameters within which a sentence is to be imposed. There is no necessity in this judgment and indeed it would be wholly undesirable to consider what the limits might be (if any) on the power of the Oireachtas to provide for either fixed sentences or mandatory sentences. One could postulate extreme situations where the sentencing powers of judges were removed altogether and every offence had a mandatory sentence. The constitutionality of such a law would obviously be questionable. But it has always been accepted and indeed was accepted, in *Deaton v. The Attorney General and the Revenue Commissioners* that, within reason at least, the Oireachtas has power to lay down those parameters."

Murray C. J. went on (at page 518) to state:-

"As has already been pointed out, there are reasonable options open to the trial judge in these cases and in so far as there are limitations (a) they are not unreasonable and (b) they are the kind of limitations which are normal in revenue offences. The principle that sentences must be proportionate to the personal circumstances of the appellant is perfectly capable of being applied in these cases. It may well be, as Professor O'Malley suggests in his *Leading Cases of the Twentieth Century*, that the courts might be entitled to strike down a mandatory sentence if they were convinced that its purpose or effect was to leave offenders liable to a disproportionately heavy punishment. In the view of the court, that issue does not arise and should not be considered in this case."

5.7 The Court will consider proportionality with particular regard to the 'proportionality test' identified by Costello J. in *Heaney* as that test applies to criminal penalties. The Court will also do so by reference to the objectives of the control system applicable to the common fisheries policy, the connection between the measures applied by way of penalty by statute and the stated objective of the common fisheries policy, the rationality of the measures, the terms of the Council Regulation 2847/93, and whether the effects on the rights of persons convicted are proportional. The Court will also consider the issue as to whether the measures, adopted by way of criminal sentence, impair a convicted person's right as little as possible with due regard being paid to the right of the Oireachtas to decide the appropriate penalty as long as such penalty is proportional to the aim to be achieved. The Court will proceed on the basis that it should only interfere with the exercise of the power of the Oireachtas to determine penalty if there is a clear failure to ensure that the penalty is proportional.

## **Due Process – Right to a trial in due course of law and conclusions on proportionality**

6.1 It is claimed by the applicant that as a consequence of the alleged disproportionality of penalty that the applicant's right to a trial in due course of law has been breached. The question raised is whether the constitutionally guaranteed right to trial in due course of law has been interfered with by the mandatory sanction providing for the confiscation of all fish found on board a ship. In considering both this issue and proportionality it is necessary to consider whether such sanction has been limited in a reasonable and justifiable manner appropriate to the circumstances. The Court applies a proportionality test to the proposed section and considers whether or nor the sanction is rationally designed to meet the objective of the legislation and whether it intrudes into constitutional rights as little as is reasonably possible and also is there a proportionality between the sanction and the right to trial in due course of law and the objective of the legislation. This approach is consistent with the test annunciated by Hamilton C.J. in the *Employment Equality Bill* 1996 case (at page 383).

6.2 It is clear that the question of the determination of the appropriate penalty for the commission of an offence created by a statute is a matter for the Oireachtas. The Oireachtas, as the law making body in the State, sets out in law the sentence and consequences which follow upon a conviction. It is the Court which implements such sentences and sanctions as prescribed by law. In considering the test as to whether or not the penalty or sanction is rationally designed to meet the objective, the Court must have due regard to the separation of powers. The Courts should not interfere with the sentences and sanctions prescribed by the Oireachtas unless it has been clearly established that the prescribed sentence or sanction, if carried out, would clearly result in a breach of the fundamental rights of an individual. The obligation to have due regard to the separation of powers doctrine is clear from the judgment of Murray C.J. (at page 518) of the *Osmanovic* judgment.

6.3 The recognition of the fundamental constitutional doctrine of the separation of powers and the resulting consequence that the Courts must be careful not to interfere with sentences prescribed by the Oireachtas is mirrored in the approach in European law. European law as identified in the decisions of the Court recognises that community law must be consonant with the principle of proportionality. However as pointed out by Schermers and Waelbroeck in their textbook "Judicial Protection in the European Communities" (sixth edition) at paragraphs 182, 183 and 184 at page 102, the requirement that a provision of community law is consonant with the principle of proportionality "does not mean however that the principle of proportionality is equal to the German principle of the least radical intervention possible. Particularly in the agricultural field, the Court felt that very radical interventions may be necessary as long as they are proportional to the aim to be achieved." The text went on to state (at para. 183) "With regard to judicial review of the principle, in matters in which the Community legislature has a wide discretionary power, the legality of a measure adopted can be effected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.....There is a violation of the principle of proportionality if the sanction is not appropriate or if it is not necessary to achieve the purpose pursued."

6.4 In considering both the constitutional position within this State and the position in EU law the Court must have regard to the fact that the mandatory statutory consequence of forfeiture of catch is one of the sanctions expressly envisaged in Article 31.3 of Council Regulation 2847/93. Potential sanctions identified include the seizure of prohibited fishing gear and catches. It is clear that Article 31 envisaged a wide discretionary power in the choice of sanctions by a Member State. It is also clear that Ireland chose a number of the sanctions including fines and seizure of prohibited fishing gear and catches but did not provide for the sequestration of a vessel or the suspension or withdrawal of a licence. Given the identification of the potential sanction of the seizure of the catch, within the Regulation, it cannot be said that such sanction is not appropriate.

6.5 Also in considering whether or not the sanction would be deemed to be rationally connected to the objective and not to be arbitrary, unfair or based upon irrational considerations, it is necessary to consider the recitals contained in Council Regulation No. 2847/93. The recitals state that the establishment of a common EU control system is necessary for the success of the common fisheries policy and that for that purpose it is necessary for the common fisheries policy to implement an effective system of control covering all aspects of the policy. The recitals also identify that it is necessary to ensure that all catches and landings are kept under surveillance and that Member States must monitor in all maritime waters the activities of Community vessels and all related activities allowing verification of the implementation of the rules concerning the common fisheries policy. Verification of the implementation of the rules requires that there is in place a system which can ensure, in so far as possible, the veracity of all records including logbooks kept by masters of Community fishing vessels. This Court is satisfied that the imposition of a significant and serious sanction in the form of the seizure of an entire catch is rationally connected to the objective of the Council Regulation establishing a control system applicable to the common fisheries policy. Nor can it be said to be arbitrary or unfair or based upon irrational considerations. This finding is reinforced by the fact that Article 31.2 of Council Regulation No. 2847/93 makes it clear that Member States should not only ensure that proceedings are capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of infringements but also of producing results proportionate to the seriousness of such infringements and that such sanctions should be capable of effectively discouraging further offences of the same kind. The requirement "to effectively discourage further offences of the same kind" recognises that the sanctions adopted by a Member State must have regard to their deterrent effect as part of an enforcement and prevention procedure. The importance and significance of surveillance and monitoring of fishing activities in order to achieve the stated purpose of the common fisheries policy is demonstrated by the recital which states "whereas compliance with measures for the conservation and management of fishery resources requires an increased sense of responsibility on the part of all operators in the fishing industry."

6.6 Given the identification that it is essential to clarify and confirm at the time of landing the information contained in fishing vessels logbooks, there is a clear necessity for those involved in the landing of catches to declare accurately both the quantities and type of all fish. This Court is satisfied that in considering the issue of proportionality it must do so in the light of the control system laid down for the purposes of implementing the common fisheries policy and to the fact that it is unquestionably the case that the proper maintenance of a logbook is central to a system of control. The Court is satisfied that the choice of the sanction including the forfeiture of the entire catch, even if the major portion of the catch is properly recorded, is the imposition of a sanction rationally connected to the objective sought to be achieved and cannot be described as arbitrary, unfair or based upon irrational considerations. Given the wide discretion, provided for in Article 31 and the requirement to effectively discourage further offences of the same kind, the Court is also satisfied that it cannot be said that the sanction is disproportionate to the objective. It is the case that the sanction provided goes no further than what is necessary to achieve a legitimate social or community aim.

6.7 In considering the proportionality of such sanction regard must be paid to the fact that the penalty provided is dissuasive where it prevents an individual from infringing the objectives pursued. The sanction also has the purpose of discouraging further offences of the same kind. This Court is satisfied that the sanction in this instance is proportionate, that is to say effective for attaining the legitimate objectives pursued and also is proportionate and appropriate for attaining the stated objective of establishing a control system applicable to the common fisheries policy. The mandatory sanction is not only one envisaged as a measure which may be adopted by a Member State but is directly linked to the central requirement of the control system of ensuring surveillance and monitoring by means of accurate record keeping. The necessity of accurate and precise record keeping is so central that without such records the system could not operate. Putting a Master of a vessel at risk of the forfeiture of the entire catch, if inaccurate

records are kept, reinforces the critical importance of complete and accurate records. The more fish that are caught and kept on board a vessel, the greater the impact on fish stocks and the greater the need for precise records. The object of ensuring accurate and precise records is so central that a sanction which causes a forfeiture of all fish on board if convicted of failing to keep such records is not disproportionate. The means corresponds to the aim. The capacity of a Court to impose a fine from zero to £100,000 on conviction as well as the consequent forfeiture of all fish is recognition of the requirement for proportionality in sanction. The Court is satisfied that the sanction in providing for the forfeiture of any fish found on board a boat to which the offence relates is proportionate in Irish law and is not invalid having regard to the provisions of the Constitution of Ireland nor is there a failure to respect the rights of the applicant in EC law.

### **European Convention on Human Rights**

7.1 In his submissions the applicant places reliance on the European Convention on Human Rights and in particular Article 6, Article 13 and Article 14. The applicant asserts that the State in making the Sea Fisheries (Control of Catches) Regulation, 2003 and implementing such Regulations in a manner which exclusively provided for prosecution on indictment, gave rise to a situation where there is a failure to respect the rights of the applicant under EC law. It is also claimed that the Regulations are contrary to the European Convention on Human Rights.

7.2 The applicant asserts that a provision of Irish law is contrary to the European Convention on Human Rights. However, the applicant does not seek a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act, 2003. Further, the applicant does not identify how it is alleged that there has been a breach of Articles 6, 13 and 14 of the Convention. In so far as this matter was raised it was an ancillary argument in relation to proportionality. Given the Court's decision in relation to proportionality and in the absence of any other identifiable complaint in relation to the alleged breach of the European Convention on Human Rights, the Court is satisfied that the applicant has failed to make out any claim under this heading. No declaration of incompatibility been sought pursuant to s. 5 of the European Convention on Human Rights Act, 2003.

### **Requirement that offence be tried on indictment**

8.1 The section under which the applicant is being prosecuted provides for trial on indictment and no provision is made for summary prosecution. It is claimed that the failure to provide for the possibility of prosecution by way of summary trial is a breach of the applicant's right to a trial in due course of law and/or in breach of his constitutional rights. The applicant does not expand upon this contention.

8.2 Article 38.5 of the Constitution provides "save in the case of the trial of offences under s. 2, s. 3 or s. 4 of this Article no person shall be tried on any criminal charge without a jury." In this instance, at the time of the alleged offence, the law did not provide for a trial otherwise than by jury. Further Article 38.2 of the Constitution provides "minor offences may be tried by Court of summary jurisdiction". The Article provides that minor offences may, not shall, be tried by Courts of summary jurisdiction. The applicant has failed to establish any basis or to put forward any argument to support his claim to have the offence with which he is charged tried summarily. The applicant has failed to make out that his right to a trial in due course of law is in any way violated by the fact that he is to be tried on indictment.

### **Conclusion**

9.1 The applicant has failed to establish that the impugned provision is contrary to the Constitution of Ireland or the laws of the European Union. The Court is satisfied that the provision, which provides for a fine not exceeding £100,000 and as a statutory consequence on conviction of the forfeiture of all or any of the fish found on board the vessel, does not violate the principles of proportionality. The applicant has failed to identify any constitutional or convention rights which would be violated by the imposition of a consequential order forfeiting all fish found on board his vessel in the event of his conviction. The Judge who will try the applicant has, in the event of a conviction, a discretion to impose a fine not exceeding £100,000 or no fine. This Court is satisfied that the mandatory consequential order which would apply on conviction does not give rise to a situation where the sentencing power of the trial Judge has been removed with a consequence that inevitably results in the imposition of unfair or disproportionate penalties upon conviction. This Court is satisfied that the mandatory sanction is a proportionate penalty and that the applicant has failed to establish an entitlement to any of the reliefs sought in these proceedings. In the light of the above findings the Court is satisfied that it is not necessary to make a reference to the European Court of Justice under Article 234 of the EC Treaty.