

THE HIGH COURT

[2009 No. 825 J.R.]

BETWEEN

LIAM O'DRISCOLL AND BRENDAN O'DRISCOLL

APPLICANTS

AND

ATTORNEY GENERAL, MINISTER FOR AGRICULTURE, FISHERIES AND FOOD AND IRELAND

RESPONDENTS

AND

DISTRICT COURT JUDGE JAMES MCNULTY

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on 5th of October 2012.

1. The applicants are the masters and owners of the Irish registered sea fishing vessel, the *Carmona*.
2. The applicants have been charged with multiple offences of fishing in contravention of Article 6 of Council Regulation 2847/93(EEC) whereby they are accused of failing to correctly fill in the log book of their fishing vessel as required by Article 6 of Regulation 2847/93 of 12th October, 1993 and in contravention of S.I. 345/2003 in contravention of s. 224B of the Fisheries (Consolidation) Act 1959, as inserted by s. 5 of the Fisheries (Amendment) Act 1983 and to s. 232 of the Fisheries (Consolidation) Act 1959. These offences are alleged to have been committed on multiple dates in 2003 and 2004.
3. The applicants have also been charged with multiple offences of fishing in contravention of Article 8(1) of Regulation 2847/93 as amended, by Article 2 of Commission Regulation 2807/83 in that they are alleged to have failed to correctly make a landing declaration in respect of the fishing operations of the said vessel in contravention of S.I. 345/2003 contrary to s. 224B 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. These offences are alleged to have been committed on multiple dates in 2003 and 2004.
4. On 14th November, 2008, the applicants were charged with these offences and served with a book of evidence. On 3rd March, 2009, they were returned for trial. On 27th July, 2009, the applicant sought and obtained leave to bring these judicial review proceedings. In these proceedings, the applicants sought to challenge their return for trial in respect of these charges on three grounds. At the hearing of the case before me, the applicants limited their grounds to two:-
 - (a) that the offences created by s. 224B of the Fisheries (Consolidation) Act 1959 are void and of no legal effect.
 - (b) the alleged offences were not committed within the exclusive fishery limits of the State.
5. The within judicial review was originally opened before the High Court on 5th November, 2010, but was adjourned in order to await the judgment of this Court in the case of *Michael Faherty v. Attorney General & Ors*. The judgment in that case was delivered on 3rd June, 2011.
6. In relation to the first ground upon which the applicants base their challenge. It seems to me that this ground is entirely answered by the decision of this Court in *Faherty*. In that judgment, this Court considered the very issue which is raised by the applicants herein. This Court decided that it was the Oireachtas and not the Minister who created the offence. The Oireachtas created the offence and the subject matter or details of the offence are set out in the Regulations. There was thus no impermissible delegation of power. In arriving at this decision, this Court relied upon the dicta of Denham J., as she then was, in *Browne v. Attorney General* [2003] 3 I.R. 205:-

"This is a specific power given to the second respondent, 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 224B(2) mirrors s. 3(2) of the Act of 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 respondent to implement community law by regulation and to create an indictable offence."
7. This Court went on to decide that the Act did, in fact, create the offence and the subject matter or details of the offence are set out in the Regulations. The Act used the words "shall be guilty of an indictable offence". This Court held that even in the event that this was not correct, that s. 224B(3) clearly and unequivocally gave the Minister the power to create the offence. The implementation of the relevant EC Regulations was an obligation which was necessitated by Ireland's membership of the European Union. The manner in which that implementation was done was left to the Member States. The Oireachtas opted to make the matter a criminal offence and gave the Minister the power to implement the Regulations accordingly. In short, the Regulations did no more than implement the details of a policy clearly contained in the 1959 Act. In this regard, see the views expressed by O'Higgins C.J. in *Cityview Press Limited v. An Chomhairle Oiliúna* [1990] I.R. 381 at p. 398. The applicant herein argues that the creation of the offences with which they are charged is an impermissible delegation of power and that the Oireachtas not the minister should have created the offence in question. It seems to me to be the same argument that was rejected by this court as set out above. No reasons have been advanced to support an argument that this court should not follow its previous decision in *Faherty* and thus this ground must be rejected
8. Dealing with the second ground advanced by the applicants in this case, whether the offences were committed within the

exclusive fishery limits of the State is, in my view, clearly an evidential matter that needs to be resolved at the criminal trial. The scope of judicial review in prohibiting trials has been dealt with at great length in a long series of cases both before this Court and the Supreme Court. The jurisdiction is a very limited one to be exercised only where there is a real risk of an unfair trial. The proper place for criminal proceedings is in the criminal courts and not in the courts of judicial review. Not the least of the reasons for this is that the court of judicial review does not have the opportunity to have the evidence fully presented before it and thoroughly questioned. This is a matter for the court of trial. That trial is before a court of law established under the Constitution and one which is entitled to the presumption that it will act in a fair manner and will provide an accused with all appropriate protection by way of orders and directions during the trial. The place to make the case that these offences were not committed within the exclusive fishery limits of the State is quite clearly, in my view, before the court of trial. That court is best placed to make any ruling necessary as to whether the offences were in fact committed within the exclusive jurisdiction of the State and what effect that might have on the outcome of the case.

9. For the above reasons, the relief sought by the applicants herein is refused.