THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2020/232
High Court Record No. 2019/316 JR
Neutral Citation No. [2023] IECA 53

APPROVED
NO REDACTION NEEDED

Murray J.
Donnelly J.
Ní Raifeartaigh J.

BETWEEN

TOM KENNEDY AND NEIL MINIHANE

APPLICANTS/RESPONDENTS

– AND –

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 10th of March 2023

1. In my first judgment ([2022] IECA 165, with which Donnelly J. and Ní Raifeartaigh J. agreed) I rejected all but one of the grounds of challenge advanced in these proceedings to Policy Directive 1 of 2019 ('the Policy Directive'). The Policy Directive was issued by the respondent Minister on 5 March 2019 pursuant to the provisions of s. 3(3) of the Fisheries (Amendment) Act 2003 ('the 2003 Act'). The ground on which the applicant succeeded on appeal arose from the provisions of Article 20 of Regulation 1380/2013 ('the Regulation'). That Article requires, in certain circumstances, notification to the European Commission where conservation and management measures to be adopted by a Member State are liable to affect fishing vessels of other Member States. The provision further states that such measures shall be adopted only after consulting the Commission, the relevant Member States and the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, *inter alia*, that those measures are non-discriminatory.

2. Although the Court determined that the Minister ought to have, but did not, comply with this provision, and while it decided that his failure to do so was such as to affect the validity of the provision, the Court invited further submissions from the parties on two related issues. The first was whether the measure could be severed, so that that part of the Policy Directive that affected Northern Irish vessels could be disentangled from the Directive insofar as it affected only Irish vessels and, if so how, such severance might be effected. The second was directed to the relief (if any) to be granted having regard (a) to the prospect of such severance and/or (b) the fact that there is now, by reason of the departure of the United Kingdom from the European Union, no requirement that the Policy Directive be notified in accordance with Article 20(2) of the Regulation.

3. The parties have delivered submissions on these questions. In the light thereof I have come to the view (a) that the Court should not sever the Policy Directive insofar as it applies to Northern Irish vessels, and (b) that the entire of the Policy Directive should therefore be viewed as invalid having regard to the provisions of Article 20 of the Regulation. These short reasons for that conclusion should be read together with the substantive judgment.

4. The reason further submissions were solicited from the parties before determining the final orders to be made was this. Given that the United Kingdom has now departed from the European Union, it seemed proper to allow the respondents the opportunity to contend that were the Policy Directive to be introduced today, there would be no requirement to comply with the provisions of Article 20. In that event, and given that the illegality of the Directive arose only because it extended to Northern Irish vessels, had the measure been severable *vis à vis* those vessels it might be argued that if thus severed the measure would have lawfully applied to Irish vessels, and that in that event the grant of relief insofar as the illegality affected the Northern Irish vessels would be futile (and see [2022] IECA 165 at paras. 95 and 187).

5. Both parties have furnished extremely helpful written submissions in the light of the foregoing. Having regard to those submissions I believe the following to be clear:

(i) As of April 2019 there was an obligation on the Minister to comply with the provisions of Article 20(2) of the Regulation prior to the commencement of the Policy Directive on 1 January 2020. The failure to comply with that obligation meant that the Policy Directive – in its entirety – could have no legal effect.

(ii) As I explained in the principal judgment, the mandatory consultation process could have resulted in a situation in which the Policy Directive was adopted in a different form from that it eventually assumed, and indeed in theory it might not have been adopted at all. The failure to comply with that process, accordingly, was not a merely technical oversight.

(iii) Under Heading 5 of the Trade and Cooperation Agreement between the European Union and the United Kingdom ('the TCA') before Ireland could introduce a measure such as the Policy Directive which would affect Northern Irish fishing vessels, the EU (on behalf of Ireland) is required to notify the measure to the United Kingdom. Both the EU and the United Kingdom have the right to make observations on such a measure which might result in changes to it. Those measures must be notified *before* those measures are applied, allowing sufficient time for the other party to provide comments or seek clarification. It is important to stress that this is accepted by the Minister, who describes the situation (having regard to Article 496(3) of the TCA) in his submissions as follows:

> *'If the Policy Directive were to be severed, the European Commission, acting on behalf of Ireland, would be required to notify the United Kingdom of any measures inside the 0 to 6 nautical mile zone that could affect Northern Ireland vessels before such measures could be applied to those vessels.'*

6. In these circumstances, it seems clear that the grant of relief to the applicants arising from the non-notification of the Policy Directive insofar as it affected Northern Irish vessels would not be futile: on the contrary if granted the Minister would, before re-

introducing such a measure, have to exhaust the consultation procedure now provided for in the Trade and Cooperation Agreement.

7. While the fact that the extension of the Policy Directive to include Northern Irish vessels was effected by a distinct legal instrument might, at first glance, suggest that there is a strong argument for severing this from the Policy Directive as introduced (which, it will be recalled, on its face, applied only to Irish vessels), I am satisfied that this is not a case in which such severance is possible. The imposition by s. 10(2) of the Sea-Fisheries and Maritime Jurisdiction Act 2006 ('the 2006 Act'), as amended, of a requirement to comply with those obligations imposed on Irish vessels referred to in s. 10(3) was an inherent part of the extension to Northern Irish vessels of the facility to fish within the six nautical mile zone effected by the Sea-Fisheries (Amendment) Act 2019 ('the 2019 Act'). It is hard to see how the Policy Directive could be left in place for Irish vessels but struck down for Northern Irish vessels without disrupting the scheme envisaged by those provisions, as it would result in a situation in which one class of vessels that can fish in the 6nm zone (the Irish vessels) are subject to the requirement of the Policy Directive while the other (the Northern Irish vessels) are not. The only coherent way of maintaining that scheme is to strike the Policy Directive down in its entirety. To sever would have been to create an instrument and bring about a state of affairs that the Minister could never intended to introduce (and see *Maher v. Attorney General* [1973] IR 140).

8. In these circumstances, the appropriate relief is an order of *certiorari* quashing the Policy Directive.

9. This leaves the question of costs. The applicant has succeeded in obtaining an order of *certiorari* but has done so on the narrowest of grounds. It has failed to prevail on all other arguments advanced, including the rationality challenge which occupied the focus of the evidence, and it lost in its bid to overturn the High Court judgment on these same grounds. That said, the appeal hearing was focussed, was presented with commendable efficiency by counsel on both sides and involved issues that presented closely connected and overlapping questions of law and fact. In consequence it is my view that an attempt to sever the grounds of appeal for the purposes of costs would be futile in respect of a unitary and – having regard to the range of issues – tight appeal hearing. Therefore, it is my provisional view that the applicant should obtain the costs of the appeal in full.

10. As to the hearing in the High Court, however, the overwhelming bulk of the time as disclosed in the transcripts was directed to grounds on which the applicants lost. In particular, they failed to prevail not merely on the rationality, proportionality and constitutional issues and on the argument as to fair procedures, but failed to establish that the use by the Minister of the power to issue Policy Directives for the purposes in issue here, was *ultra vires* the applicable statutory provisions. These were central issues in the case. To that extent the question of High Court costs bears more than a passing semblance to the dilemma that presented itself in *Chubb v. The Health Insurance Authority* [2020] IECA 183. However, there are differences: in *Chubb* there were two cases, and not one, and while the ground on which the applicant succeeded was very narrow, it was capable of being isolated from the broader matrix in which the case fell to be considered (it related to a technical issue around the content of a statutory notice). Here, the interconnection between the issues on which the applicant prevailed and those on which it lost is greater.

11. In those circumstances, I am of the provisional view that the applicant should obtain an order of one third of their High Court costs. If either party wishes to argue to the contrary, the Court will convene a short hearing to that end.

12. Donnelly J. and Ní Raifeartaigh J. are in agreement with this judgment and the orders I propose.