THE COURT OF APPEAL

Birmingham P.
Donnelly J.
Edwards J.

Record No: 214/2015

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

KLASS DIRK MEIJVOGEL

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on 25th July 2023.

Introduction

1. This is an appeal against severity of sentence that arises in unusual circumstances. The appellant is the master of a sea fishing vessel who was convicted by a jury at Cork Circuit Criminal Court 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 equipment prohibited by Article 32(1) of Council Regulation (EC) No 850/98 in contravention of Statutory Instrument number 197 of 2013 (SI 197/13), contrary to section 14 of the Sea Fisheries Maritime Jurisdiction Act 2006.

2. The offending conduct in respect of which the appellant faced sentencing was particularised on the indictment as follows:

> "Klass Dirk Meijvogel on the 11th of February 2015 was the master of the UK registered fishing vessel 'Wiron 5' having registration number PH – 1100, 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."

3. The appellant had previously appealed his conviction to this Court and that appeal was dismissed on the 11th October, 2018. See the judgment of Birmingham P on behalf of the Court – [2018] IECA 317, which refers in detail to the circumstances of the appellant's offending.

4. The appellant was sentenced on the 27th of July 2015 to a fine of €500, together with confiscation of his catch to the value of €344,960, and the fishing gear on board his vessel (both

prohibited and legal) to the value of €55,000. The confiscation of the appellant's catch and gear was ordered in circumstances where it was believed by all concerned (i.e., both prosecution and defence lawyers) to arise as a statutory consequence of the appellant's conviction leading to the sentencing court being informed that it had no discretion in regard to the extent of any order for the confiscation of catch and gear. The appellant has appealed against the severity of the sentence imposed upon him and the focus of the appeal has been on the confiscation order, with the appellant contending that it was a disproportionate penalty in all the circumstances of the case, was unlawful under European Union ("EU") law on that account and ought not have been imposed.

5. The case raised potentially complex issues of EU law, which led this Court to make two separate references, dated the 21st of January 2020 and the 27th of July 2021, respectively, to the Court of Justice of the European Union (CJEU) seeking preliminary rulings pursuant to Article 267 TFEU. See in that regard the judgment of the CJEU (Sixth chamber) in *KM (Sanctions imposed on the master of a vessel)*, Case C-77/20, dated the 11th of February 2021 ("*KM No 1"*) and the reasoned order of the CJEU (Eighth Chamber) in *KM v Director of Public Prosecutions*, Case C-493/21, dated the 1st of March 2022 ("*KM No 2"*). Where necessary, we will make detailed reference to these rulings later in this judgment.

Background to the matter including evidence at trial and at sentencing and the plea in mitigation.

6. Evidence was given at trial was that on 11th February, 2015, the captain in command of the Irish Naval Service vessel, the LE Samuel Beckett, a Lieutenant Commander Anthony Geraghty, which was engaged on a routine sea fisheries patrol, decided that Naval Service personnel, accompanied by a Sea Fisheries Protection Officer, should board and inspect a UK registered fishing vessel, the Wiron 5 (later described in evidence at trial as "a factory trawler"), which it had encountered 163.5 nautical miles inside the exclusive fisheries limits of the State and of which the appellant was the Master.

7. A three person boarding party, comprised of Sub Lieutenant Niall McCarthy, and Leading Hull Artificer James Cotter (both Irish Naval Service personnel) and a Mr James Hedderman, (a Sea Fisheries Protection Officer), using a rigid inflatable boat ("RIB"), duly boarded the Wiron 5 and upon inspection of it, concluded that it was equipped with a grading machine and that there was a chute from the grading machine, which had both an automatic grading section and a manual grading section, by means of which fish could be returned to the sea via a sump the contents of which could be discharged overboard using a vortex pump. Based on his observations of the equipment encountered while on board the Wiron 5, and how it was set up, Sub Lieutenant McCarthy, who was in command of the boarding party, formed the view that the vessel was engaged in "high grading", a prohibited activity comprising the selection of only the best fish from the catch and returning the remainder to the sea.

8. Evidence was also given at the appellant's trial that Sub Lieutenant McCarthy subsequently approached the appellant in his capacity as Skipper of the Wiron 5, and having administered a legal caution to him, asked him if the grading equipment he had encountered was being used for discharging catch to the sea. The appellant admitted that it had been so used but stated that it

was not being so used at the time of the boarding. He stated that they were retaining their catch on board, that it was being frozen and that they were not discharging anything.

9. There was further evidence that after some time, but while the boarding party was still on board, production facilities on the Wiron 5 were re-started and that the equipment was observed in operation by members of the boarding party. Both Sub Lieutenant McCarthy and Leading Hull Artificer Cotter told the jury that they saw fish being diverted into the sump and Leading Hull Artificer Cotter further told the jury that he personally observed water containing fish being discharged from the sump to the sea. He said that the sump contents were dumped quite regularly, and that such dumping had occurred as he was standing observing the equipment in operation.

10. There was evidence that the equipment encountered was capable of grading approximately 350,000 fish per day.

11. The appellant pleaded not guilty to the single count on the indictment. He was tried before a jury on the 16th, 17th and 18th June, 2015. The defence case centred on the existence of exceptions to the general legal ban on having grading equipment on fishing vessels such as was found on the appellant's vessel, and a claim that there was a degree of tension between different regulations (specifically Article 32 (b) (ii) and Article 19 of Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms) ("Council Regulation (EC) No 850/98"), and in consequence of that tension ambiguity and/or uncertainty concerning what exactly the law required of a person in the position of the appellant seeking to avail of an exception to the general ban.

12. Article 32 of Council Regulation (EC) No 850/98 sets out restrictions on the use of automatic grading equipment, and creates the offence of which the appellant was charged. It provides:

> "(1) The carrying or use on board a fishing vessel of equipment which is capable of automatically grading by size or by sex herring or mackerel or horse mackerel shall be prohibited.
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> (2) However, the carrying and use of such equipment shall be permitted provided that: (a) The vessel does not simultaneously carry or use on board either towed gear of mesh size less than 70mm or one or more purse seins or similar fishing gears or
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> (b) (i) the whole of the catch which may be lawfully retained on board is stored in a frozen state, the graded fish are frozen immediately after grading and no graded fish are returned to the sea except as required by Article 19 and
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> (ii) the equipment is installed and located on the vessel in such a way as to ensure immediate freezing and not to allow the return of marine organisms to the sea."

13. However, Article 19 of Council Regulation (EC) No 850/98 which deals with how undersized marine organisms are to be treated, states:

> "(1) Undersized marine organisms shall not be retained on board or be trans-shipped, landed, transported, stored, sold, displayed or offered for sale, but shall be returned immediately to the sea.

(2) Paragraph 1 shall not apply to (a) Sardine, anchovy, herring, horse mackerel and mackerel, within a limit of 10% by live weight of the total catches retained on board of each of these species. The percentage of undersized sardine, anchovy, herring, horse mackerel or mackerel shall be calculated as the proportion by live weight of all marine organisms on board after sorting or on landing. The percentage may be calculated on the basis of one or more representative samples. The limit of 10% shall not be exceeded during trans-shipment, landing, transportation, storage, display or sale."

14. The defence went into evidence and adduced testimony from a Mr Andrew Pillar, the fleet and operations manager for the company that owned the Wiron 5. He told the jury that he was familiar with the grading equipment set up on the Wiron 5; that the chute which had been described in evidence by prosecution witnesses as leading to the sump emanated from the manual grading section rather than the automatic grading section of the line, and that the boat owner's understanding was that it was a requirement of Article 19 of Council Regulation (EC) No 850/98 to have such a chute, adding, *"not having a chute I believe to be unlawful".* The import of his evidence was that, notwithstanding Article 32 (b) (ii) which on the one hand prohibited the return of marine organisms to the sea, Article 19 on the other hand was understood as prohibiting the retaining on board and landing of undersized catch in any circumstances, and that it expressly required such catch to be returned to the sea immediately. The chute in question was intended to facilitate this.

15. It was urged upon the jury that given the difficulty in reconciling these two ostensibly competing legal requirements, they could not be satisfied beyond a reasonable doubt as to the guilt of the appellant in respect of the offence with which he had been charged, and that they should acquit him. On day 3 of the trial, after approximately 4 ¼ hours of deliberation, the appellant was convicted by the jury by a majority verdict of 10:2.

16. The sentencing hearing was conducted on the 27th of July 2015. The transcript of this hearing is very short, running to just 4 ½ pages (excluding the index). At the outset of the hearing on that date the sentencing judge enquired of the lawyers in the case as to whether a confiscation (of catch and gear) was required. He was informed that it was indeed required, by both prosecuting counsel and the appellant's solicitor. Prosecuting counsel referred to a High Court decision in a case of *Martinez* (the reference is believed to have been to the High Court's judgment in judicial review proceedings entitled *Augustin Ferradas Martinez v Ireland, The Attorney General and District Judge James McNulty* (unreported, High Court, O'Neill J, 27th of November 2008)) as confirming that it was *"mandatory to confiscate all fish and gear found on board the vessel"* and stated *"that's unequivocally the position apparently."* The appellant's solicitor indicated agreement with what prosecuting counsel was saying and stated that it was his understanding also that *"it's an automatic statutory consequence of the conviction"*. Pressed by the sentencing judge, who was concerned to have absolute clarity, the lawyers on both sides confirmed that a confiscation of catch and gear was consequential and mandatory, and it was expressly confirmed to the judge that the court had, they believed, no discretion in regard to the matter of confiscation, but rather only in respect of any fine. In response to a query raised by the sentencing judge concerning whether confiscation of catch and gear was to be regarded as a penalty or a consequence (such as in the case of a driving disqualification), it was stated by prosecuting counsel that the confiscation

of catch and gear represented a penalty and that it had been *"deemed to be such by the High Court under European Union law."*

17. Evidence was then led from a sea fisheries protection officer, a Mr Pat Scanlon, who gave a summary of the evidence that had been given at the trial. He told the court that on the 11th February 2015 the offending vessel was detected at a point approximately 160 miles inside the exclusive fishery limits of the State, that the vessel was boarded (routinely and not as a result of any suspicion), and that it was found to have the prohibited equipment, described as a form of fish selection device, on board. The sentencing judge later recalled in exchanges with the lawyers, there had in fact been evidence at the trial from a member of the Naval Service boarding party, described by the sentencing judge as the *"Leading Hand"*, that he had observed the grading equipment, which he saw to be set up in a particular manner (i.e., not installed or located in such a way as to ensure immediate freezing or to prevent the return of marine organisms to the sea), to be actually in operation. We infer this to have been a reference to the evidence given at trial by Leading Hull Artificer James Cotter.

18. Mr Scanlon confirmed that having such equipment on board a fishing vessel was *"made illegal in the last 12 months or so".* He stated that the vessel was duly detained following which the skipper of the vessel, the appellant, had been cooperative in every way possible and had made admissions. When the appellant had been taken ashore he had further cooperated by producing his books and records.

19. Mr Scanlon placed a value upon the fish found on board the vessel of €344,960. He estimated the value of the fishing gear on board to be €55,000. It was stated to the court by the solicitor for the appellant that these values were agreed. In answer to a question asked of him by counsel for the prosecution, which was couched in leading terms but which was not objected to, Mr Scanlon informed the court of his belief that the gear and catch were required to be confiscated as a consequence of the fact of the appellant's conviction. He stated that while the vessel had been allowed to depart from Cork harbour following its arrest, its departure had been facilitated by a bond being entered into which was equivalent to the value of the catch and gear. The court was further informed that the maximum potential fine that might also be imposed was €235,000.

20. Mr Scanlon concluded his evidence by confirming under cross-examination that there had been a full and thorough examination of the rest of the vessel and no other offences were detected, nor had any other concerns arisen.

21. The sentencing court then heard a plea in mitigation from the solicitor representing the appellant. He alluded to the fact that the regulations which outlaw having the impugned equipment on board a fishing vessel (set up and operating in the manner in which it had been found by the Naval Service boarding party) had been introduced relatively recently. He stated that the fishing vessel had been purchased by the company which owned it in January 2014. He tendered to the court a copy of an extract from Lloyds Marine Register and suggested that this evidenced that prior to the vessel being put into commission by the owner, an enquiry had been made of Lloyds to ascertain whether or not it complied with article 32 of EU regulation 850/98. While the transcript does not record in terms that the exhibited document confirmed that it had been represented to the owner that the vessel was compliant, that was certainly the implication. Regrettably, the

exhibit handed into the court below was not made available to the Court of Appeal and so we have not had an opportunity to scrutinise it.

22. It was further stated (during the plea in mitigation):

"I should say that since the conviction, Judge, and since indeed the detention, Judge, my client has ceased all fishing operations subject to the determination of this matter and then having had the matter determined my client has engaged in extensive consultation with the British Department of Marine, the British Sea Fishery Protection Authority and indeed, Judge, also as well as that the Lloyds (sic) *as well, Judge, and has taken steps to amend the equipment so that the prospect of there being a secondary offending behaviour has been taken care of, Judge.*

In relation to this matter, Judge, both the owner and this particular individual skipper have had no previous prosecutions in any court or tribunal, Judge. This vessel would have fished extensively off Irish waters, English waters, Scottish, French and the Jersey islands, Judge. The position, Judge, is that the changes in the law which took place at the start of this year in relation to discards, Judge, they had taken genuine attempts to try and ensure that they were being compliant with the law but obviously, Judge, they accept that the jury has found guilty of the offence."

The sentencing judge's remarks

23. The sentencing judge's remarks were relatively brief. He stated:

"This was a technical offence. The offence was a relatively new one and, as I understand it, this is the first prosecution or conviction under the alleged -- under the regulation. The master met with the case in a responsible way. He put forward his case and the matter was decided by a jury, that the fish selection device was illegal under the regulation. As I say, the evidence of the State from the Leading Hand or the leading sea man of seeing this device in operation and whether or not it retained broken and small fish was, I believe, crucial in the prosecution being successful. The amount of the confiscation which is penal is very substantial and there is the ordinary forfeiture of the gear. In the circumstances I'll impose a fine of €500 together with the confiscation of the catch which is 344960 and the gear of 55,000."

Grounds of Appeal

24. The Notice of Appeal (to the extent that it relates to the sentence imposed) pleads:

"*The sentence imposed on the [appellant] by [the sentencing judge] at Cork Circuit Criminal Court on the 27th day of July 2015 erred in principle in imposing a sentence that was excessive and disproportionately severe in all the circumstances in that:*

(a) The learned sentencing judge failed to hear the submission that the value of the catch and the gear was not the value of the catch and the gear to the Master/Owner on the basis that there are costs associated with the catching of the said catch and gear which ought to be taken into account in determining the correct valuations of the catch and gear.

(b) The learned trial judge did not listen to the submission that in light of the implementation of Community Legislation into Law, Ireland has done so in a manner which is in breach of Article 49(3) of the Charter of Fundamental Rights of the European Union.

(c) The [appellant] intends to rely on such further or other grounds of appeal as may be argued by counsel acting on behalf of the [appellant] at the hearing of this [appeal]."

25. The transcript contains nothing to suggest that submissions along the lines mentioned in either paragraphs (a) or (b) of the particularisation of how the sentence was said to be excessive and disproportionately severe were made to the sentencing judge. Neither does it reveal that any evidence was adduced before the court below concerning a mismatch between the value of the catch and gear as assessed by the State's witness and the true value of the catch and gear to the Master/Owner of the fishing vessel. On the contrary, it was confirmed to the sentencing judge by the solicitor for the appellant that the values suggested by the State's witness were agreed. In the circumstances, the particulars asserted in paragraph (a) of the Notice of Appeal would appear therefore to be totally without evidential support and misconceived as such; and to the extent that the particulars in both paragraphs (a) and (b) of the Notice of Appeal rely on asserted failures by the sentencing judge to engage with specified submissions allegedly made on behalf of the appellant, both grounds are problematic in the absence of any record confirming that such submissions were in fact made.

26. The appeal will therefore be approached on the basis that it rests solely on a generic complaint that the sentence imposed was excessive and disproportionately severe. Before considering the legal issues as they have crystalised for determination by us, it is necessary to consider some of the legislative background (both European and domestic), and to place it in context having regard to relevant policy.

The Common Fisheries Policy

27. The establishment of the Common Fisheries Policy (CFP) predates Ireland's accession to the European Communities (the EEC, the ECSC and Euratom) in 1972. The CFP originally formed part of the common agricultural policy but gradually developed a separate identity as the EEC evolved. It was established in 1970 by the original six EEC Member States by means of Council Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry. As new member states joined the European Communities, and the CFP grew in complexity and scope, it came to be recognised that in order for the CFP to be successful it required an efficient control system to ensure that the rules of the CFP would be applied and implemented in practice.

28. Although the conservation of marine biological resources under the CFP is an area in which the then EEC had, and the present day EU has, exclusive competence, the establishment and implementation of necessary associated control systems are conceived of as being a national competence. Thus Member States are responsible for controlling their fishing and related activities in each of their roles as flag, coastal, port and market states, while the EU Commission is tasked with verifying that the Member States are fulfilling their responsibilities.

29. A Community wide fisheries control system, to be implemented by the individual Member States, was first established in 1982 by Council Regulation (EEC) No 2057/82, of the 29th of June

1982, establishing certain control measures for fishing activities by vessels of the Member States ("the 1982 Control Regulation"). The 1982 Control Regulation was amended several times before being repealed and replaced by Council Regulation (EEC) No 2241/87 ("the 1987 Control Regulation") which in turn was revised many times, and substantially so by Council Regulation (EEC) No 2847/93, of the 12th of October 1993, establishing a control system applicable to the common fisheries policy ("the 1993 Control Regulation"), which repealed the 1987 Control Regulation with effect from the 1st of January 1994.

30. The 1993 Control Regulation was in force when Ireland enacted the Sea Fisheries and Maritime Jurisdiction Act, 2006 ("the Act of 2006"), s. 28(1) and (5) of which provided (until later amended / impacted by the Sea-Fisheries (Miscellaneous Provisions) Act 2022 ("the Act of 2022") and the European Union (Sea-Fisheries and Maritime Jurisdiction Act 2006) (Amendment) Regulations 2022 (S.I. No. 407 of 2022) ("the Regulations of 2022")) that:

> "(1) A person guilty of an offence committed on board a sea-fishing boat under a provision of—
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> (a) Chapter 2 specified in column (2) of Table 1, or
>
> (b) the Act of 2003 specified in column (2) of Table 2,
>
> is liable, on conviction on indictment, to the fine specified in column (3) of that Table at the reference number at which that provision is specified in respect of the category of sea-fishing boat mentioned in that column and to the forfeiture specified in subsection (5).
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> ….
>
> (5) Where a person is convicted on indictment of an offence specified in a Table, in addition to any fine the court may impose under this section—
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> (a) in the case of a conviction under section 8 or 9, it may order the forfeiture of all or any fish and fishing gear found on the boat to which the offence relates, or
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> (b) in the case of a conviction under any other provision mentioned in a Table, 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."

31. The 1993 Control Regulation was again subject to regular amendments until it was in turn substantially overhauled and repealed and replaced by Council Regulation (EC) No 1224/2009, of the 20th of November 2009, establishing a Community control system for ensuring compliance with the rules of the common fisheries policy ("the 2009 Control Regulation").

32. The 2009 Control Regulation was in force when the offence the subject matter of these proceedings was committed and when the appellant was sentenced. Section 28 of the Act of 2006 had not at that stage been amended in any way however. As mentioned at paragraph 30 above, that section would subsequently be amended or impacted both by the Act of 2022 and the Regulations of 2022, the effect of which (to the extent relevant here) was to provide that where a person who is convicted of an offence to which subsection (5)(b) applies demonstrates that the mandatory forfeiture required by the subsection concerned is disproportionate, the court may in those exceptional circumstances adjust, modulate or mitigate the extent of the mandatory forfeiture order. However, those statutory changes were not in place at the time of either the commission of the offence with which we are concerned or of the appellant's sentencing.

33. Articles 89 and 90 of the 2009 Control Regulation merit consideration in detail. They appear in Title VIII of the instrument under the major heading "Enforcement".

34. Article 89 which is headed "Measures to ensure compliance, provides in paragraphs 1 to 3 thereof:

> 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.
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> 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.
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> 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.

35. Article 90, which is headed "Sanctions for serious infringments", provides (to the extent relevant):

> "1. In addition to Article 42 of [Council] Regulation (EC) No 1005/2008 [of the 29th of September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing] the following activities shall also be considered as serious infringements for the purpose of this Regulation depending on the gravity of the infringement in question which shall be determined by the competent authority of the Member State, taking into account criteria such as the nature of the damage, its value, the economic situation of the offender and the extent of the infringement or its repetition:
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> > (a) [not relevant];
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> > (b) [not relevant];
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> > (c) the failure to land any species subject to a quota caught during a fishing operation, unless such landing would be contrary to obligations provided for in the rules of the common fisheries policy in fisheries or fishing zones where such rules apply.
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> 2. Member States 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, in accordance with the range of sanctions and measures provided for in Chapter IX of Regulation (EC) No 1005/2008.
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> 3. Without prejudice to Article 44(2) of Regulation (EC) No 1005/2008, the Member States shall impose a sanction that is effectively dissuasive and, as appropriate, calculated on the value of the fisheries products obtained by committing a serious infringement.
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> 4. In fixing the sanction, the Member States shall also take into account the value of the prejudice to the fishing resources and the marine environment concerned.

5. Member States may also, or alternatively, use effective, proportionate and dissuasive criminal sanctions.

6. The sanctions provided for in this Chapter may be accompanied by other sanctions or measures, in particular those described in Article 45 of Regulation (EC) No 1005/2008."

36. In outline written submissions filed on 15th March 2019 the appellant sought to make the case that the confiscation and forfeiture of all catch and gear on board the vessel concerned, which was stated to the sentencing judge by the prosecution to be an automatic consequence (by virtue of s.28(5)(b) of the Act of 2006), of conviction of an offence contrary to s.14 of the Act of 2006, being the offence for which the appellant faced sentencing, was not required by the European Council regulatory regime comprised by the 2009 Control Regulation, and in particular Articles 89 and 90 thereof. Further, it was claimed, that such confiscation and forfeiture offended the principal of proportionality under the treaties of the European Union and Article 49 (3) of the Charter of Fundamental Rights of the European Union ("the Charter").

37. In circumstances where the 2009 Control Regulation was said to be directly effective, and asserted by counsel for the appellant to be *acte clair* in regard to the application of the principle of proportionality in EU law to the domestic statutory provision at issue, namely, s.28(5)(b) of the Act of 2006, the Court of Appeal was asked to find that s.28(5)(b) of the Act of 2006 was not in conformity with EU law, and as such *ultra vires* such law. The court was asked to quash the sentence at first instance on the basis that the sentencing judge, and indeed the parties, had proceeded upon an erroneous understanding of the legal position, and to disapply s.28(5)(b) of the Act of 2006 in any resentencing as being not in conformity with EU law.

38. It was further submitted that in the event that the court was not satisfied that the position was *acte clair* in regard to the application of the principle of proportionality in EU law to the provision at issue, the court should consider making a preliminary reference to the CJEU.

39. In an outline written submission on behalf of the respondent filed on 19 July 2019 the respondent contested that s.28(5)(b) of the Act of 2006 was not in conformity with EU law, and the 2009 Control Regulation was *acte clair* in regard to the application of the principle of proportionality in EU law to that domestic statutory provision.

40. Following these submissions the Court of Appeal determined that, notwithstanding the terms of the 2009 Control Regulation, it did not regard the position as being *acte clair* in regard to how the principle of proportionality in EU law impacted s.28(5)(b) of the Act of 2006, and as to whether that provision could be regarded as being in conformity with EU law, or otherwise. In the circumstances the Court of Appeal decided on the 21st of January 2020 to stay the proceedings and to make a preliminary reference to the CJEU pursuant to Article 267 TFEU.

The Preliminary References

41. In its request for a preliminary ruling the Court of Appeal referred the following question:

"*In the context of the implementation of the Common Fisheries Policy and of the provisions of Article 32 of* [Council Regulation (EC) No 850/98]*, 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* [the 2009 Control Regulation], *and specifically Articles 89*

and 90 thereof, and the principle of proportionality under the Treaties … and Article 49(3) of the [Charter]?"

42. The CJEU delivered its judgment in response to the reference on the 11th of February 2021 i.e., the judgment in *KM No 1*. It noted that it was clear from the 2009 Control Regulation, read in the light of recital 2 thereof, that, given the fact that the success of the common fisheries policy involves implementing an effective system of control, that regulation seeks to establish a system for control, inspection, and enforcement with a global and integrated approach in accordance with the principle of proportionality, so as to ensure compliance with all the rules of the common fisheries policy in order to provide for the sustainable exploitation of living aquatic resources by covering all aspects of this policy. It emphasised that in that connection, recital 38 of the 2009 Control Regulation states that the absence of dissuasive, proportionate and effective sanctions in certain Member States reduces the effectiveness of controls and that, indeed, the obligation on the Member States to ensure that sanctions which are effective, proportionate and a deterrent are imposed for infringements of the rules of the common fisheries policy is of fundamental importance.

43. It stated that in that context Articles 89 and 90 of the 2009 Control Regulation give the Member States the responsibility of ensuring that appropriate measures are taken to penalise infringements of the rules of the common fisheries policy. Without requiring particular sanctions, those articles lay down certain criteria that the Member States must take into account and the principle that the sanctions must be effective, proportionate and dissuasive. Those criteria are discussed in paragraphs 30 to 34 inclusive of the judgment, which then goes on to state that it follows that, within those limits as resulting from Articles 89 and 90, the choice of sanctions is left to the discretion of the Member States.

44. The CJEU then recalled that, according to settled caselaw, in the absence of harmonisation at EU level in the field of the sanctions applicable, the Member States retain the power to choose the sanctions which seem to them to be appropriate. However, the Member States must exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality. In particular, it stated, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation. Furthermore, the severity of the sanctions must be commensurate with the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality. The judgment in the case of *Chmielewski*, C-255/14, at paragraphs 21 to 23 inclusive, was referenced in support of these statements.

45. The CJEU went on to state that while it was for the Irish Court of Appeal to decide whether, in this instance, in relation to the infringement committed by the appellant, the mandatory forfeiture of catches and prohibited or non-compliant fishing gear, in addition to a fine, was proportionate to the attainment of the objective legitimately pursued by the prohibition laid down in Article 32 of Council Regulation (EC) No 850/98, relating to grading equipment, the CJEU *"may provide it with all the criteria for the interpretation of EU law which may enable it to determine whether that is the case."*

46. The CJEU then went on to provide the necessary criteria in paragraph's 40 to 56 inclusive of the judgment. Rather than quoting them verbatim the following represents a summary of them:

- The national court should examine whether the severity of the sanction provided for by the national legislation exceeds the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question (para 40 of *KM No 1*);
- The national court should in particular verify that for persons engaging in fishing activity and related activities, there is a serious risk that infringements of the rules of the common fisheries policy will be detected and offenders will have sufficiently severe sanctions imposed on them (para 41 of *KM No 1*);
- The national court should bear in mind that the prohibition laid down in Art 32 of Council Regulation (EC) 850/98, relating to grading equipment, prohibiting such equipment from being carried or used on board unless it ensures the immediate freezing of catches and does not allow the return of marine organisms to the sea, has the objective in particular of preventing a practice that consists in keeping the most profitable species and returning the other species to sea in order to increase the value of catches, a practice which is prohibited in Art 19a of that regulation. In this way, it further seeks to prevent the risk of the non-reporting of certain quantities of discarded dead fish that are therefore not taken into account in the quota uptake, resulting in a risk of overfishing; and, to gradually eliminate the discarding into the sea of unwanted catches in order to ensure the long-term environmental sustainability of fishing activities (paras 42 & 43 of *KM No 1*);
- The national court should also bear in mind that the purpose of the mandatory forfeiture of catches and prohibited or non-compliant fishing gear appears to be such as to deter the persons concerned from infringing the (aforementioned) prohibition by depriving them of the unlawfully acquired profits that they could otherwise enjoy and of the possibility of continuing to use such equipment (para 44 of *KM No 1*). (We feel it appropriate to interject here to say that it may be relevant that the mandatory forfeiture of fishing gear provided for in the Irish legislation is not confined to prohibited or non-compliant fishing gear. It extends to *"all or any … fishing gear found on the boat to which the offence relates"*);
- The CJEU points out to the national court that (mandatory) forfeiture of catches has the effect of depriving the persons responsible for the infringement of the undue economic benefit derived from that infringement, which a fine alone cannot ensure. The CJEU further says that as regards the (mandatory) forfeiture of prohibited or non-compliant gear which is on board a fishing vessel for the purposes of carrying out an unlawful activity, *"it must be stated that that mandatory forfeiture constitutes an effective sanction that is proportionate to the objective pursued by the legislation infringed"* (para 45 of *KM No 1*);
- Noting that Art 90 of the 2009 Control Regulation provides that the sanctions provided for therein may be accompanied by other sanctions or measures, such as the confiscation of prohibited fishing gear, catches or fishery products (para 46 of *KM No 1*); and further noting that in KM's case he received a fine of €500 whilst the catch on board was worth €344,000 and the non-compliant fishing gear on board was valued at €55,000; and further noting the maximum fines that had been provided for under the Irish legislation (€10,000,

€20,000 or €35,000 depending on the size of the vessel) (para 47 of *KM No 1*); the CJEU observed that *"[i]f those fines were imposed as the sole sanction for that type of offence, they might not effectively deprive those responsible of the economic benefit derived from their infringement. Thus, such a sanction would be neither effective nor dissuasive"* (para 48 of *KM No 1*). (We feel it appropriate to comment in passing that the CJEU's understanding that the value of the prohibited or non-compliant fishing gear was €55,000 may have been incorrect because, although the CJEU seemingly did not realise it, the valuation figure provided related to all of the fishing gear liable to mandatory forfeiture, which in principle under the applicable domestic legislation included both legal gear and prohibited or non-compliant gear. However, no breakdown of the valuation was provided at any stage by either side, either to the sentencing court, to the Court of Appeal, or to the CJEU, seeking to differentiate between that applicable to legal fishing gear and that applicable to prohibited or non-compliant fishing gear);

- The national court was counselled that in order to assess the proportionality of the sanction, account should also be taken of the relationship between the amount of the fine that may be imposed and the economic benefit derived from the infringement committed, in order to deter offenders from committing such an infringement, and of the value of the fisheries products obtained by committing a serious infringement (para 49 of *KM No 1*);
- Furthermore, if, as in these proceedings, a fine is imposed on the master of the fishing vessel, who is not its owner, the latter could, first, not perceive any dissuasive effect resulting from that sanction and, second, continue to enjoy the economic benefit of the catches (unlawfully) acquired and to possess, with a view to its possible use, the (prohibited) equipment (para 50 of *KM No 1*);
- Noting (inter alia) that under the Irish legislation the (potential) sanction varies in relation to the seriousness of the infringement, with forfeiture of catches and prohibited or non-compliant fishing gear mandatory for certain offences but not for others (para 51 of *KM No 1*), the CJEU observed at para 52 of their judgment:;
  "Thus, in the light of the seriousness of the infringement and of the objective pursued in Article 32 of Regulation No 850/98, and subject to verifications concerning the overall level of the sanctions and accompanying sanctions under Irish law, which it is for the referring court to carry out, the mandatory forfeiture of catches and prohibited or non-compliant fishing gear is necessary in order to deprive those responsible of the economic benefit derived from their infringement. It also appears to have a dissuasive effect."
- They added that such a sanction was consistent with the criteria laid down in Article 89(2) of the 2009 Control Regulation, stating that those responsible must be effectively deprived of the economic benefit derived from their infringement and that the sanctions must be capable of producing results proportionate to the seriousness of such infringements, thereby effectively discouraging further offences of the same kind (para 53 of *KM No 1*);
- The CJEU further counselled the national court that it must assess the possible impact of the sanction on the offender as regards his or her legitimate right to exercise a profession, in accordance with Article 89(2) of the 2009 Control Regulation. They noted the submissions of KM in that regard (submissions which, we would observe, were made to the

CJEU but which were not made to the sentencing judge), but stated that it was for the national court to consider those matters (para 54 of *KM No 1*);

- Finally, the national court was advised that although Article 90(1) of the Control Regulation must be read in conjunction with recital 39 of that regulation, *"it should be noted that the requirement that sanctions introduced by the Member States must be proportionate does not mean that, in applying Article 90(1), those authorities must take account of the specific individual circumstances of each case or that they necessarily have to take account of intention or recidivism."* (The judgment in the case of *Chmielewski*, C-255/14, at paragraphs 28 and 29, was referenced in support of these statements) (para 55 of *KM No 1*);
- In conclusion, (at para 56 of *KM No 1*) the question referred was answered as follows: *"Articles 89 and 90 of* [the 2009 Control Regulation] *read in the light of the principle of proportionality enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, subject to the verifications which it is for the referring court to carry out, they do not preclude a national provision which, to penalise a breach of Article 32 of Council Regulation (EC) No 850/98 provides for not only the imposition of a fine but also the mandatory forfeiture of the catches and the prohibited or non-compliant fishing gear found on board the vessel concerned."*

47. Although the Court of Appeal regarded the judgment in *KM No 1* as helpful, and was grateful for its assistance, there was concern that the CJEU, which had declined to conduct an oral hearing, and had proceeded without an Advocate General's opinion, had ostensibly not appreciated that the mandatory forfeiture of fishing gear provided for in the Irish legislation was not confined to prohibited or non-compliant fishing gear, but extended to *"all or any … fishing gear found on the boat to which the offence relates",* and that they had offered their views on a mistaken understanding that it was limited to prohibited or non-compliant fishing gear. Further, it was unclear whether the CJEU had appreciated that, in the present case, the national sentencing court did not find that the offence was a 'serious infringement' (within the meaning of Council Regulation (EC) No 1005/2008), and that, in that context, the prosecution of an offence on indictment, involving a jury, does not necessarily reflect the seriousness of the offence. In the circumstances this Court decided to further stay the proceedings and to make a further reference to the CJEU seeking certain clarifications.

48. The further reference reiterated the single question that had been initially asked, and added two further questions:

> *"(1) In the context of the implementation of the Common Fisheries Policy and of the provisions of Article 32 of* [Council Regulation (EC) No 850/98]*, 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* [the 2009 Control Regulation], *and specifically Articles 89 and 90 thereof, and the principle of proportionality under the Treaties … and Article 49(3) of the* [Charter]?
>
> *(2) Do the terms of Article 89 and/or 90 of* [the 2009 Control Regulation*], and the*

requirements of proportionality under the Charter and EU law, require the sentencing court to have a discretion to adjust, modulate or mitigate the extent of the forfeiture order of the catch and gear in particular having regard to the circumstances referred to in Articles 89 and 90 of [the 2009 Control Regulation]*?*

(3) Having regard to the potential impact on the livelihood of a Master as a consequence of an automatic mandatory forfeiture of all catch and gear, can a provision of national law such as section 28(5)(b) of the [Act of 2006] *which does not allow for a national court to examine any impact on the right to earn a livelihood of a person convicted on indictment of an offence contrary to that section and the Regulation (save in the context of considering what fine might be appropriate) be considered compatible with the terms of the Regulation, the Charter and EU law, having rcgard to the fundamental right of the Master to exercise his or her profession?*

49. Article 99 of the CJEU's Rules of Procedure provides that the Court may, in particular, where it considers that the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, decide at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to rule by reasoned order. The CJEU opted to rule on the second request for a preliminary ruling by reasoned order, and did so on the 1st of March 2022 in *KM No 2*.

50. In *KM No 2* the CJEU, in considering the questions referred, acknowledged (at paras 19 and 20 thereof) the concerns that had given rise to the second reference, stating:

"19 In the present case, the referring court states that the applicable national legislation provides not only for the mandatory forfeiture solely of prohibited or non-compliant fishing gear and of catch obtained as a result of the use of that gear, but also the mandatory forfeiture of all catch and all fishing gear found on board the vessel, without any causal link being required under that legislation between the offending behaviour and the subject matter of the confiscation and forfeiture order.

20 Furthermore, the referring court observes that, in the present case, the national sentencing court did not find that the offence was a 'serious infringement' within the meaning of Regulation No 1005/2008, and states that, in that context, the prosecution of an offence on indictment, involving a jury, does not necessarily reflect the seriousness of the offence. The referring court also states that the mandatory forfeiture of all catch and all fishing gear found on board the vessel concerned applies irrespective of the seriousness of the infringement of the provisions of that regulation."

51. The CJEU then stated that in that regard it was for the referring court, in accordance with the assessment criteria provided by the CJEU in its earlier judgment of the 11th February 2021, *K. M. (Sanctions imposed on the master of a vessel)* C-77/20, in paragraphs 40 to 56, to assess whether, in relation to the infringement committed by K. M., the mandatory forfeiture of all catch and all gear found on board the vessel, in addition to a fine, is proportionate to the attainment of the objective legitimately pursued by the prohibition, laid down in Article 32(1) of Regulation No 850/98, relating to grading equipment – (para 21 of *KM No 2*).

52. Furthermore, the referring court should bear in mind that, as was apparent from paragraphs 54 and 55 of the CJEU's earlier judgment, it is for the referring court to assess the possible impact of the sanction on the offender as regards his or her legitimate right to exercise a profession, in accordance with Article 89(2) of the 2009 Control Regulation. In connection with that assessment, that court must also take into consideration the impact of the sanction on the offender's right to earn a livelihood - (para 22 of *KM No 2*).

53. They added that it is only following that assessment that the referring court would be required, if necessary, to examine the need to adjust, modulate or mitigate the extent of the forfeiture order in respect of the catch and the fishing gear.

54. By way of interpretative guidance, and in a situation where this Court had found it necessary to make a second reference, we were reminded that, while the CJEU upon receiving a preliminary reference necessarily takes into account the legal and factual context of the dispute in the main proceedings, it does not itself apply EU law to that dispute. Rather the interpretation provided by the Court is usually expressed *in abstracto,* and it is for the referring court to draw case-specific conclusions. However, a principle to be borne in mind was that *"the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States"*. That principle requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States - (paras 24 and 25 of the reasoned opinion).

55. In those circumstances, it was for the the referring court, in the light of the interpretative guidance set out, to assess specifically whether the national legislation at issue in the main proceedings is compatible with Articles 89 and 90 of [the 2009 Control Regulation], read in the light of the principle of proportionality enshrined in Article 49(3) of the Charter.

56. The CJEU's formal ruling on the second reference was then expressed in these terms:

> *"Articles 89 and 90 of* [the 2009 Control Regulation], *read in the light of the principle of proportionality enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is for the national courts to assess, in accordance with the assessment criteria provided by the Court in the judgment of 11 February 2021, K. M. (Sanctions imposed on the master of a vessel) (C-77/20, EU:C:2021:112), whether, in relation to the infringement committed, including its seriousness, the mandatory forfeiture of all catch and all fishing gear found on board the vessel concerned is proportionate to the attainment of the objective legitimately pursued by the prohibition, laid down in Article 32(1) of* [Council Regulation (EC) No 850/98], *relating to grading equipment, and to examine, if necessary, the need to adjust, modulate or mitigate the extent of the forfeiture order in respect of the catch and the fishing gear."*

Submissions received in light of the preliminary rulings

57. Both sides were invited to make further written submissions on the appeal in light of the contents of both the CJEU's initial judgment and it's subsequent reasoned opinion. The Court then convened a further oral hearing which took place on the 20th of October 2022. The submissions received, both oral and written, may be summarised as follows:

Submissions on behalf of the appellant

58. Counsel for the appellant submitted that, having regard to *KM No 1,* and the CJEU's subsequent reasoned opinion in these proceedings, *KM No 2*, there is an obligation on the Court of Appeal to assess the compatibility of the domestic legislative provision in controversy, namely s.28(5)(b) of the Act of 2006 with Article 89 of the 2009 Control Regulation. He submitted that it was not necessary to consider its compatibility with Article 90 of the same regulation as it appeared to be accepted that Article 90 does not apply in the circumstances of the present case. He further submitted that given what he described as *"the findings of the CJEU"* a conclusion that s.28(5)(b) of the Act of 2006 is compatible with the said Article 89 is simply not open to this Court.

59. Counsel for the appellant further submitted that his client *"was precluded from adducing any evidence as regards the automatic forfeiture of the catch and the gear, all catch and all gear in the Circuit Court",* and that therefore the sentence should be quashed.

60. He further suggested that in any resentencing, whatever court was to do this, should disapply s.28(5)(b) of the Act of 2006 on the basis that it is not compatible with Article 89 of the 2009 Control Regulation. The effect of such a disapplication would be that the Court would be confined to imposing a fine of up to the maximum specified by statute as being appropriate to a vessel of the length of the Wiron 5. Although the transcript of the sentencing hearing suggests that a figure of €235,000 was mentioned, it is accepted that that represents a typo and that the Circuit Court was in fact told, without demur, that the maximum potential fine was €35,000.

61. While the appellant's primary submission was that a disapplication would leave any re-sentencing court with only the possibility of imposing a fine, his alternative or fall-back position (as understood by the Court of Appeal) was acceptance that if the re-sentencing court considered that, by virtue of the directly effective status of Article 89, it could in the exercise of its discretion impose such level of forfeiture of catch and of the prohibited or non-compliant fishing gear as was proportionate in the circumstances of the case having regard to the criteria specified by the CJEU, it could and should proceed to do so.

62. Counsel for the appellant submitted that in the event that the Court of Appeal was disposed to quash the sentence imposed by the court below, then, exceptionally, the Court of Appeal should not itself proceed to resentence the appellant but rather should remit the matter back to the Circuit Court for re-sentencing. The basis for this request was that the process of verification spoken of by the CJEU, and the conducting of the required proportionality test, simply did not take place before the court below in circumstances where that court had been incorrectly given to believe that in no circumstances could the court have any discretion with respect to the forfeiture of catch and fishing gear. Counsel for the appellant informed the Court of Appeal that the sentencing judge had asked six times if he had any discretion in that regard and he was incorrectly told by the prosecution (admittedly supported in that regard by the defence) that the court had no discretion. In the circumstances, the evidential foundations that would be required by a sentencing court at first instance, and any re-sentencing court, to enable it to conduct the necessary verification exercise and proportionality assessment were not in place, and the justice of the case therefore required that the appellant have the matter remitted to the Circuit Court so that necessary further evidence could be adduced.

63. A further reason proffered by counsel for the appellant for suggesting that it should be done in that way, rather than the appellant perhaps seeking to adduce additional evidence before the Court of Appeal (assuming that could be permissibly done, and we express no view on that), is that it would mean that the appellant would have a possible right of appeal in respect of the verification process and assessment of proportionality at first instance, which he would otherwise be denied.

Submissions on behalf of the respondent

64. Counsel for the respondent disputed counsel for the appellant's assertion that the CJEU had imposed an obligation on this Court to assess the compatibility of the relevant domestic provision with Article 89 of the 2009 Control Regulation. He stressed that that is not the relationship between this Court and the CJEU, and stated that the CJEU had placed no obligation on this court to do anything. It had merely interpreted issues of European law, and those interpretations obviously fed into the national context, but the national context was a matter for this Court and for this jurisdiction. There was nothing in European law, let alone in *KM No 1* and the subsequent reasoned opinion, which disrupted that relationship.

65. Great emphasis was laid by counsel for the respondent on the fact that there had been no application to the Circuit Court judge to disapply s.28(5)(b) of the Act of 2006, insofar as it relates to mandatory forfeiture of all catch and fishing gear on the basis that it is not compatible with Article 89 of the 2009 Control Regulation. The point was made that the jurisdiction of the Circuit Court to disapply nonconforming domestic legislation is the same as this Court's jurisdiction. Further, the appellant had never sought to make the case in the court below that the domestic statutory provision requiring forfeiture of all of his catch and fishing gear had gone beyond what was necessary such that it was disproportionate to the legitimate aim being pursued by relevant legislation, both domestic and European; or that it would impact disproportionately on his legitimate right to exercise his profession, and his right to earn a livelihood. Indeed, no evidence was adduced concerning the financial circumstances of the master of the vessel, let alone the owner. It was submitted that nothing was put in the balance to suggest that the effect of the mandatory forfeiture would be to disproportionately impact on the rights of the appellant.

66. Counsel for the respondent submitted that the CJEU had not found the domestic statutory provision in controversy to be incompatible with either Article 89 or 90 of the 2009 Control Regulation. It had in effect been asked, "is the provision in Irish law incompatible with the 2009 Control Regulation and/or the Charter of Fundamental Rights?". The answer had come back (in counsel's words), "not necessarily." In counsel for the respondent's submission this court was not being required to conduct a proportionality assessment. The CJEU had indicated that in a hypothetical case where the point was raised properly and somebody had said that a particular provision of Irish law offended, because of their personal circumstances, a provision of European law then the point might be engaged. But it cannot be engaged on an academic basis. The appellant had not raised the point at first instance, and it was submitted he could not rely on the point now on appeal in the absence of having done so, and having laid an appropriate evidential foundation in the court below.

67. Counsel for the respondent referenced the recent statutory amendment to s. 28 of the Act of 2006 (effected by the Regulations of 2022, reg. 2) which, with effect from the 27th of July 2022, inserted a new subsection 6A into that section, which provides:

> "(6A) Where a person who is convicted of an offence to which *subsection …, (5)(b)* or … applies demonstrates that the mandatory forfeiture required by the subsection concerned is disproportionate, the court may in those exceptional circumstances adjust, modulate or mitigate the extent of the mandatory forfeiture order. In making this assessment the court shall have regard to the requirement that the severity of the sanctions must be commensurate with the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect."

68. It was submitted that there was a strong presumption against retrospective legislation, and in counsel's contention it had no application in the present case. Moreover, and in any case, it was an ameliorating provision. It was submitted that it covers a situation where somebody established following argument that mandatory confiscation would be disproportionate. In those circumstances, the provision ameliorates that and allows for a lesser degree of forfeiture. However, the argument has to have been made. The fundamental problem which the appellant has, says counsel for the respondent, is that even if the provision were in force, and applicable in his case (which the respondent says it is not) he never sought to make the argument that the mandatory confiscation of all of his catch and gear would be disproportionate.

69. The appellant cannot be allowed, says counsel for the respondent, to come before the Court of Appeal and to be heard to say that the mandatory disqualification provisions in the Act of 2006 *"might have"* acted disproportionately on him, and to contend that that provides him with sufficient *locus standi* for him to ask this Court (or another court, as the case might be) to disapply those provisions, in a situation where no evidence had been adduced at any stage to show that the provisions in question actually impacted disproportionately upon him.

The Court's Decision.

70. Although complex issues of European law were raised before us, and this Court felt it necessary to refer certain matters to the CJEU, and now has the benefit of the CJEU's initial judgment in response dated the 11th of February 2021, and its subsequent reasoned opinion dated the 1st of March 2022, the case remains ultimately an appeal against severity of sentence.

71. A precondition for any intervention by the Court in such an appeal is that the appellant should demonstrate the existence of an error of principle, or error of law, on the part of the sentencing court at first instance. We are satisfied that the appellant in this case has done that. The sentencing judge at first instance incorrectly approached sentencing on the basis that he had absolutely no discretion with respect to whether or not to impose a mandatory forfeiture of all of the appellant's catch and fishing gear in sentencing him for the offence of which he had been convicted at trial. It is now clear, however, that he was obliged by virtue of Article 89 of the 2009 Control Regulation, a directly effective provision of EU law, to be read in the light of Article 49(3) of the Charter, to assess whether, in relation to the infringement committed, including its seriousness, the mandatory forfeiture of all catch and all fishing gear found on board the vessel concerned was proportionate to the attainment of the objective legitimately pursued by the

prohibition laid down in Article 32(1) of Council Regulation (EC) No 850/98, relating to grading equipment, and to examine, if necessary, the need to adjust, modulate or mitigate the extent of the forfeiture order in respect of the catch and the fishing gear.

72. The sentencing judge at first instance is not to be personally or professionally criticised for the error in his approach, because he was incorrectly informed by prosecuting counsel, who in turn was supported in what he was saying by the solicitor for the defendant, that he had, as a matter of law, no possibility of being able to exercise any discretion in the matter of the forfeiture of catch and fishing gear. All concerned were mistaken. In fairness to them the possibility that s.28 (5)(b) of the Act of 2006, which imposed the requirement, might not be compatible with Article 89 of the 2009 Control Regulation does not appear to have occurred to anybody at that time. The bottom line, however, is that the sentencing judge was invited to proceed on an incorrect legal basis.

73. The question that then arises is whether the error of principle that has been identified led, or may have led to, the imposition of an incorrect sentence, and if so, whether it is appropriate that we should quash the sentence imposed by the court below.

74. As has been rightly pointed out by counsel for the respondent, the CJEU has not found that s.28 (5)(b) of the Act of 2006 is necessarily incompatible with Article 89 of the 2009 Control Regulation. In the words of counsel for the respondent it has said, *"not necessarily"*; or in other words that it may or may not be compatible, depending on circumstances. What the CJEU has very clearly said is that a national court concerned now with that issue must seek to verify, using the helpful criteria specified by the CJEU in *KM No 1* and *KM No 2*, whether the measures which it is being asked to apply are effective, proportionate and dissuasive.

75. But for the fact that s.28(5)(b) of the Act of 2006 (in its pre-amended state) is wider in scope than the provisions in EU law which it was supposed to give effect to, or mirror, we think that, in light of the guidance provided by the CJEU, a person in the position of this appellant would face something of an uphill battle in seeking to make the case before us, or another relevant court, that that provision had gone beyond what was necessary such that it was disproportionate to the legitimate aim being pursued by relevant EU legislation, (whatever about whether it could and would impact disproportionately on his legitimate right to exercise his profession, and his right to earn a livelihood).

76. However, the appellant in this case may be on stronger ground (although we do not wish to express a concluded view on the issue as it is unnecessary for us to do) in a situation where s.28(5)(b) of the Act of 2006 (in its pre-amended state) is arguably wider in scope than what was envisaged by the provisions in EU law that it was supposed to give effect to, or mirror. It is clear from the approach of the CJEU in *KM No 1*, and from the relevant EU instruments which are reviewed and quoted in that judgment, that mandatory forfeiture of **prohibited or non-compliant gear** (our emphasis), is (ignoring other considerations) to regarded as constituting an effective sanction that is proportionate to the objective pursued by the legislation infringed (in this instance Article 32 of Council Regulation (EC) No 850/98) – see *KM No 1*, para 45. However, s.28(5)(b) of the Act of 2006 provides for mandatory forfeiture not just of catches and of prohibited or non-compliant gear, but extends to *"all or any … fishing gear found on the boat to which the offence relates."* We consider that in these circumstances, and quite apart from any issue concerning whether the forfeiture envisaged under the Irish legislation would impact

disproportionately on the appellant's right to earn a livelihood or to pursue his profession, that it is at least arguable that s.28(5)(b) of the Act of 2006 goes beyond what was necessary such that it was disproportionate to the legitimate aims being pursued by relevant EU legislation.

77. While noting the position taken by the respondent with respect to the failure of the appellant to raise a point in the court below about the possible incompatibility of s.28(5)(b) of the Act of 2006 with Article 89 of the 2009 Control Regulation and Article 49 (3) of the Charter, we consider that, in the unusual circumstances of there being a shared error in the court below as to the applicable law, the interests of justice require that the appellant should not be shut out from relying on it before this Court. We are disposed to allow it . The issue of proportionality was raised at a very early stage in this Court (albeit in quite general terms), following which arguments in that regard were developed with greater specificity, and there has been engagement with it from that early stage by the respondent's legal team, albeit that they maintained the position that we should not entertain a proportionality complaint in circumstances where it was not canvassed in the court below. We are satisfied that they are not prejudiced. The issue ultimately occupied a great deal of time in the course of these appeal proceedings. It is not something that was only raised late in the day.

78. Without having to decide the proportionality issue, we can indicate that we are sufficiently concerned about it to be able to say that the legal error into which the sentencing judge was inadvertently led was by no means therefore an inconsequential one. That being so, having regard to the real possibility (and we accept that on the present state of the evidence it can be put no higher than that) that a disproportionate sentence may have been imposed upon, and a consequential injustice done to, the appellant, we believe that it is appropriate to quash the sentence imposed by the court below. In order to do so we do not find it necessary to make an order disapplying s.28(5)(b) of the Act of 2006. Indeed in the absence of an actual finding of its incompatibility with Article 89 of the 2009 Control Regulation and Article 49(3) of the Charter it would be inappropriate to make a disapplication order at this point.

79. We note the submission made to us by counsel for the appellant that the appropriate order to make following upon the quashing of the sentence imposed by the court below is to remit the matter to the Circuit Court for resentencing. The Court's jurisdiction, and powers, at a sentencing appeal are set out in subsections (2) (3) and (4) of s.3 of the Criminal Procedure Act 1993.

80. The relevant subsections of s.3 read:

> (2) On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial.
>
> (3) The Court, on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may—
>
> > (a) where the appeal is based on new or additional evidence, direct the Commissioner of the Garda Síochána to have such inquiries carried out as the

Court considers necessary or expedient for the purpose of determining whether further evidence ought to be adduced;

(b) order the production of any document, exhibit or other thing connected with the proceedings;

(c) order any person who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings;

(d) receive the evidence, if tendered, of any witness;

(e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court.

(4) For the purposes of this section, the Court may order the examination of any witness whose attendance might be required under this section to be conducted, in a manner provided by rules of court, before any judge or officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court.

81. As can be seen, s.3 of the Act of 1993 does not make provision for a remittal to the court of first instance for a purpose such as that suggested by the appellant. We think that in the circumstances we must re-sentence the appellant. In doing so, we must impose a sanction that is effective, proportionate and dissuasive. The choice of sanctions has been left by the EU legislation to the discretion of the Member States. The provision in Irish law which provides for possible sanctions is s.28 of the Act of 2006. It provides both for a fine of up to €35,000 in the present case and, pursuant to subsection 5(b) thereof, for the mandatory forfeiture of all or any catches or fishing gear found on the boat to which the offence relates. It must be applied by us in re-sentencing unless, having carried out the verifications and the proportionality assessment commended as being necessary by the CJEU in *KM No 1* and *KM No 2*, we conclude that in order to be compliant with Article 89 of the 2009 Control Regulation and Article 49(3) of the Charter there is a need to adjust, modulate or mitigate the extent of the proposed s. 28(5)(b) forfeiture order in respect of the catch and the fishing gear. In order to effect any such adjustment, modulation or mitigation it would be necessary at that point to disapply s.28(5)(b) of the Act of 2006 to the extent that it requires mandatory forfeiture of all or any catches or fishing gear found on the boat to which the offence relates, and for the re-sentencing court to limit the extent of any proposed forfeiture of catch and fishing gear to what it considered was necessary to provide for a sanction that does not go beyond what is necessary in order to attain objectives legitimately pursued by the relevant legislation, but which at the same time is effective, proportionate and dissuasive. The Court of Appeal in re-sentencing will further be required to bear in mind the nature of the

infringement, including its seriousness, and possible impacts on the appellant as regards his legitimate right to exercise his profession and to earn a livelihood.

82. We consider that in the interests of justice the parties should be permitted in the context of any re-sentencing hearing to adduce such further evidence as they consider may be relevant to the issue of the proportionality of any forfeiture of catch and fishing gear, or that the court may need more generally for the purposes of arriving at a just and proportionate overall sentence.

83. Without intending to be prescriptive it is envisaged that such evidence could encompass from the appellant's side (i) the overall value of all and any fishing gear found on the boat to which the offence relates; (ii) the value of prohibited or non-compliant fishing gear found on the boat to which the offence relates; (iii) evidence concerning the appellant's employment and financial situation; (iv) evidence concerning potential impacts of any proposed forfeiture on his right to exercise his profession and right to earn a livelihood (v) mitigating evidence, if any, bearing on the individual culpability of the appellant in committing the said offence, and (vi) evidence concerning any other relevant personal circumstances of the appellant.

84. We might mention in passing that in paragraph 55 of *KM No 1*, the CJEU cautioned that the requirement that sanctions introduced by the member states must be proportionate does not mean that, in applying Article 90(1) of the 2009 Control Regulation, those authorities must take account of the specific individual circumstances of each case or that they necessarily have to take account of intention or recidivism. We would observe, however, that the appellant has argued that the present case concerns the application of Article 89 and not Article 90. That having been said, the respondent maintains that Article 90 may also be engaged having regard to the terms of Article 90(1)(c) of the 2009 Control Regulation and in circumstances where the evidence in the court below was that there was a failure to land species subject to a quota by virtue of the grading equipment setup on the Wiron 5. We consider that it will be a matter for this Court in the context of its resentencing to engage with and resolve that issue.

85. From the respondent's side there might perhaps be further evidence as to the prevalence of grading equipment infringements, the extent of the economic impact of such infringements, the implications for the CFP in terms of the shared efforts of member states to reduce overfishing and ensuring the long-term environmental sustainability of fishing activities of a failure to deter and adequately control grading equipment infringements, and the likely undue economic benefit derived, or that might have been derived, from the particular infringement detected in this case.

Conclusion

86. The appeal is allowed, and the sentence imposed by the Court below is hereby quashed.

87. The matter is adjourned pending receipt of further evidence to facilitate the required proportionality assessment and re-sentencing.