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No. 1

O. 58, r. 15



SUPREME COURT

Record No: 13-2019

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Date of Filing: 17TH JANUARY 2019

2. Title of the Proceedings: [As in the Court of first instance]

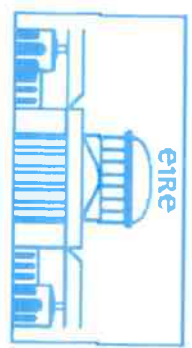
Pat Fitzpatrick and Michael J. Flannery

-v-

Minister for Agriculture, Food and the Marine and the Sea Fisheries Protection Authority

3. Name of Applicants : Pat Fitzpatrick and Michael J. Flannery

What was the applicant's role in the original case: Applicants



1254866254 533746



4. **Decision of Court of Appeal (where applicable):**

None – application for leave to appeal directly from High Court

Record No:

Date of Order:

Perfection Date:

Date of Judgment:

Names of Judges:

5. **Decision of the High Court:**

Record No: 2017/884JR

Date of Order: 18th December 2018 Perfection Date: 21st December 2018

Date of Judgment: 30th October 2018

Names of Judge(s): Ms Justice Úna Ní Raifeartaigh

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes No

6. **Extension of Time:**

Yes No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

The Order was perfected on the last day of Michaelmas term and delays were caused by the Christmas vacation. Further delay resulted from the fact that the Solicitor handling the case had a family emergency, meaning that he was out of his office from 17th December 2018 to 14th January 2019 with the result that he was not aware when the Order was perfected. There were additional

logistical difficulties in getting instructions as the applicants are fishermen and were at sea.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

The subject matter of the within appeal is asserted to be of general public importance for the following reasons:

1. **Background:** Council Regulation (EU) No. 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (the “Control Regulation”) provides, inter alia in Articles 14, 15 and 33 for a system of capture of data in respect of fishing outtake or exploitation of a fishery and the transmission of the same to the European Commission for control purposes. The fundamental element of this system is the fishing logbook, whereby each fisher records his catch, which is then reported to the national control authority. There are legal obligations on the fisher to ensure that the catch recorded is correct, and an obligation on the control authority to ensure that such fishing returns are accurate, with extensive powers of investigation available to the latter prescribed by the Control Regulation and criminal sanction for the former in case of misreporting. In the fishing area of Functional Unit 16 (FU16), which straddles the Porcupine Bank off the west coast of Ireland, the second Respondent, instead of ensuring the accuracy of the fishing logbooks so as to ensure that fishing outtake for the area is correctly measured, has supplanted

the logbook system established by the Control Regulation with its unilaterally devised system for calculation based on attributing the amount of fish caught in the said area as a proportion of the amount of time spent in that area. The first Respondent, instead of rejecting the figure reported to him by the second Respondent as being collected using a methodology not provided for by the Control Regulation, reported the figures to the European Commission.

2. The new methodology of the second Respondent for the calculation of fishing “outtake” (a term for the measurement of exploitation of a fishery for the amount of fish caught) is asserted to be a breach of the provisions of the Control Regulation, and therefore a breach of the Irish State’s obligations under European Union Law. The question raised has not been determined before now in Ireland or by the Court of Justice of the European Union.
3. The said methodology interferes, not just with the rights of the Applicants and fishermen under the Control Regulation, but also with the rights of all other fishers who fish the same quota as the Applicants. As such the impact of the decision is not just confined to the Applicants but to the broader fishing sector.
4. The new methodology being used by the second Respondent has the potential to be used across the fishing sector in circumstances where it now appears possible for the second Respondent to replace the method for the calculation of fishing outtake provided under the Control Regulation with its own unilateral methodology with potentially even greater effects on the legality of the regulation of fishing exploitation under European Union Law in the State.
5. The application of the Control Regulation by the Respondents diverges from the approach in other EU Member States.

Word count - 489

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Applicants respectfully repeat the matters referred to at paragraph 7 above.
2. In addition the Applicants argue that the appeal if accepted by this Honourable Court will necessitate a reference to the Court of Justice of the European Union ('CJEU') on the proper interpretation of certain provisions of the Control Regulation to dispose of the issues arising in these proceedings. The interests of justice require a speedy determination of the precise matters to be referred given the delay involved in any reference to the CJEU. That can be more readily achieved in this Honourable Court at present.

Word count - 99

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

The Applicants repeat the contentions at paragraphs 7 and 8 in respect of the issues at the heart of the appeal being of general public importance and that the interests of justice would be best served by an appeal to this Honourable Court and add the following:

1. The matters involved in the present proceedings have not been the subject of any determination by the Superior Courts in advance of this case.

2. The issues which arise in the Applicants' challenge to actions of the Respondents are matters which will require a determination by the Court of Justice of the European Union. To the knowledge of the Applicants, there is no existing case law from the CJEU on the particular issue, and a reference to that Court will be required. In the interests of the avoidance of delay and legal uncertainty, it is respectfully submitted that the matter should be admitted directly to the Supreme Court.
3. The fisheries sector is of significant importance to the Irish economy and the necessity for certainty in the control regime is such to warrant the appeal being heard directly by this Honourable Court.

Word count - 143

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing:

Yes

No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

As stated above the judgment has systemic consequences for the control regime applied to the fisheries sector and is therefore of considerable economic significance. In the absence of any guidance in the CJEU's jurisprudence and given that the case concerns the proper interpretation of a European Union Regulation, a reference to the CJEU will be required and therefore this Court is best placed to ensure a speedy resolution of the issues at present. Given the inherent delay in a reference to the CJEU a priority hearing is requested in order to accelerate the final determination of the proceedings.

Word count - 98

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

The matter concerned is that the second Respondent, instead of ensuring the accuracy of the fishing logbooks so as to ensure that fishing outtake for the area is correctly measured, has supplanted the logbook system established by the Control Regulation with a unilaterally devised system for calculation of fishing outtake based on attributing the amount of fish caught in the said area as a proportion of the amount of time spent in that area. The first Respondent, instead of rejecting the figure reported to him by the second Respondent as being collected using a methodology not provided for by the Control Regulation, reported the figures to the European Commission.

The question the Applicants would seek to have referred if the appeal is accepted is as follows:

Whether a body such as the Second named Respondent when performing its functions as single authority pursuant to Article 5(5) of Council Regulation No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy is entitled to disregard the data recorded and transmitted in accordance with Articles 14, 15 and 33 of that Regulation and to supplant that data using its own methodology for calculating fish outtake for the relevant fishing area?

Whether the terms “data” and “information” in, inter alia, articles 14, 15 and 33 of the Control Regulation can include such information as a body such as the Second named Respondent considers more accurate notwithstanding the failure by the said body to apply the instruments of control provided for in Regulation 1224/2009?

Whether a Member State is entitled or obliged to accept the methodology of a body such as the Second named Respondent when exercising its functions under Regulation 1224/2009 and in particular when reporting data under the said Regulation to the European Commission?

15. Legal Aid:

In the case of an application by a defendant from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same. N/A

Signed:

CONWAY SOLICITORS

(Solicitor for) the Applicant

Date:

17 JANUARY 2019

To be served on:

CHIEF STATE SOLICITORS OFFICE

(Solicitors for) Respondent(s)

Please file your completed form in:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7**

Appendix

Notice of Appeal

1. **Title of the Proceedings:** *[As in the Court of first instance]*

Pat Fitzpatrick and Michael J. Flannery

-v-

Minister for Agriculture, Food And the Marine

and the Sea Fisheries Protection Authority

2. **Grounds of Appeal:**

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

- i. The learned trial judge erred in law in finding that the second named Respondent was legally entitled to replace the figures reported in respect of the nephrops species caught within the fishing ground known as Functional Area 16 ('FU 16') in accordance with the system prescribed for calculating fishing outtake under Council Regulation (EU) No. 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (hereinafter the 'Control Regulation') with its own figures calculated on the basis of the "time spent in FU16".**
- ii. The learned trial judge erred in law in finding that the second named Respondent, in exercising its**

functions under the Control Regulation was entitled as a matter of law to disregard the outtake figures for nephrops fished in FU 16 reported in accordance with the requirements of the Control Regulation in favour of a methodology not provided for by the Control Regulation.

- iii. The learned trial judge erred in law in determining the correct or true interpretation of the term “data” or “information” when considering the information to be transmitted under the Control Regulation and ancillary instruments to the European Commission in respect of fishing outtake or yield.
- iv. The learned trial judge erred in law in finding that the terms “data” and “information” in, inter alia, articles 14, 15 and 33 of the Control Regulation did not denote the figures reported by the logbook system, duly corrected in accordance with the provisions of the Control Regulation but rather could include such information as the second named Respondent might reasonably consider more accurate.
- v. The learned Trial Judge erred in law in interpreting the provisions of the Control Regulation by erroneously interpreting the “fundamental objectives” of the Common Fisheries Policy such as to undermine the principles of uniformity and legal certainty of European Union legislation.

- vi. The learned Trial Judge erred in law in finding that the language of Control Regulation was not clear enough such as to prevent the second named Respondent from employing its own methodology for the calculation of fishing outtake rather than applying the system provided for by the Control Regulation.**
- vii. The learned Trial Judge erred in law in recognising the attribution of discretion to the Second named Respondent in its interpretation of the Control Regulation. The learned Trial Judge erred in law in characterising the exercise of functions and duties prescribed by the Control Regulation as “mechanistic”.**
- viii. The learned Trial Judge erred in law in finding that the legal obligation placed on the Second named Respondent in the circumstances comprised a competence, outside the supervisory tools prescribed by the Control Regulation and ancillary legislation, to use a number of possible means of calculating fishing outtake, once the said methods were not unreasonable or irrational.**
- ix. The Learned Trial Judge erred in law in finding that that the Second named Respondent was entitled to apply the provisions of the Control Regulation in the light of the opinion of Dr. Colm Lordan that the “time spent” methodology for calculating fishing outtake was a “scientifically respectable one” thereby replacing the methods**

prescribed under the Control Regulation for the calculation of fishing outtake.

- x. The Learned Trial Judge erred in law in relying on the scientific evidence before the Court to interpret the provisions of the Control Regulation in such a manner as to thereby replace the methods prescribed under the Control Regulation as a matter of law for the calculation of fishing outtake.
- xi. The learned Trial Judge erred in fact and law in finding that the enforcement powers under the European Union Common Fisheries Policy and in particular the Control Regulation could be used to arrive at global figures needed to discharge the Second named Respondent's duties in law and that the approach of the Second Named Respondent accordingly replaces the supervisory system prescribed by the Control Regulation by correcting fishing outtake figures using its own methodology.
- xii. The learned Trial Judge erred in fact and in law in not having regard to the standardised instruments of control established by the Control Regulation and accepting the supplanting of those instruments in the light of concerns held by the Second named Respondent.
- xiii. The learned Trial Judge erred in law in finding that the second named Respondent, in returning generalised figures which disregarded the figures reported by individual fishing vessels, did not deprive law-abiding Irish fishers of a level playing

field in circumstances where the consequences of the supposed overfishing of some was visited on others by the Respondents in contrast to the methodology applied in other European Union Member States.

- xiv. The learned Trial Judge erred in law and in fact in finding that the methodology conceived and applied by the Second named Respondent for the calculation of fishing outtake for Nephrops in FU16 did not create such a lack of uniformity as to be non-compliant with the Control Regulation and the goals and purposes of the common fisheries policy.
- xv. The learned Trial Judge erred in law in finding that the Second named Respondent did not act otherwise than in accordance with the Control Regulation and related measures in employing the “time spent” methodology for calculating the figures for Nephrops caught by July 2017 in FU16.
- xvi. The learned Trial Judge erred in law in finding that the Second named Respondent, having reported monthly figures to the European Commission in the exercise of its functions, for the exploitation of the fishing opportunities in the fishing ground FU16 from 1st January 2017 to September 2017 could lawfully adjust those figures by reporting entirely different figures in October 2017 based on its new methodology.
- xvii. The learned Trial Judge erred in law in not finding that the Second named Respondent was not

entitled to make the decision dated on or before 5th October 2017 and communicated on 5th October 2017 causing the First named Respondent to not open FU 16 for the fishing of nephrops.

- xviii. The learned Trial Judge erred in law in finding that the First named Respondent did not act *ultra vires* in accepting the information furnished by the Second named Respondent and/or making the decision to issue the impugned Fisheries Management Notices and/or making any other official communication to the European Commission based on the figures reported by the second named Respondent.
- xix. The learned Trial Judge erred in law in not finding that the First named Respondent was not entitled to make the decision dated on or before 17th October 2017 and communicated on 17th October 2017 refusing to permit the fishing of nephrops in FU 16.
- xx. The learned Trial Judge erred in law in not finding that the First named Respondent had not performed his functions in accordance with inter alia Sections 12 and 13 of the Sea Fisheries and Maritime Jurisdiction Act, 2006 and Articles 34 and 35 of the Control Regulation refusing to permit the fishing of nephrops in FU 16.
- xxi. The learned Trial Judge erred in law in not finding that the Appellants were entitled to damages.

xxii. Such further and other grounds as may be advanced.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

i. An Order of Certiorari by way of an application for Judicial Review quashing the decision of the first named Respondent made on or before, 17th October, 2017 and formally communicated on the 17th October, 2017 by which he refused to permit the fishing of nephrops in the fishing ground known as Functional Area 16 on the Porcupine Bank off the West coast of Ireland on the grounds that the same was, inter alia, unlawful, ultra vires his powers under domestic and European law.

ii. An Order of Certiorari by way of an application for Judicial Review quashing the refusal of the first named Respondent made on or before, 17th October, 2017 and communicated on the 17th October, 2017 by which he refused to exercise his statutory competences and discretion in making a decision to not permit the fishing of nephrops in the fishing ground known as Functional Area 16 on the Porcupine Bank off the West coast of Ireland by unlawfully derogating his functions to the second named Respondent on the grounds that the same was, inter alia, ultra vires his powers under domestic and European law.

iii. An Order of Certiorari by way of an application for Judicial Review quashing all fisheries management notices issued by the first named Respondent prohibiting the fishing of nephrops in the fishing ground known as Functional Area 16 on the Porcupine Bank off the West coast of Ireland on foot of or in connection with his decision made on or before 17th October 2017 on the grounds that the same were, inter alia, unlawful, ultra vires his powers under domestic and European law.

iv. An Order of Certiorari by way of an application for Judicial Review quashing the decision of the second named Respondent made on or before, 5th October, 2017 and communicated by letter dated 5th October, 2017 by which it, using a methodology which was ultra vires its powers, and otherwise in breach of European and domestic law, advised the first named Respondent not to open the fishing grounds for Nephrops known as Functional Unit 16 (hereinafter FU16).

v. An Order of Certiorari by way of an Application for Judicial Review quashing the decision of the second named Respondent to report, to the European Commission, adjusted figures for the exploitation of the fishing opportunities in the fishing ground FU16 from 1st January 2017 to September 2017 in circumstances where monthly figures had already been reported to the Commission in exercise of the second named Respondent's functions by reason of which the said decision was unlawful.

vi. A Declaration by way of an application for Judicial Review that the first named Respondent acted in a manner ultra vires his powers and otherwise unlawfully under the legislative regime provided for by European Law under the Common Fisheries Policy and in the implementing Irish legislation by failing or refusing to grant the relevant authorisation or allocation of quota and/or by refusing to reopen the Fishing Grounds known as FU16 in October and November 2017 and in such months as may follow the commencement of the within proceedings.

vii. A Declaration by way of an application for Judicial Review that the second named Respondent acted in a manner ultra vires its powers and functions and otherwise unlawfully under the legislative regime created by the Common Fisheries Policy as provided by European Union Law and in the implementing Irish legislation in the manner in which it performed its functions as single authority pursuant to Article 5(5) of Council Regulation No 1224/2009 of 20 November 2009 (hereinafter the Control Regulation) as regards the methodology used in calculating "fish outtake" or "catch" from FU16 between July 2017 and the initiation of these

proceedings and in the advice given by way of letter dated 5th October, 2017 to the first named Respondent.

viii. An Order of Mandamus by way of application for Judicial Review directing the first named Respondent to perform his statutory functions under, inter alia, section 12 and 13 of the Sea Fisheries and Maritime Jurisdiction Act, 2006 and articles 34 and 35 of the Control Regulation by analysing all relevant data, including the manner of the collection of the same and the compliance of the same with the requirements of the Control Regulation prior to exercising his competences under the said legislation, specifically the assignment of the monthly quota allocation for FU16.

ix. An Order of Mandamus by way of application for Judicial Review directing the second named Respondent to perform its statutory functions under section 43 of Sea Fisheries and Maritime Jurisdiction Act, 2006 and article 5(5) of the Control Regulation in accordance with European and domestic law.

x. An Order awarding the Appellants the costs of the proceedings, to include the costs of the appeal and all reserved costs.