OUTER HOUSE, COURT OF SESSION

[2024] CSOH 27

P1056/22

OPINION OF LORD ERICHT

In the petition

(FIRST) SCOTTISH FISHERMEN'S ORGANISATION LIMITED;
(SECOND) SHETLAND FISH PRODUCERS ORGANISATION LIMITED

Petitioners

for

Judicial Review of a decision by the Scottish Ministers, dated 21 September 2022, to amend the conditions under which sea fishing licences are to operate as of 1 January 2023

Petitioners: Findlay KC, Blair, Mackinnons
Respondents: Mure KC, Irvine, Scottish Government Legal Directorate

8 March 2024

Introduction

[1] The respondents wish to increase the landings of pelagic fish in Scotland. The petitioners, who are producers organisations representing pelagic fishermen, do not object to that aim but take a different view as to how it should be achieved, favouring voluntary measures rather than licence changes. On 21 September 2022 the respondents intimated a decision ("the Decision") to vary the economic link licence condition in relation to Scottish sea fishing licences as of 1 January 2023. The petitioners have brought judicial review proceedings seeking reduction of the Decision. Interim interdict was refused on 23 December 2022 ([2023] CSOH 2).

[2] This case then proceeded to a substantive hearing at which the petitioners sought reduction of the decision and reduction of the variation of the condition. At the hearing a factual dispute arose between the parties in respect of certain figures and parties undertook to discuss these further. They did so and a Joint Minute resolving that dispute was lodged over 3 months after the hearing. The reduction was sought on four grounds: breach of Article 1 Protocol 1 of the European Convention on Human Rights ("ECHR"), use of statutory power for an improper purpose, unfair consultation process and failure to take into account relevant considerations. As the ECHR ground is in part dependent on me finding in favour of the petitioners in at least one of the other grounds, I deal with the ECHR ground last.

The variation of the licence condition

[3] The licence condition which has been varied is a condition which deals with a "real economic link".

[4] Prior to the variation, Scottish vessels landing more than 2 tonnes of species subject to total allowable catch (TACs) were required to demonstrate a real economic link to the United Kingdom in one of the following ways:

- by landing 50% of quota stocks caught in any calendar year into UK ports (the "landings condition");
- by employing crew 50% of whom normally reside in the UK (the 'crewing condition');
- by incurring 50% of operating expenditure in the UK (the expenditure condition); or

- if a licence holder fails to meets any of these options, or a combination thereof, they are required to provide quota to their relevant authority - so called 'Gifted Quota'.

[5] The respondents intimated the Decision in a document entitled "*Outcome Report: Consultation on proposals to amend the economic link licence condition"* dated 21 September 2022 (the "Outcome Report"):

> "In summary, the Scottish Government will introduce the following amendments to economic link arrangements from 1 January 2023:
>
> - landings into Scotland will form the main basis for compliance with the economic link licence condition;
> - the options for demonstrating compliance through crewing and/or operating expenditure will no longer be available;
> - the option to gift quota in lieu of landings into Scotland will continue with the formula used to estimate a suitable quota gift amended to better reflect the GVA from fishing;
> - the minimum level for qualifying for economic link criteria will increase from landings of two tonnes to landings of 10 tonnes;
> - the required rate to satisfy the landings target will increase from 50% to 55% for demersal and shellfish stocks covered by the provision;
> - the landings target rate for pelagic species will be phased in and increased to 55% over a three year period. This will see the introduction of the following landings targets for pelagic species:
>
> o 30% landings in 2023
> o 40% landings in 2024
> o 55% landings in 2025
>
> - the landings target will only cover the eight most important species, by landed value, into Scotland. These are - herring, mackerel, *Nephrops*, haddock, monkfish, cod, hake and whiting… which account for 90% of the value of total landings by Scottish vessels of TAC stocks.
>
> The policy will be kept under review and may be amended if required."

[6] For the purposes of the current petition, the key elements in the new economic link condition are:

(a) The increase in the landings condition from 50% to 55%, staged in a transitional basis for pelagic species.

(b) The removal of the possibility of meeting the economic link condition by employing UK crew or incurring operating expenditure in the UK.

The petitioners' members have until now fulfilled the economic link condition by satisfying the crewing condition.

Affidavits and reports

[7] The petitioners lodged affidavits from the following:

- John Anderson, Chief Executive of the first petitioners
- Brian Isbister, Chief Executive of the Second Petitioner and a director of Pelagia Scotland;
- Gary Spence, director of LHD Limited which manages seven pelagic trawlers in Shetland ("Adenia", "Antarctic", "Antares," "Charism,." "Research," "Serene" and "Zephyr");
- George West, owner of the pelagic trawler "Resolute";
- Michael Tait, owner of the pelagic trawler "Ocean Star";
- Richard Williamson, co-skipper and part owner of the "Research";
- Ritchie Reid, who is an employee of a fisherman's cooperative which acts as fish sales agent and who handles fish sales for "Ocean Star", "Resolute" and "Grateful"

[8] The petitioners also lodged a report which from Poseidon Aquatic Resource Management *Assessing the Impact of the Scottish Landings Target* which was dated August 2023 and was instructed for the purposes of this Judicial Review (the "Second Poseidon Report"). The Second Poseidon Report considered the impact of the landings target on the Scottish pelagic fleet, particularly 13 vessels from which were independent and not tied to a processor business which regularly land into Norway and did not previously meet the new landings target, and also considered the wider implications for the functioning of the mackerel market. The petitioners also lodged various documents responding to the MAU Report.

[9] The respondents lodged affidavits from three of their officials, Allan Gibb, Malcolm MacLeod and Amy McQueen. Ms McQueen also authored a report from the Respondent's Marine Analytical Unit dated July 2023 (the "MAU Report"), and also lodged various documents of data and analysis. The MAU report sets out the evidence base on which the decision was made, presents subsequent data for the 2022 and partial 2023 fishing seasons, and responds to issues raised by the petitioners in this judicial review.

[10] In view of the substantial differences between the MAU report and the Second Poseidon Report, the court enquired whether evidence would be led at the substantive hearing, but parties were agreed that the court should proceed on the basis of counsels' submissions and written documentation.

Statutory provisions

[11] The Fisheries Act 2020 provides the legal framework for the United Kingdom to operate as an independent coastal state under the United Nations Convention on the Law of

the Sea 1982 (UNCLOS). The Act sets out the fisheries objectives, which include the national benefit objective. Section 1 provides:

> "**1 Fisheries objectives**
>
> (1) The fisheries objectives are—
> (a) the sustainability objective,
> (b) the precautionary objective,
> (c) the ecosystem objective,
> (d) the scientific evidence objective,
> (e) the bycatch objective,
> (f) the equal access objective,
> (g) the national benefit objective, and
> (h) the climate change objective.
> …….
>
> (8) The 'national benefit objective' is that fishing activities of UK fishing boats bring social or economic benefits to the United Kingdom or any part of the United Kingdom."

[12] Section 10(1) of the 2020 Act provides:

> "**10 Effect of fisheries statements and fisheries management plans**
>
> (1) A national fisheries authority must exercise its functions relating to fisheries, fishing or aquaculture in accordance with the policies contained in a [Joint Fisheries Statement]…. that are applicable to the authority, unless a relevant change in circumstances indicates otherwise"

[13] The Joint Fisheries Statement 2022 states:

> "2.1.23 the national benefit objective means that the fisheries policy authorities will make conditions for each UK Vessel they license to bring either economic or social benefits to the UK, or any part of the UK."
>
> "4.1.8 The vital role of the seafood sector in the supply of food and employment, as well as its significant cultural value is also recognised. Decisions by the fisheries policy authorities on the management of fisheries should take this into account in accordance with the sustainability, equal access and national benefit objectives in order to ensure continuity of this role, to protect the long-term interests of the sector and well-being of the communities it supports."
>
> "4.2.17.2 The fisheries policy authorities will aim to ensure coastal fisheries, and the communities that benefit from them, are able to adapt to the current and future needs of the seafood sector and the associated support industries, recognising the differing, yet often complementary, local dynamics with other industries. The

potential of the fishing industry to secure and improve livelihoods in coastal communities is acknowledged."

[14] The 2020 Act gives Scottish Ministers power to grant licences in respect of Scottish and foreign fishing boats (sections 15 and 17), and to attach conditions to such licences (section 18 and Schedule 3). Paragraph 1 of Schedule 3 of the 2020 Act provides:

> **"1. Power to attach conditions to sea licence**
>
> (1) A sea fish licensing authority may, on granting a sea fishing licence, attach to the licence such conditions as appear to it be necessary or expedient for the regulation of sea fishing (including conditions which do not relate directly to fishing).
>
> (2) The conditions that may be attached to a sea fishing licence include, in particular, conditions –
>
> > (a) as to the landing of fish … (including specifying the ports at which catches are to be landed);"

[15] The respondents may subsequently vary a licence condition, in which case the variation can be communicated electronically to the licence holder (Regulation 3(2)(c)(ii) of the *Sea Fishing (Licenses and Notices)(Scotland) Regulations* 2011).

The background to the change in the real economic link condition

[16] The Scottish National Party 2016 Election Manifesto stated:

> "We will set a Scottish landings target for all Scottish fishing boats to ensure more fish are landed in Scotland to create jobs and support local businesses in our fishing communities."

[17] The Scottish National Party won the General Election and formed a government. The then Cabinet Secretary wished to achieve higher landings into Scotland through co-operation and voluntary action with the industry rather than through regulation by amending licence conditions. There were meetings and correspondence between the

petitioners and Scottish Government to this end. Having explored the voluntary option, the respondents decided to consult on amendments to licence conditions.

[18] On 30 August 2017 Marine Scotland issued a consultation letter headed "Scottish Government Proposal to amend Economic Link Licence condition". The letter invited a response by 31 October 2017. The purpose of the letter was stated as being:

> "to consult sea fisheries licensees and other interested parties about Scottish Government proposals to amend the 'economic link' licence condition that is included in sea fisheries licences for vessels over 10 metres."

The letter asked the following questions:

> "Consultation question 1: Do you agree that landings into Scotland provide the best economic link to Scotland, and that they should form the main basis of the economic link licence condition, and that therefore the present options to demonstrate a link through crewing and/or operating expenditure should be removed?"
>
> "Consultation question 2: Do you agree that the landings target included in the economic link licence condition should in general be 55 per cent?"
>
> "Consultation question 3: Do you agree that there should be transitional arrangements in relation to landings of pelagic fish?"
>
> "Consultation question 4: Do you agree that there should continue to be arrangements whereby fishing vessels that do not meet the landings target should instead be able to meet the economic link licence condition by making quota gifts to the Scottish Government?"

The letter concluded:

> "The Scottish Government further notes that it remains content to consider proposals for industry-led action that has the result of increasing landings of fish, and particularly pelagic fish, into Scotland, so as to achieve benefits broadly equivalent to those envisaged in paragraphs 8 and 9. The Government would be content for any such proposals to be made having regard to the aggregate landings of vessels in Producer Organisations. The Government invites those with an interest who wish to offer such alternative proposals to do so no later than 31 October 2017. The Government will consider any proposals offered, and leaves open the option of not proceeding with amendment to the licence condition if it considers that alternative proposals are likely to achieve broadly equivalent benefits."

[19] The consultation letter was accompanied by a partial Business and Regulatory Impact Assessment (the "Partial BRIA ").

[20] The first petitioner responded to the consultation on 31 October 2017. Their answers to the questions were:

Question 1: No

Question 2: No

Question 3: Not applicable

Question 4: Not applicable

[21] In its consultation response the first petitioner made clear that it supported the Scottish Government's aim of increasing the volume of pelagic fish landings into Scotland. However, it did not support the Government's proposed current approach of regulatory intervention in tackling this issue and instead proposed a combination of non-regulatory approaches. It identified what it said were illogical flaws or misleading in accuracies in the consultation letter and accompanying partial BRIA.

[22] Annexed to the response was a study commissioned by the petitioners from Poseidon Aquatic Resource Management entitled "*Assessing the impact of the Scottish Landings Target and possible alternatives*" dated October 2017 (the "First Poseidon Report"). The First Poseidon Report concluded by proposing an alternative to a change in the landing targets in the licence:

> "Alternatives to the landings target are proposed to incentivise increased landings of pelagic fish into Scotland, as follows:
>
> Support Scottish processors in growing high value export markets by:
> (a) targeted export marketing assistance and
> (b) plant investment to achieve the quality required of those markets.

> Support Scottish processors in bidding for fish on the Norwegian auction system by:
> (a) enabling Scottish processors to give the payment guarantees needed to bid; and
> (b) negotiating improved arrangements with the system operators to avoid Scottish processors being precluded from bidding."

[23] The first petitioner's consultation response emphasised the willingness of the first petitioner

> "to work with both the Scottish pelagic processing sector and the Scottish Government to achieve the ambition of increased landings of pelagic fish in Scotland by pursuing each of the non-regulatory options identified in the Poseidon Report".

[24] The second petitioners responded to the consultation on 27 October 2017. It was not in favour of any of the proposals in any of the questions. It made similar points to the first petitioner and proposed a joint industry-government funded programme to carry out an independent evaluation of Scottish Fish markets and the Scottish processing sector and that any decision on changes to licence conditions should be deferred until the results were available.

[25] In December 2020 the respondents published *Scotland's Fisheries Management Strategy 2020-2030* in which they stated:

> "We will also seek to strengthen links between the offshore fishing industry and onshore interests, recognising the benefits that fishing as a national asset must have for our communities, onshore processing, local markets, healthy eating and sustainable food supplies, and opportunities for training and employment. The policies which we take forward under this strategy, for example allocation of additional quota opportunities, the introduction of the economic link licence condition from 2022 and our drive to ensure that quota remains in the control of the active fishing industry, will directly support these considerations." (p7)

[26] The SNP's 2021 election manifesto stated:

> "We will create an explicit economic link between catching and landing, incentivising the landing of more fish in Scotland creating more jobs and business opportunities onshore, especially in processing."

[27] On 10 November 2021 the Cabinet Secretary for Rural Affairs and Islands said in Parliament:

> "The Scottish Government is committed to amending the economic link arrangements for Scottish fishing vessels in order to increase the amount of fish that is landed in Scotland and to broaden the return to our nation from fishing, thereby extending the benefits to our coastal communities." (Official Report 10 November 2021).

[28] In April and May 2022 the respondents undertook what they called "further consultation". I shall refer to this as the "Further Consultation" as that is the expression that is used in the final version of the BRIA (*Amending the economic link licence conditions in sea fishing licences* 21 September 2022 ("the Final BRIA")). However it must be borne in mind that this was not a formal consultation exercise and parties were agreed that it was not a re-consultation in whole or part. The Final BRIA explained the Further Consultation as follows:

> "In April and May 2022, we undertook further consultation to inform our impact assessments and obtain feedback from industry given the passage of time since the consultation closed in 2017. Officials selected businesses and trade associations with a direct interest in the policy change in order to establish impacts on them (and where relevant any constituent businesses) in greater detail and to take account of relevant market changes since 2017.
>
> To this end, we selected 11 interested businesses (fishers, processors, trade bodies and port authorities) and requested their views on the anticipated costs and benefits on their business that would be associated with each of the questions posed in the consultation document.
>
> In addition, we sought feedback on the following:
>
> - the capacity of processors to deal with the proposed changes;
> - the impact of Brexit, the COVID-19 pandemic and the situation in Ukraine on the proposed changes;
> - how the proposed changes would impact on various markets?

To inform this process officials spoke to:

- four processing businesses;
- four sectoral groups (groups delegated with quota management responsibilities by the Scottish Government);
- three Scottish Fishing Associations (a group (distinct from sectoral groups) which represent the interests of fishers). A fourth approached by officials pointed to its previous response and said its position had not changed; and
- two harbour authorities." (p25)

[29] The respondents' thinking on whether or not to have a new full consultation in 2022 was set out by Mr MacLeod in his affidavit. A new full consultation on the amended economic link provisions was not considered necessary, as the substantive issues had not altered significantly. There had not been a significant change in the pelagic sector, in the ownership of pelagic vessels, nor in the pelagic processors. The substantive issues would remain the same, namely the material impact on the pelagic fleet and concerns about Scottish pelagic processing capacity and competitiveness. They did take account of the fact that Brexit/Covid had produced a change in the policy environment which warranted further exploration, but considered that Brexit/Covid could be viewed as exacerbating existing concerns rather than creating significant new ones. The respondents identified that they would wish to have further discussions with businesses impacted by the proposed policy change in order (i) to inform the BRIA that was to be published alongside the Outcome Report and (ii) inform the broader decision making process. The respondents wanted to give key stakeholders such as the petitioners the opportunity to raise any additional concerns and ask any questions. The respondents recognised that this presented an opportunity to establish wider changes on the policy front, such as Brexit/Covid and the Ukraine conflict. Had these discussions indicated that there had been a substantive change

of which the respondents were not already aware and had not already considered, then the respondents could have undertaken a second full consultation.

[30] As part of the BRIA process it is recommended that there are discussions with 6-12 businesses that are likely to be impacted by the policy change. The respondent selected 11 interested business (fishers, processors, trade bodies and port authorities). The Cabinet Secretary was provided with a summary of the discussions to inform decision making prior to any decision being taken.

[31] The Further Consultation took the form of Microsoft Team meetings conducted by officials in accordance with a script. The respondents' position was that the meetings only concluded when stakeholders said they had nothing to say or add. The length of each meeting varied.

[32] The script begins:

> "**BRIA – ECONOMIC LINK CHANGE - SCOTTISH FIRMS IMPACT TEST Opening Statement**
>
> As part of the process for introducing changes to Scottish economic link licence conditions we are going to be producing a Business Regulator Impact Assessment (BRIA). A BRIA helps assess the impact of proposed changes in regulation.
>
> As part of a BRIA it is recommended that we have discussions with businesses that are likely to be impacted by the policy change. A full consultation ran on this proposed change in 2017 and you may have provided a response to that consultation. What we want to do today is discuss particular aspects of the proposed policy change in order to gain a view of how the change will impact your business and/ or the member businesses in your organisation. It will also be helpful to consider any substantive changes to anticipated impacts since 2017. To summarise the consultation proposals sought views on the following:
>
> - To make landings into Scotland the main basis of the economic link condition and that options for demonstrating the link through crewing and/or operating expenditure should be removed.
> - That the landings target included in the economic link licence condition should in general be 55 per cent (increased from the current 50%).
> - That there should be transitional arrangements in relation to landings of pelagic fish.

- For those vessels that do not meet the landings target element, arrangements should continue to be in place whereby they could continue to quota gift to the Scottish Government.

I will now ask a series of questions in relation to the proposed intervention, specifically around the potential benefits and costs to your individual business(es). You may feel that in the response you provided to the consultation you covered the potential impact on your business and you can indicate this in your response. So, in this exercise we are interested in the potential impact on your business not general policy areas."

[33] The script then went on to look at specific areas.

"Section 1 – Benefits of policy change
In section one, we are going to ask you to consider the benefits to your business, or the businesses you represent, arising from the policy changes set out in the consultation document in 2017. For each of the questions put in the consultation I will ask you to consider the benefits to your business. It may well be the case that you feel some of the questions do not impact, in which case please indicate this.

Question 1 - Related to question 1 of the consultation document. What, in your view, will be the benefits of making increased landings into Scotland the main basis for demonstrating an economic link to Scotland and removing the crewing and/or operating expenditure criteria?
Nudge: do you expect to change your crewing makeup/operational expenditure in response to this change?

Question 2 - Related to question 2 of the consultation document. What, in your view, will be the benefits to your business, of increasing the general landings target element of the economic link licence condition to 55 per cent?
Nudge: [For processors] would they be turning away imports to deal with additional landings?

Question 3 – Related to question 3 of the consultation document. What, in your view, will be the benefits to your business of having transitional arrangements for pelagic species?

Question 4 - Related to question 4 of the consultation document. What, in your view, will be the benefits to your business, of continuing to have arrangements whereby fishing vessels that do not meet the landings target should instead be able to meet the economic link licence condition by making quota gifts to the Scottish Government?

Section 2 – Costs of policy change
I will now ask you to consider the costs to your business or businesses you represent of the policy changes as set out in the consultation document. It may well be the case

that you feel some of the questions do not impact on your business, in which case please indicate.

Question 5 - Related to question 1 of the consultation document. What, in your view, will be the costs of making increased landings into Scotland the main basis for demonstrating an economic link to Scotland and removing the crewing and/or operating expenditure criteria?

Question 6 - Related to question 2 of the consultation document. What, in your view, will be the costs to your business, of increasing the general landings target element of the economic link licence condition to 55 per cent?

Question 7 – Related to question 3 of the consultation document. What, in your view, will be the costs to your business of having transitional arrangements for pelagic species?

Question 8 - Related to question 4 of the consultation document. What, in your view, will be the costs to your business, of continuing to have arrangements whereby fishing vessels that do not meet the landings target should instead be able to meet the economic link licence condition by making quota gifts to the Scottish Government?

Section 3: Views on particular issues raised in consultation responses or changes in environment

In the following questions I am going to focus on issues related to the introduction of the policy change:

Question 9: What is your view on the capacity of Scottish fish processors to deal with the proposed policy changes?

Question 10: What is your view on the impact of the Brexit/Covid pandemic/ Ukraine crisis on the proposed changes?

Question 11: What is your view on the impacts on markets on the proposed changes?

- The Scottish internal market
- Are you aware of any secondary processing for the stocks you land/process?
- Foreign markets

Question 12: Question for Processors, to assist in our understanding of the downstream benefits of increased landing. What proportion of the extra input costs are made up of fish products (ignoring staff costs)? i.e. assuming you could increase processing throughput by 50%, how much of the extra input costs would be fish?

> Question 13: Is there any other relevant information you would wish to relate on this proposed policy change?"

[34] The meeting with the second petitioners took place on 8 April 2022 and lasted 1 hour and 44 minutes. A note of the discussion produced by the respondents' officials records a detailed discussion following the structure of the script. Points made by the second petitioner as recorded in the Note include:

> "..believes that consultation should be re-done as a lot has changed over the last 5 years"
>
> "Believes Scotland isn't prepared for that level of Pelagic landings, nor at the price fishers are used to"
>
> "Thinks all of the penalties are focused on the fishing industry and not on the processors, thinks some of the onus should be on the processors"
>
> "Significant changes since last consultation, suggest doing another. Does not feel like there has been significant engagement with industry on this, first real engagement in 5 years."

[35] The meeting with the first petitioner took place on 23 May 2022 and lasted 42 minutes. Points recorded as having been made by the first petitioner include:

> "Costs
>
> - Referred to consultation response
> - No benefit to SFO members from this regulatory intervention. Noted that it was conceivable there would be some lost Scottish crewing to replace the lost revenue.
> - Lost revenue, lost efficiency, reputational damage, less competition market, riskier prospect for boat, degradation of price and quality"
>
> "Misc
> …
> - Opposed to the regulatory intervention but supportive of the concept.
> - Noted concern on the legal and practical ability to pursue this intervention. Specifically noting the FTA with Norway, transition period and its interaction with EU competition law, and creating a division in the UK internal market."

"Q10

- Brexit has mostly benefitted the pelagic fleet over others. Noted that with the extra mackerel if we should still be considering the same landing targets
- Covid didn't have much impact
- Ukraine is an important export market, unsure if the fish destined there is being stored up or being sold to another market at a lower price point

Q11

- Covered in main discussion, concerns about capacity and division in the Uk market, concern on Ukraine."

[36] The Scottish Government's Programme for Government 2022-3, published in September 2022, included:

> "implement new licensing arrangements to encourage those fishing Scottish seafish to increase the number of valuable species processed in Scotland, increasing the economic benefit from those fishing the Scottish Seafish quota."

[37] On 21 September 2022 the Scottish Government published the Outcome Report on the 2017 consultation and the Final BRIA.

[38] Paragraph 1 of the Outcome Report explained that:

> "Publishing a report on the outcome of the consultation was due to pressure on Scottish Government time and resources as officials were required to prepare for and adapt to the UK's departure from the EU which included undertaking a lengthy and complex process of reviewing and incorporating certain parts of the Common Fisheries Policy into domestic legislation, and dealing with the COVID-19 pandemic."

[39] In addition to intimating the decision set out above and challenged in this petition, the outcome report set out the Scottish Government's response to the matters which had been raised by consultees in the 2017 consultation. It took into account both the consultation response and the Further Consultation (see eg p 19).

[40] The Full BRIA summarised the further consultation, and noted that by and large those who responded to the 2017 consultation had not changed their views on their support

or opposition to the proposed change. The BRIA considered the First Poseidon Report, which had been commissioned by the petitioners for the 2017 consultation.

[41] The board of the first petitioners met with the Cabinet Secretary for Rural Affairs and Islands, Mairi Gougeon, in August 2022, where the issues of changes to economic link arrangements were raised and substantively the same concerns about the policy as had been raised throughout were repeated.

[42] The respondents intend to keep the new licence condition under review and amend it if required (Outcome Report paragraph 1.2). The BRIA states:

> **"17. Post-implementation review**
>
> Officials will keep the policy under review and may amend it if necessary. In addition, a post-implementation review will be undertaken 5 years after the introduction of this proposal to ensure that the objectives are met and to enable a review of the projected impacts. In order to properly complete this review, Marine Scotland will continue to collect data which will be used for ongoing and any future monitoring or analysis. A post-implementation review will test the assumptions made in this BRIA and in particular, assumptions made about the ability to increase processing capacity and competitiveness within the Scottish sea fish processing industry and the potential impact this could have on the Scottish fishing fleet."

Ground 2 statutory power used for an improper purpose

The purpose of the economic link condition

[43] The purpose of the amended economic link condition is set out in the BRIA as follows:

> **"2 Purpose and intended effect**
>
> Establishing a Scottish landings target for each Scottish licenced and administered fishing vessel is a longstanding ambition of the Scottish Government and was restated as a manifesto pledge in the Programme for Government 2021-22. The Scottish Government is seeking to achieve this commitment by amending the economic link licence condition in Scottish sea fishing licences. The proposed amendments aim to increase the volume and improve the stability of landings of the most valuable fish species into Scottish ports. These benefits should increase and create a more stable supply for Scotland's fish processing businesses. The

> policy seeks to improve the distribution of economic benefits arising from Scotland's natural resources by increasing the value added in Scotland so that local, coastal and rural economies will benefit from increased employment and income from the seafood industry. The policy may help with food security as more raw material (fish) is landed into Scotland.
> …
> These amendments are expected to result in an increase in the volume of supply and a reduction in supply chain risks for Scottish sea fish processing and handling businesses, and therefore the potential to attract greater investment and employment in Scotland's fishing industry. In the longer term it is expected they will contribute to the sustainable growth of the local economies where fishing is an important driver for business activity (e.g. the North East of Scotland and the Islands)." (page 1)

[44] The petitioners say that this is an improper purpose for the exercise of the power to attach conditions to a licence under Schedule 3 of the Fisheries Act 2020. The respondents say that the purpose is a proper one.

Submissions for the petitioners

[45] Senior counsel for the petitioners submitted that the new economic link licence condition was *ultra vires* because the statutory power relied upon (schedule 3, paragraph 1 of the Fisheries Act 2020) had been exercised for an improper purpose (*R (Moderasi)* v *Secretary of State for Health* [2013] UKSC 53 at paragraph 14. *Trafford* v *Blackpool Borough Council* [2014] EWHC 85 (Admin)). Any condition may only be imposed to the extent that it is necessary or expedient for the regulation of sea fishing. The stated policy objective of the respondents was to promote the fish processing sector and the economic development of coastal communities. The new economic link condition was not proposed as necessary or expedient for the regulation of sea fishing, nor were the promotion of the fish processing sector and the economic development of coastal communities reasonably incidental to that purpose. It was an economic rather than a regulatory objective that was being pursued. Counsel took issue with the respondents' characterisation of this case as a *Padfield* case.

Instead he asked the court to construe the power not in terms of the objective of the 2020 Act as a whole, but to construe it in terms of the purpose of the power in Schedule 3 which was the licensing and regulation of sea fishing (*R (Wright)* v *Forest of Dean District Council* [2019] UKSC 53; [2019] 1 WLR 6562; *Brightcrew Ltd* v *City of Glasgow Licensing Board* [2011] CSIH 46; 2012 SC 67). The single function under Schedule 3 was the licensing of sea fishing.

Submissions for the respondents

[46] Senior counsel for the respondents submitted that "including conditions which do not relate directly to fishing" was a broad power (*Colley* v *Duthie* 1994 SLT 1172). The question of whether a statutory power has been exercised for an improper purpose requires to be answered having regard to the object and purpose of the legislation and the intention of Parliament in conferring the powers concerned (*R (Palestine Solidarity Campaign)* v *Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774). The purpose of the 2020 Act was to provide the post-EU legal framework for the UK to operate as an independent coastal state under the UN Convention on the Law of the Sea. The purpose of paragraph 1 of Schedule 3 to the 2020 Act is to confer on the UK fisheries administrations power to regulate sea fishing within their territorial waters as they see fit. To that end, the power was expressed in terms not solely of necessity but also expediency. The question of necessity or expediency was a matter for the decision maker. Provided the decision to impose a condition is rationally necessary or expedient for the regulation of sea fishing, including where it does not relate directly to fishing, the exercise of the power is not for an improper purpose.

Decision

[47] Counsel for the petitioners submitted that the licensing power had been exercised for an admirable purpose but one which was outside the powers of the 2020 Act. He drew a distinction between the licensing function in schedule 3 of the 2020 Act and the other functions under the Act. The power to impose licensing conditions was for the regulation of sea fishing, and it could not be used to impose conditions for the benefit of coastal communities. He founded on *R (Wright)* v *Forest of Dean District Council*, a planning case in which the court held that a proposed community benefit was not a material consideration and stated:

> "The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community" (paragraph 44)

He also founded on *Brightcrew Ltd* v *City of Glasgow Licensing Board.* That was a case under the Licensing (Scotland) Act 2005. The licensing board had refused an alcohol licence to an adult entertainment venue on the ground that such venues could only be considered to be suitable for the sale of alcohol where the board was satisfied that its policy on Adult Entertainment would be complied with. The venue appealed and argued:

> "In summary, the Dean of Faculty submitted that the single function given to a licensing board under the 2005 Act was that of licensing the sale of alcohol; and the powers to licence the sale of alcohol could not be deployed to effect objectives not related to the sale of alcohol, but which the licensing board might yet find desirable. The generality of the objectives described in the 2005 Act as licensing objectives — such as 'protecting and improving public health' — did not give to a licensing board, properly exercising its function under the 2005 Act, power to lay down conditions, however desirable those conditions might be seen, which were not linked to the selling of alcohol." (para [12])

The court found in favour of the venue, and stated:

> "Turning to the substance of the issues before us, we consider that, in general terms, there is force in the submission advanced on behalf of the appellants that, on a proper construction of the statute, the essential function conferred on a licensing

> board by the 2005 Act is that of licensing the sale of alcohol. It is, in our view, clear from what the 2005 Act terms its 'core provisions' that the statute is concerned with the regulation of the sale of alcohol by means of the grant of licences." (para [24])

[48] If the petitioners are correct that it is unlawful to attach to a fishing licence a condition which is for economic benefit, then that would have far-reaching consequences. It would mean not only that the new amended economic link condition was unlawful, but also that any economic link condition (including the unamended economic link condition and the economic link conditions currently in force in other parts of the UK) would be unlawful. The maritime equivalent of a coach and horses would be driven through current fisheries policy throughout the UK.

[49] However, when the Fisheries Act 2020 is construed as a whole, then it becomes apparent that the imposition of the new economic link condition is within the powers of the respondents and is lawful.

[50] The legal principles which are applicable in this case were summarised by Lord Wilson JSC in *R (Palestine Solidarity Campaign Ltd)* v *SSCLG* as follows:

> "*The Legal Principles*
>
> 20. The Padfield case, [*Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997,] , arose out of the statutory requirement in England and Wales that producers of milk should sell it only to the Milk Marketing Board. Producers in the south east of England complained to the minister about the price paid to them by the board. Statute provided that, 'if the Minister … so directs', a committee had to consider their complaint. The minister declined to direct the committee to do so. The House of Lords upheld the claim of the producers that he had acted unlawfully in declining to give the direction. Of the four judges in the majority, one (Lord Hodson) applied long-recognised principles of judicial review. But Lord Reid, supported by Lord Pearce at p 1053 and Lord Upjohn at p 1060, reached his decision by reference to a different principle which he explained as follows at p 1030:
>
> > 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [which] must be determined by construing the Act as a whole … [I]f the Minister … so uses his discretion as to thwart or run counter to the policy and objects of the Act,

> then our law would be very defective if persons aggrieved were not entitled to the protection of the court.'

21. In *R* v *Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 the House of Lords applied the principle identified in the Padfield case, albeit in reaching a conclusion that the Secretary of State's order was not unlawful. His order, under challenge by a landlord, capped otherwise justifiable increases in the rent which had been registered as payable under regulated tenancies. The order was made pursuant to a power conferred in wide terms by section 31 of the Landlord and Tenant Act 1985. The landlord argued that Parliament's object in granting the power was that it should be used only in order to counter inflation but the appellate committee held that it had wider objects which extended to the purpose behind the capping order. Lord Bingham of Cornhill said at p381:

> '… no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question … The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31.'"

Lord Nicholls of Birkenhead said at p 396:

> "The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) …? No statutory power is of unlimited scope … Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose … The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event … the exercise is one of statutory interpretation."

[51] There is a marked distinction between a licensing board operating under a licensing act, whose sole function is licensing alcohol, and a fisheries authority operating under the 2020 Act whose functions relate to the management of the national resource of fish within British waters. The licensing powers of a fisheries authority are exercised in the context of their functions as a whole.

[52] The starting point in interpreting the proper purpose of the power to attach conditions to the licence is to consider the objectives of the Act. The purpose of the 2020 Act is set out in section 1. The objectives set out in section 1(1) include "the national economic

objective" which is defined in section 1(8) as being "that the fishing activities of UK fishing boats bring social or economic benefits to a part of the United Kingdom".

[53] There is nothing in the wording of the statutory licensing power in Schedule 3 which disapplies the objectives of the Act. Indeed, Schedule 3 includes wording which is entirely consistent with the use of Schedule 3 to further the national economic objective. That Schedule expressly provides for attaching conditions "which do not relate directly to fishing" (paragraph 1(1). It also expressly provides for attaching conditions "as to the landing of fish… (including specifying the ports at which catches are to be landed)" (paragraph 2(a)). The words "necessary or expedient for the regulation of sea fishing" must be read in the context of the purpose of the Act as a whole, including fisheries objectives. The regulation of sea fishing in a way which furthers the fisheries objectives, including the national economic objective, is a proper purpose under the 2020 Act.

[54] Moreover, under section 10(1) of the 2020 Act the respondents are under a statutory duty to exercise their functions relating to fisheries in accordance with the Joint Fisheries Statement 2020. That statutory duty applies to all of their functions, and there is no carve-out of their licensing functions. The Joint Fisheries Statement obliges the respondents to make conditions for each vessel they licence to bring either economic or social benefits to the UK, or any part of it (2.1.23). As the respondents are under a statutory obligation to attach a condition to bring economic benefit, it cannot be said that to do so is an improper purpose.

[55] Even if the petitioners are correct that in exercising the licensing function in Schedule 3 the fisheries objectives in section 1 do not apply, the petitioners do not succeed in their argument that the power has been used for an improper purpose. The wording of paragraph 1 of Schedule 3, taken in isolation and without reference to the fisheries

objectives, does not restrict the power to attach conditions so as to prevent the imposition of a landing condition for economic reasons. The power requires to be construed widely. This can be seen from the decision of the Court of Criminal Appeal in *Colley* v *Duthie*. The version of the licensing power in force at the time of that case was to be found in the Sea Fish (Conservation) Act 1967 (as amended):

> "4(6) A licence under this section may authorise fishing either unconditionally or subject to such conditions as appear to the Minister granting the licence to **be necessary or expedient for the regulation of sea fishing, and in particular a licence may contain conditions**- (a) **as to the landing of fish or parts of fish taken under the authority of the licence (including specifying the ports at which the catch is to be landed**)……;"

The 1967 Act did not contain a general statement of fisheries objectives. Nonetheless, the court took a wide interpretation of the power to attach conditions to the licence and did not limit the purposes of the power to the licensing of a particular vessel:

> "The way in which s 4 is set out seems to us to suggest that, while the limitations which may be imposed must be related to the use for fishing of the particular vessel named in the licence, the conditions which may be imposed are not so restricted. **They may be of a more general character, so long as, in the view of the minister, they are necessary or expedient for the regulation of sea fishing generally**.... The power to impose conditions is not limited to a requirement that these conditions must relate only to the use of the vessel for fishing, or that they can only apply while the vessel is being used for that activity. All that is said is that the purpose which the minister must have in view is the regulation of 'sea fishing', and in and in our opinion that phrase describes the activity with which the licensing system as a whole is concerned." (p1175-6) (emphasis added)

A wide interpretation should also be applied in the current case, particularly as the current licensing power in Schedule 3 of the 2020 Act, unlike that in force at the time of *Colley* v *Duthie*, specifically gives power to impose conditions "which do not relate directly to fishing". In my opinion on the proper construction of the wording of the Schedule 3 the respondents may in the exercise of their licensing function attach conditions which relate to the landing of fish and to the regulation of sea fishing, including an economic link condition.

[56] In all these circumstances, I find that the power to attach conditions to the licence has been used for a proper purpose.

Ground 3 unfair consultation process

Submissions for the petitioners

[57] Senior counsel for the petitioners submitted that the consultation which led to the outcome report was improper and unfair. There was nearly a 5 year gap between the end of the public consultation and the decision. Since the end of the consultation period there had been material changes in circumstances relating to the Scottish fishing sector. The UK had left the European Union on 31 January 2020. Additional fishing quota is available to UK fishermen as a result of the Trade and Co-operation Agreement between the UK and the EU. There had been a number of Covid lockdowns. At the time of the consultation period, the Bank of England base rate was 0.25% and is now 3%. The economic conditions are materially different as of September 2022 as compared to October 2017. Employment in the Scottish fish processing sector had reduced significantly since 2017 as a result of developments in automation and the restriction on the movement of EU labour which formed a large part of the workforce. The Further Consultation did not constitute a further open consultation process. The respondents selected which business to speak to. The discussions amounted to online meetings of not more than one hour. The respondents did not invite written correspondence in relation to the issues on which it had previously consulted. The discussions focussed solely on the BRIA as opposed to wider policy concerns about the proposals. Any consultation process must be carried out properly and fairly (*School & Nursery Milk Alliance* v *Scottish Ministers* [2022] CSOH 11, 2022 SLT 262). Where, as here there was a fundamental change in circumstance fairness required a further

consultation process (*R (Elphinstone)* v *Westminster Schools and others* [2008] EWHC 1287 (Admin)).

Submissions for the respondents

[58] Senior counsel for the respondents submitted that the question was whether there had been unfairness (*R (Help Refugees Ltd)* v *SSHD* 2018 4 WLR 168, *School and Nursery Milk Alliance*). There had been consultation in 2017 and the Further Consultation 2022. The alleged "material changes in circumstances", being COVID-19, Brexit and economic conditions in the UK, had been canvassed in 2022 (Final BRIA section 11) and did not meet the test for unfairness in *(R) Elphinstone* v *Westminster City Council.* The petition did not explain what the petitioners would have said differently to Marine Scotland had the further consultation been handled differently.

Decision

[59] In *R (Help Refugees Ltd)* v *Secretary of State for the Home Department* the English Court of Appeal stated:

> "The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, 'clear unfairness must be shown' (*Royal Brompton and Harefield NHS Foundation Trust* v *Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at para 13); or, as Sullivan LJ said in *R (Baird)* v *Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: 'a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong.'" (paragraph 90)

[60] Further guidance on fairness can be found in *R (Mosely)* v *Haringey LBC* ([2017] UKSC 10, [2017 1 WLR 771):

> "24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn)* v *Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'
>
> 26. Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government's proposed designation of Stevenage as a 'new town' (*Fletcher* v *Minister of Town and Country Planning* [1947] 2 All ER 496 at p 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. Second, in the words of Simon Brown LJ in the *Baker* case, at p 91, 'the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit'."

[61] The requirement of fairness applies to any consultation, including, such as in the current case, consultations undertaken when there is no statutory obligation to consult:

> "Even if no duty to consult exists, where consultation is carried out, it must be carried out properly and fairly:
> *Regina* v *North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, paragraph 108 ; *R (Eisai)* v *National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, paragraph 24". (*School & Nursery Milk Alliance* v *Scottish Ministers* para [43]).

[62] In this case there was an exceptionally long period between the consultation closing in 2017 and the publication of the outcome in 2022. A lengthy time gap is undesirable. However, a lengthy time gap does not in itself justify quashing the decision. The question is whether during that time gap there has been a fundamental change of circumstances such that fairness requires that the decision-maker is required to give consultees a further opportunity to make representations:

> "Given …. the underlying principle of fairness that governs the caselaw on consultation, it seems to me that a fundamental change is a change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed." (R *(Elphinstone)* v *Westminster Schools* paragraph 62).

[63] The petitioners found on three changes of circumstances: Brexit, Covid and change in the economy.

[64] In my opinion, none of these changes render the consultation process unfair.

[65] Firstly, the respondents did give the petitioners an opportunity to make representations about the effect of these three changes of circumstances and the petitioners' representations in response were taken into account in the Outcome Report and the Final BRIA. Question 10 of the Further Consultation gave the petitioners a specific opportunity to make representations on Brexit and Covid:

> "Question 10: What is your view on the impact of the Brexit/Covid pandemic/ Ukraine crisis on the proposed changes?"

The petitioners were also given an opportunity to make representations about any material changes in the economy which affected their members' businesses. They were asked about the impact of the proposals on their business and were specifically told "It will also be helpful to consider any substantive changes to anticipated impacts since 2017".

[66] Secondly, on the evidence before me, there was no unfairness because the petitioners have not identified any additional information which they were prevented from bringing to the attention of the respondents. The first petitioner's Chief Executive James Anderson says in his affidavit:

> "had there been a full and proper consultation in 2022 we would have taken the opportunity to reiterate our view that an alternative non-regulatory approach to achieving a higher level of pelagic landings into Scotland would have been a better way to deliver the manifesto promise and elaborate to that end on the proposals we had made 5 years earlier…..My wish to revisit the fundamentals of the policy was given little credence by the participating officials"

That is not an indication that there had been fundamental changes which the petitioners wished to bring to attention of the respondents, but merely an indication of a desire to reiterate and elaborate on the original consultation response. If there had been such additional information about a fundamental change of circumstances there is no reason why the petitioners could not have submitted it as part of the further consultation. This could have been done in response to any specific question to which the additional information related, or to Question 13: "Is there any other relevant information you would wish to relate on this proposed policy change?"

[67] Thirdly, the Further Consultation was not the end of the matter. The first petitioners had a meeting with the Cabinet Secretary in August 2022. That was another opportunity at which they could have made representations about fundamental changes of circumstance.

[68] All in all, the petitioners had ample opportunities to make representations as to the three changes of circumstance identified by them. The consultation process, looked at as a whole and including both the 2017 consultation and the Further Consultation, was a fair one.

Ground 4: Failure to take account of relevant considerations

[69] The petitioners identified four considerations which they say the respondents failed to take into account: (i) economic detriment (ii) lack of processing capacity (iii) price distortion and (iv) the potential in reduction of landings by vessels which are no longer compliant. A further consideration, relating to the lack of guarantees, was not insisted on by them.

[70] These considerations fall within the third category of considerations identified by Simon Brown LJ in *R* v *Somerset Council , Ex P Fewings* [1995] 1 WLR 1037, 1049 namely:

> "Third, those [considerations] to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision maker may decide just what considerations should play a part in his reasoning process."

[71] Further guidance on that category was given by the Supreme Court in *Friends of the Earth* v *Secretary of State for Transport* [2020] UKSC 52:

> "120 It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness. …. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.
> 121 Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. …. This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight…"

(i) Economic detriment

Submissions

[72] Counsel for the petitioners submitted that there would be a significant economic detriment to Scottish pelagic vessel owners. There was a significant price differential in relation to pelagic species as between Norway and Scotland. That consideration was not adequately considered in the decision. The Final BRIA erroneously assumed that there would be a significantly reduced price differential should the proposed changes be made. That had not been borne out since the changes came into effect. Scottish prices are expected to drop further as landings are made into a market which is already having its demands met. The Final BRIA's snapshot of price differentials was misleading. There was a risk of Norwegian prices increasing further.

[73] Counsel for the respondent submitted that economic detriment was fully considered in the Final BRIA. The 2022 price gap remained lower than in the Final BRIA. The current prices were not expected to continue but if they did would remain within the modelling.

[74] The economic detriment to the pelagic vessels was a consideration which was taken into account by the respondents. It is considered in both the Outcome Report and the Final BRIA.

Decision

[75] The Outcome Report gave specific consideration to the economic detriment to pelagic fishers. Paragraph 2.2 states:

> **"Impact on the pelagic fleet**
> Pelagic fishers, some Producer Organisations and fish agents took the view that changes to the economic link licence condition were intended to subsidise the processing sector at the expense of the pelagic fleet. There were recurrent concerns that if pelagic vessel owners were to shift their landings to Scotland from elsewhere

> in order to comply with the proposed new economic link licence condition, they could suffer financial loss as prices tend to be less competitive in Scotland than in other countries and the change could result in result in [sic] processors offering lower prices. Concerns were expressed that the anticipated financial loss could be such that it would impact their viability."

[76] At page 10-11, under the heading "Direct negative financial impact on the pelagic fleet", the Outcome Report considered the reduction in income which had been estimated in the First Poseidon Report and concluded:

> "Set against this £4.1 million loss, based on the Poseidon Report's methodology, Scottish Government estimates that this reform to economic link provisions could generate c. £35 million of additional revenue for the processing sector, as well as related job creation in Scotland." (p12)

[77] The Final BRIA also gives specific consideration to the economic detriment to pelagic fishers. Paragraph 6.3.1 states:

> "Price differentials – Pelagic vessels mainly land in Norway. Based on the average of 2015 to 2019 data, Mackerel is expected to receive £35 per tonne less in Scotland than in Norway and Herring is expected to receive £31 per tonne less in Scotland than in Norway. These are expected 2023 prices. …In the longer term, there is also the possibility that the price received by fishers in Scotland could decrease due to increased supply and greater market power of buyers."

[78] Paragraph 11.2 states:

> "11.2 Impact on fishing vessels
> the largest impact is likely to be on pelagic vessels that tend to land a high proportion of their catch abroad."

[79] The Final BRIA recommends the amendment of the economic licence condition and concludes:

> "Other options, including voluntary options, were considered but when analysed the benefits were shown to fall short of the benefits that are expected from the above proposal. The preferred option is expected to deliver the benefits associated with landing and processing more valuable stocks in Scotland as set out above. It will ensure further opportunities in Scotland to realise more benefits from a national resource. It will deliver a number of both monetised and non-monetised benefits that are believed to outweigh the carefully considered costs which may arise from the introduction of this policy."

[80] It is apparent from the foregoing that far from, as the petitioners suggest, the respondents not taking into account the economic detriment to pelagic fishers, the respondents took it into account and examined it in detail. The weight to be given to the economic detriment consideration was a matter for the respondents. They weighed that consideration against other considerations including the potential benefit to the processing sector and job creation. Having taken that consideration into account, the weight to be given to it was a matter for them, and they were entitled to come to the conclusion which they did.

[81] The petitioners also criticise the Final BRIA for erroneously assuming that there would be a significantly reduced price differential should the proposed changes be made, which the petitioners say has been borne out since the changes came into effect. If fish prices subsequent to the date of the decision have been different from those predicted at the time of the decision, that is not relevant to the question of whether a relevant factor has been left out of account at the time of the original decision, but can be considered by the respondents as appropriate in the Post-Implementation Review.

(ii) Lack of processing capacity

Submissions

[82] The petitioners submitted that the respondents had failed to take into account the lack of capacity for processing of pelagic fish in the volume anticipated by the new economic link condition. There would likely be delays in landing which would have a detrimental effect on quality and prices. The respondents failed to have sufficient regard to this consideration.

[83] The respondents submitted that processing capacity was addressed in the Final BRIA and Outcome Report and that sufficient capacity exists today.

Decision

[84] The lack of processing capacity was a consideration which was taken into account by the respondents.

[85] At page 12 of the Consultation Response they state:

> **"Concerns around lack of capacity ….**
>
> Lack of processing capacity was a key theme in consultation responses opposed to the change, alongside a perceived lack of competitiveness. It was argued that this would lead to reduced fish prices and lower economic returns for crew and vessels….
>
> The question of capacity was rebutted by respondents from the processing sector. Most believed that increased landings would allow them to plan for the future and expand their operations, thereby generating wealth for the Scottish economy. Moreover, they did not share concerns about the perceived lack of capacity to process higher volumes of pelagic catch.
> In addition, the consultation was clear that any changes to the economic link licence condition would be phased for the pelagic fleet allowing both them and the processing sector time to adapt their operations and processes to these new arrangements. It also proposed quota gifting as an alternative means of meeting the economic link licence condition thereby giving vessel owners the option of continuing their current landing practices."

[86] The respondents weighed the competing responses of the pelagic fishermen and the processors and adjusted their proposal to include transitional arrangements, as explained in the Consultation Response pages 22-23:

> "…arguments from the pelagic catching sector in opposition to this proposal tended to focus on objections to the level of the target and the lack of processing capacity in Scotland.
>
> I. Lack of domestic market processing capacity
> Respondents raised concerns over the processing and domestic market for specific pelagic stocks…
> Respondents raised concerns that the proposed policy change could have unintended consequences, including:
>
> (i) that fishers are compelled to land some of their catch for such species into Scotland, despite a lack of local processing capacity and/or market, with negative economic consequences for all concerned; and

(ii) that fishers could meet the licence condition by landing fish into Scotland for which there is limited processing capacity or market (which tends to lead to lower value) while continuing to land higher value stocks abroad.

The Scottish Government considers there is merit in these concerns and has adjusted the proposal as set out in the Next Steps section below.

Scottish Government – Next Steps….

Having considered the responses to the consultation as summarised above and in light of subsequent discussions with the fishing industry and others affected by the policy, the Scottish Government will proceed to phase in the implementation of the economic link licence condition for pelagic species as proposed. This will see the introduction of the following landings targets for pelagic species:

- 30% landings in 2023
- 40% landings in 2024
- 55% landings in 2025"

[87] As the consideration of lack of processing capacity was taken into account by the respondents, the only challenge that can be made by the petitioners is that they did not give it enough weight. That challenge fails. The weight to be given to that consideration was a matter for the respondents and they were entitled to come to the decision which they did.

(iii) Price distortion

Submissions

[88] The petitioners submitted that the respondents had failed to take into account the likely distortion to pelagic fish prices in Scotland caused by the new economic link condition. The pelagic fish processors in Scotland have the majority of their capacity met by "tied boats" which they own. If pelagic fishermen are required to sell the majority of their yield to these processors, that will allow the processors to pay artificially low prices. New processors would not open to stabilised the market as there are high costs of entry. Preferential prices may be offered to tied boats.

[89] The respondents submitted that the Final BRIA considered competition impacts and was entitled to conclude that they would have no significant long term impact due to the global nature of the pelagic fish market and the absence of major barriers to new processors entering the market. The matter was taken into account.

Decision

[90] The risk of price distortion due to anti-competitive behaviour on the part of fish processors was examined in the Final BRIA. Section 8.2 states:

> "There is a risk that the few pelagic processing factories in Scotland, along with a near guaranteed supply, could result in non-competitive behaviour with processors leveraging their new market position to lower prices. The potential effect of this behaviour has not been monetised, beyond the aforementioned sensitivity analysis on the drop in prices in Scotland, but this behaviour is not expected to occur in the long term as there are no major restrictions in new fish processors entering the market if there are supernormal profits available, and in the short term would likely only result in a transfer between fishers and processors rather than overall loss for the economy."

[91] Section 12 of the Final BRIA is a competition assessment. It states:

> "There is a competition concern in the expected restriction of competition in buyers via the requirement to land in Scotland. As a highly perishable good it is expected that most, if not all, of the extra landings of fish will be processed in Scotland, which will result in fishers selling to a smaller pool of fish processors than they previously had access to. While a smaller pool of buyers is a potential concern in the short run, many Scottish fish processors operate mixed species processing plants which would allow them to more easily expand into the pelagic market and, there is nothing to prevent the establishment of new processing businesses. As such, there is space to allow competition to continue. Additionally, pelagic fish processors in Scotland are in competition with each other and have the capacity to process more. Given the prices for their products are set by the international market, they are incentivised to continue to compete vigorously."

[92] As can be seen from the foregoing, the consideration of anti-competitive price distortion was taken into account by the respondents. The respondents have examined the restriction of competition in respect of the low number of Scottish processors. Having taken

that consideration into account, the weight to be given to it was a matter for them and they were entitled to come to the conclusion that there was space to allow competition to continue. If in future vertically-integrated fish processors with tied vessels enter into illegal anti-competitive arrangements favouring their own vessels that can be addressed in the Post-Implementation Review, and/or by the bringing of proceedings against the offending processors for breach of competition law. The petitioners fail on this ground.

(iv) The potential in reduction of landings by vessels in Scotland

Submissions

[93] The petitioners submitted that there would be a likely reduction in landings by Scottish vessels which currently would comply with the new landings target as they would seek to reduce their landings in Scotland to the minimum necessary. That was because Norwegian processors were likely to seek to replace the landings lost to them from those who had majority Norwegian landings by offering increased prices. The decision had no regard to this consideration.

[94] The respondents submitted that the petitioners' complaint was based on speculation and that it was not necessary to take into account every speculative consequence of a decision.

Decision

[95] The possibility of Scottish vessels deciding to land the minimum in Scotland in order to obtain the benefit of higher Norwegian prices is expressly contemplated by the policy. That option is open to vessels by virtue of the quota-gifting arrangements. The Outcome Report states (p27):

> "Whilst the Scottish Government acknowledges that quota gifting provides less economic benefit as compared to increased landings of valuable fish stocks into Scotland, it considers it reasonable and proportionate to the policy aim to include an alternative means of meeting the economic link licence condition."

Accordingly, the reduction of landings by vessels in Scotland to the minimum in order to benefit from higher prices in Norway is permitted by the new economic link condition. In these circumstances it cannot be said that such a reduction has been left out of account by the respondents. The petitioners fail on this ground also.

Ground 1: Breach of article 1 protocol 1 of the European Convention on Human Rights and Fundamental Freedoms ("A1P1")

A1P1

[96] A1P1 states:

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Submissions for the petitioners

[97] Counsel for the petitioners submitted that a sea fishing licence was a possession for the purposes of article 1 protocol 1 (*Tr Traktörer AB* v *Sweden* (1989) 13 EHRR 309; *O'Sullivan McCarthy Mussel Development Ltd* v *Ireland* (App No 44460/17), *R (Mott)* v *Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022; *R (Guernsey)* v *Secretary of State for the Environment* [2016] EWHC 1847 (Admin), [2016] 4 WLR 145 *Sunbeam Fishing Limited* v

Secretary of State for Environment, Food and Rural Affairs [2023] CSOH 16, 2023 SLT 369, *Back* v *Finland* (2004) 40 EHRR 48 at paragraph 53). The decision interferes with the right to enjoyment of the petitioners' sea fishing licences and subjects that possession to additional control by way of stricter conditions than had previously pertained. The interference was unlawful on the basis that (i) it was in breach of a legitimate expectation, (ii) it had been pursuant to an improper purpose (iii) it had been made following an unfair and improper consultation process, (iv) the respondents had failed to take account of relevant considerations and (v) the decision was irrational.

[98] Counsel further submitted that the interference with the petitioners' property right was disproportionate and did not strike a fair balance between the petitioners' interests and any wider public interest justification. The petitioners' members had made substantial capital investments in specialist boats designed specifically for catching pelagic fish. It is unlawful to carry out their business without a licence, which the respondents propose to unilaterally amend. They land the majority of their catch in Norway where the price of pelagic fish is significantly greater. Some of the petitioner's members land 100% of their catch in Norway. The new economic link condition will require the majority of their petitioners' members catch to be landed in Scotland. This would result in significant disadvantage to the petitioners' members. No compensation would be paid. Fishermen operating from Scotland would be prejudiced in the operation of their business as compared to those based in the rest of the UK, who will retain the ability to generate greater profits, through being able to decide on their port of landing based on the price which may be achieved there for their catch. The greatest financial burden to be borne by the respondents' decision to alter the economic licence condition was by the petitioners and their members, as set out in the Second Poseidon Report which concluded:

(i) Pelagic fishing vessels are not restricted in their ability to sell to the Norwegian market, which has a daily capacity for processing five times greater than Scotland;

(ii) The average impact per vessel per annum for making mackerel and herring landings into Scotland rather than Norway was significant with 68% of this attributable to mackerel and 32% to herring;

(iii) It is anticipated that Scottish prices will be depressed as the Scottish market is met with higher levels of supply than demand;

(iv) Vessels which are not owned by Scottish processors are likely to be at particular detriment. They will in effect be the back of the queue when it comes to selling their catch to the Scottish market;

(v) Scottish processors will be able to determine price by reference to their knowledge of how much of the landings target still requires to be met by each vessel in each year. In the knowledge that a significant proportion of catch must be sold in Scotland, processors are able to, in effect, hold vessels over a barrel when it comes to price. This will have a further distorting effect on the market;

(vi) Scottish processors do not have sufficient capacity to process the volume of fish which will require to be sold to the Scottish market. Any delay in processing is likely to have an effect on quality of the product, which will have a further detrimental effect on price;

(vii) It is likely that Norwegian prices will increase as a corollary of the effect on the Scottish market. The Norwegian market will continue to have a high level of demand but a reduced supply. The increase in Norwegian prices at the same time as

> a decrease in Scottish prices is likely to put Scottish pelagic vessels at a significant financial disadvantage internationally.

In these circumstances, the effect on these vessels was disproportionate and did not strike the right balance between any public interest and the specific interests of the affected victims.

[99] The petitioners were victims for the purposes of the ECHR and section 7 of the Human Rights Act 1988. The petitioners represent a class of fishermen who are directly affected by the licence change. Associations are permitted to raise complaints on behalf of their members: Reed and Murdoch *Human Rights Law in Scotland* paragraph 2.78. At any rate the petitioners receive income from their members as a direct proportion of their members' income so a measure which interferes with the members has a direct effect on the petitioners' own interests.

Submissions for the respondents

[100] Senior counsel for the respondents submitted that the legality requirement will not be breached by virtue of a public law failure of any type (*In re Gallagher* [2019] UKSC 3, [2020] AC 185). The assessment of proportionality required the court to strike a balance between the demands of the general interest of the community and protection of the individuals rights (*AXA General Insurance Co* v *Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122). The proportionality exercise is to be carried out by the court in the four stage approach in *Bank Mellat* v *Her Majesty's Treasury* (No 2) [2013] UKSC 39, [2014] AC 700. Compensation will generally not be required in a control of use case (*R (Mott)* v *Environmental Agency*). The petitioners, being producer organisations, were not "victims" for the purpose of the Human Rights Act 1988 in respect of possessions of

their members. A change in the licence may not be an interference (*AXA* v *Lord Advocate*, *Ineos Upstream Ltd* v *Lord Advocate* [2018] CSOH 66, 2018 SLT 775.) There was a wide margin of appreciation (*AXA* v *Lord Advocate, Bank Mellat* v *HM Treasury*, *Mott).* The petitioners advanced no argument on fair balance. What is being targeted is not the pelagic fleet but the most economically valuable fish stock. The sector enjoys supernormal profits. The balance that had to be struck was between the potential impact on the pelagic fleet and the economic benefits for Scotland, including additional revenue for the Scottish processing industry. There was no merit in the proportionality challenge.

Decision

Victim

[101] The petitioners may rely on ECHR rights in this judicial review only if they are a "victim" of the unlawful act within the meaning of Article 34 of the ECHR (section 100 Scotland Act 1988, section 7(1) Human Rights Act 1988). Article 34 of the ECHR provides that the European Court of Human Rights may receive applications

> "from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols"

[102] The petitioners bring this petition on behalf of their members.

[103] The leading textbook Reed and Murdoch *Human Rights Law in Scotland* states:

> "the Court recognises that associations are often established by individuals with a view to defending their interests, particularly in respect of complex administrative decision-making, and thus associations are permitted to bring complaints on behalf of their members." (paragraph 2.78)

[104] The respondents took issue with that statement of the law and argued that it was too wide and not justified by the European case law and the petitioners were not "victims".

[105] In my opinion the passage in Reed and Murdoch is an accurate statement of the law. It reflects what the European Court of Human Rights said in *Gorraiz and Lizarraga* v *Spain* (App no 62543/00):

> "like the other provisions of the Convention, the term 'victim' in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of 'victim'. Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the convention ineffectual and illusory." (paragraph 38)

[106] That statement by the court is of general application, and is not limited to the particular facts of the *Gorraiz* case.

[107] Each of the petitioners is a producer's organisation established under Art 6 of Council Regulation EU NO 1379/2013. In 2022 they administered, between them, around 56% of the Scottish mackerel quota and 62% of the Scottish herring quota.

[108] However, the role of producer's organisations goes beyond administration of the quota and includes defending their members' interests and representing the members in discussions with the respondents about complex administrative decisions. Art 7 of Regulation 1379/2013 sets out the objectives which a fishery producer organisation "shall" pursue. One of these compulsory objectives is "promoting the viable and sustainable fishing activities of their members". The petitioners, as associations which represent the interests of their members by defending their interests in discussions with the government about complex matters, and do so pursuant to a legal obligation under retained EU law to promote the activities of the members, are capable of being "victims."

[109] The issue of whether or not to introduce a compulsory landings target was a complex one. Throughout the process leading up to the Decision the respondents treated the petitioners as representing their members. The respondents explored a voluntary solution with the petitioners as representatives of their members. In both the 2017 consultation and the Further Consultation the respondents consulted with the petitioners as representatives of their members. In 2022 the Cabinet Secretary met with the first petitioner as representative of its members. In all the circumstances I find that the petitioners are "victims" for the purposes of section 100 of the Scotland Act 1988 and section 7(1) of the Human Rights Act 1998.

A1P1

[110] In *Ineos Upstream Ltd* v *Lord Advocate* the holders of Petroleum Exploration and Development Licences (PEDLs) maintained that the Scottish Government had unlawfully imposed a ban on UOG extraction, commonly known as fracking. In the United Kingdom the right to search or bore for an extract oil or gas is vested in the Crown. Under the Petroleum Act 1998, the Scottish Ministers may grant PEDLs to promote the exploitation of that national resource in the public interest. INEOS argued that their interests in the PEDLs amounted to possessions under A1P1. The court found that there had been no ban and no final policy and that the A1P1 argument was premature (para [65]) but made the following *obiter* remarks:

> "[66] The emerging policy is merely one consideration to which regard will be paid in the determination of any application by the petitioners for planning (or other) consent. Since the emerging policy does not amount to a ban, I cannot see how it interferes with any possessory interest that the petitioners may have in their PEDLs. I did not understand [counsel for the petitioners] to submit that if there was no ban there was still nonetheless an interference with the petitioners' A1P1 rights. It should also be borne in mind that the petitioners have never had any legitimate

expectation that they would obtain all (or indeed any of) the necessary permissions for the purposes of UOG extraction. They have not been deprived of their interests in the PEDLs; these have not been withdrawn or revoked. There has been no legislative change affecting the viability of the PEDLs. Such possessory interests as the petitioners might have in the PEDLs are, in any event, highly vulnerable to the inherent commercial risks of an industry that is constantly affected by fluctuations in market prices. Having regard to these factors and to the substantial uncertainty that exists about the extent of the recoverable amount of UOG in Scotland, I am doubtful whether the petitioners' interests in the PEDLs would qualify as possessions for the purposes of A1P1. It seems to me that there is considerable force in the views on similar issues expressed by Sir Christopher Bellamy QC in *R (Royden)* v *Wirral MBC* 2003 BLGR 290 at paragraph 143:

> 'Even assuming that a hackney carriage vehicle licence, or its value, constitutes 'property', that 'property' arises solely because of the legal regime in force in the Wirral which restricted the number of licences in issue. It has been the case, at least since 1985, that the restriction on the number of licences in issue in the Wirral could, in law, be removed. It follows that anyone acquiring a licence after 1985 did so on the implied understanding that that might occur. The 'property' in the licence was, therefore, inherently subject to the possibility of such a change occurring. On this view, there is no 'interference' with the property, since the possibility of 'de-restriction' occurring was always intrinsic to the 'property' itself. This approach may also be expressed in wider terms, with which I myself would respectfully agree, namely that changes in the law which may affect property values, or the value of a business, cannot normally be impugned under art 1 of the First Protocol solely on the grounds that a change in the law has caused a diminution in value.'

[67] It is not, however, necessary for me to come to any concluded view on these and other questions raised in the context of this branch of the case since I consider the claim under A1P1 to be premature."

[111] I have had the benefit of a fuller discussion than that in *Ineos* v *Scottish Ministers* of the jurisprudence of the European Court of Justice, much of which post-dates *R (Royden)* v *Wirral* in 2003. It is clear from that jurisprudence that the inherent possibility of a later revocation, restriction or alteration of a licence does not prevent there being a breach of A1P1. As Jay J said in *R (Guernsey)* v *Secretary of State for the Environment:*

> "If a broad power to revoke were a complete answer to the A1P1 claim, it would effectively render this human right nugatory in many licence cases where the existence of such a power is commonplace." (paragraph 100)

[112] The European case law is summarised by the European Court of Human Rights in *O'Sullivan McCarthy Mussel Development Ltd* v *Ireland*. In that case the court held that an A1P1 claim arising out of a suspension of licences for mussel cultivation was admissible.

[113] The court stated:

> "87 With respect to business activities subject to licensing requirements, the Court refers to the survey of the relevant case-law set out in *Malik* v *United Kingdom* (23780/08):
>
> > '91. **In cases concerning the grants of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business** (see *Fredin* v. *Sweden* (no. 1), 18 February 1991, § 40, Series A no. 192, in respect of an exploitation permit for a gravel pit; and mutatis mutandis, *Tre Traktorer AB* v. *Sweden*, 7 July 1989, § 53, Series A no. 159, concerning a licence to serve alcoholic beverages in a restaurant. See *also Rosenzweig and Bonded Warehouses Ltd.* v. *Poland*, no. 51728/99, § 49, 28 July 2005, which involved a licence to run a bonded warehouse). In this regard, the Court observed in particular in *Tre Traktorer AB* (1991) 13 E.H.R.R. 309 that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had had adverse effects on the goodwill and value of the restaurant (at §§ 43 and 53 of the Court's judgment).
> > 92. While the Court has appeared to accept on some occasions that the licence itself constituted a 'possession' for the purposes of Article 1 of Protocol No. 1 to the Convention, it is significant that on these occasions the question was not in dispute between the parties so the Court was not required to engage in an extensive analysis of the nature of the possession in the case. In any event, it went on to explain that, according to its case-law, the termination of a valid licence to run a business amounted to an interference with the right to the peaceful enjoyment of possessions (see *Bimer S.A.* v. *Moldova*, no. 15084/03, § 49, 10 July 2007; and *Megadat.com SRL v. Moldova*, no. 21151/04, §§ 62–63, 8 April 2008). It is clear that in both cases, the licences were connected to the carrying out of an underlying business.
> > …
> > 94. … [I]in cases involving the suspension or revocation of licences and permits or the refusal to enrol a person on a list of individuals entitled to practise a particular profession, the Court has tended to regard as a 'possession' the underlying business or professional practice in question. Restrictions placed on registration, licences or permits connected to the work carried out by the business or the practice of the profession are generally viewed by the Court as the means by which the interference with a business or professional practice has taken place.'

> 88 **In line with the above, the Court considers that the present case concerns a 'possession', namely the underlying aquaculture business of the applicant company.** It is true, as the Government pointed out, that all of the various licences and authorisations held by the applicant company retained their validity in 2008. In this respect, the case differs from cases previously decided by the Court, which involved the cancellation or revocation of a licence or permit, putting an end to a commercial activity (see among many others *Tre Traktorer* AB 13 where the applicant company's licence to serve alcoholic drinks was withdrawn leading to the closure of the establishment shortly afterwards; see also,14 involving the statutory cancellation of applicant's licence to sell tobacco, followed shortly afterwards by the closure of his business). The Court observes, however, that it has also found that art.1 of Protocol No.1 applied even where the licence in question was not actually withdrawn, but was considered to have been deprived of its substance.
>
> 89 Mindful of the need to look behind appearances and investigate the realities of the situation complained of in the present case, **the Court considers that the temporary prohibition on mussel seed fishing that applied during the periods in question in 2008 is properly to be regarded as a restriction placed on a permit—the mussel seed authorisation issued to it for 2008—connected to the usual conduct of its business**." (emphasis added)

[114] In my opinion, the change in the economic link condition concerns a possession, namely the underlying fishing business. That is consistent with what is said in the above quotation, and is also consistent with *Sunbeam Fishing Ltd* v *Secretary of State for Environment, Food and Rural Affairs*.

[115] Like *O'Sullivan McCarthy Mussel Development Ltd* v *Ireland,* the current case is not one in which a licence is cancelled or revoked. The new economic link condition does not put an end to a commercial activity. The pelagic vessels will still have a profitable business, albeit that the profits are expected to be less than those earned under the previous economic link condition. The new economic link condition places a restriction on a licence connected to the usual conduct of the vessels' business, and A1P1 applies.

[116] The A1P1 challenge to the decision was in two parts.

[117] The first part was a lawfulness challenge. A1P1 provides that "No one shall be deprived of his possessions except….and subject to the conditions provided for by law".

The petitioners' position in the petition was that the deprivation had not been subject to the conditions provided for by the law in that it was unlawful on the other grounds advanced in the petition, ie improper purpose, unfair consultation and failure to take account of relevant considerations. For the reasons given below, I have rejected these other grounds and found the decision to be lawful. Accordingly, the deprivation was subject to the conditions provided by the law and the petitioners' lawfulness challenge fails.

[118] The second part was a proportionality challenge: the new economic link condition would result in significant financial disadvantage to the petitioners' members. The issue is whether the members with pelagic vessels are being asked to bear a disproportionate and excessive burden (*AXA* v *LA* at paragraph 36). This requires to be dealt with by addressing the four questions set out in by Lord Reed *Bank Mellat* v *HM Treasury* at paragraph 74 (p791).

[119] The first question is "whether the objective of the measure is sufficiently important to justify the limitation of a protected right". The objective of the new economic link condition is the national benefit objective ie "that fishing activities of UK fishing boats bring social or economic benefits to the United Kingdom or any part of the United Kingdom" (section 1(8) Fisheries Act 2020). That objective is set out in primary legislation and is sufficiently important to justify the limitation of a protected right. Fish are not a private resource of the fisherman, but are a national resource. Accordingly the first question is answered in the affirmative.

[120] The second question is "whether the measure is rationally connected to the objective". That question is also answered in the affirmative. A requirement to land fish in a part of the UK is rationally connected to the objective that fishing activities bring social or economic benefits to a part of the UK.

[121] The third question is "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective". In the 2017 Consultation letter the respondents invited proposals on a less intrusive measures, and left open the option of not proceeding with amendment to the licence condition if alternative proposals were likely to achieve broadly equivalent benefits. They considered an alternative voluntary option but ruled it out (Final BRIA paragraph 4). After consultation they made their proposals less intrusive by incorporating transitional provisions (Outcome Report p23). The petitioners made no detailed challenge to the Decision based this third question. I answer this question in the negative.

[122] The fourth question is

> "whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter… In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".

[123] The effect of the measure on a member of the petitioners is a reduction in profits. For the purpose of balancing the effect on the member against the achievement of the objective, the difference in the figures for reduction of profits between the petitioners and the respondents is not a material one. When the petitioners' calculations in paragraph 3.3.1 of the Second Poseidon Report are adjusted to incorporate the revisals to that paragraph made by the petitioners in the Joint Minute, the petitioners put the average cost per annum at £267,528 per vessel. The respondents put the cost per annum at £198,000 per vessel (Amy McQueen Supplementary Affidavit paragraph 8). A reduction of profits by either of these figures will not threaten the continuance of the members' underlying businesses, which are highly profitable with a net profit margin of 36.2% (MAU report paragraph 5.10).

[124] The objective of the measure is the national benefit objective. The respondents' aim is set out in para [43] above and is summarised in the MAU Report:

> "The proposed amendments aim to increase the volume and improve the stability of landings of the most valuable fish species into Scottish ports. These benefits should increase and create a more stable supply for Scotland's fish processing businesses. The policy seeks to improve the distribution of economic benefits arising from Scotland's natural resources by increasing the value added in Scotland so that local, coastal and rural economies will benefit from increased employment and income from the seafood industry." (p1)

[125] The contribution of the measure to the achievement of the objective has been calculated by the respondents (Final BRIA section 7 and Appendix B). The respondents assessed the overall effect of the measure on the national economy. They did so in accordance with the Green Book, which is issued by HM Treasury to give guidance on how to appraise policies, programmes and projects. The result of that assessment is that the change is expected to deliver net benefits to Scotland in the range of £49.7 million to £210.6 million over 10 years depending on whether vessels choose to increase landings or quota gift (MAU Report paragraph 13.1). The MAU report concludes:

> "the economic link regulation change is expected to generate net positive benefits to the Scottish economy, presented as an increase in Gross Value Added ('GVA'). As the BRIA sets out, there is expected to be a monetary cost to vessels in the pelagic industry. These costs will vary by vessel and will be higher for those vessels which generally land more of their annual quota into Norway. However, the expected monetary benefits in the form of 1) increased supply of fish to the processing sector and 2) increased demand for goods and services by the processing sector, outweigh this cost." (paragraph 14.5)

[126] Although the BRIA and the MAU Report consider the net benefit of the policy to the Scottish economy, the Poseidon Reports do not. The petitioners' focus is on the effect of the measure on their members. Their case as pled in this petition and the seven factors on which they rely (see para [98] above) do not address the objective of the measure. The Second Poseidon Report does not assess the effect of the measure on the national economy

but limits its findings to a comparison between the petitioners' members on the one hand and the fish processing companies and their tied pelagic vessels on the other, concluding that:

> "The difference between the gain to Scotland from independent vessels (but loss to the vessels themselves) and this loss to Scotland from tied vessels landing more product overseas means that the gain from the landings target could be as little as £13.4m at first hand sale. Although this net impact represents a relatively modest 16% increase in Scottish landings, it is highly inequitable: the benefit to Scottish processing companies and their tied vessels is at the expense of the thirteen independent vessels." (paragraph 5, p 18)

[127] As the only information before me as to the benefit of the policy comes from respondents' calculation, I shall proceed on the basis of that information. In my opinion, the proportionality of the impact of the cost to a vessel in the range of £198,000 to £267,528 per annum as against the likely benefit of the impugned measure to the Scottish economy in the range of £49.7 million to £210.6 million over 10 years, falls within the respondents' margin of appreciation . The respondents were entitled to come to the view that the detriment to the petitioners' members was outweighed by the contribution that the revised economic link condition will contribute to the achievement of the objective. The petitioners fail on this ground.

Order

[128] I shall uphold the respondents' third plea in law and refuse the petition. I reserve all questions of expenses in the meantime.