



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 2

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: Lindsay KC, Blair, Mackinnons

Respondents: Mure KC, Irvine, Scottish Government Legal Directorate

23 December 2022

Introduction

[1] 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, who are producers organisations representing pelagic fishermen, have brought these judicial review proceedings seeking reduction of the Decision. They also seek interim interdict:

“against the respondents from taking any steps to implement the decision of 21 September 2022 by altering the economic link licence conditions in any Scottish sea fishing licence to reflect the conditions as set out in the decision, pending the final determination of this petition by the court”.

[2] This case called before me as a matter of urgency on the petitioners' motion for interim interdict. No answers have yet been lodged. The urgency arises because the change in the economic link condition is to take effect on 1 January 2023. I heard submissions on Monday 19 December and today, when I gave this *extempore* opinion.

[3] This opinion is not a decision on whether or not the respondents' Decision should be reduced. At this stage, the only issue for me is how to regulate the situation until a full hearing on the substantive issues can be heard. The test for interim interdict is *prima facie* case and balance of convenience.

[4] The issues raised in this judicial review are many and complex. There are also substantial disputes on material matters of fact. In the short time available to deal with the motion for interim orders it has not been possible to deal with these issues at the level of detail which will be necessary in due course at a substantive hearing.

The change in licence condition

[5] The licence condition which is proposed to be changed is a condition which deals with a "real economic link".

[6] Currently, Scottish vessels landing more than 2 tonnes of species subject to total allowable catch (TACs) are 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 meet any of these options, or a combination thereof, they are required to provide quota to their relevant authority - so called 'Gifted Quota'.

[7] In a document entitled *Outcome Report. Consultation on proposals to amend the economic link licence condition* dated 21 September 2022 (the "Outcome Report") the respondents intimated the following decision:

"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."

[8] 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.

The background to the change in the real economic link condition

[9] On 2 May 2012 the UK Fisheries Administrations entered into a Concordat which contained the framework for enabling the four UK Fisheries Administrations to be given a greater degree of control over the management of their own commercial fishing fleets, within a UK wide quota and management and licencing system. The Concordat was entitled

“A Subject Specific Concordat between
The Department for Environment, Food and Rural Affairs
Marine Scotland
The Welsh Government and
The Department of Agriculture and Rural Development (Northern Ireland)
(‘the Administrations’)

On

Management Arrangements for Fishing Opportunities and Fishing Vessel Licensing
In the United Kingdom”

[10] Clause 2(c) of the Concordat stated:

“c. Administrations may impose their own licence conditions, subject to these not discriminating unfairly against vessels from the other administrations;”

[11] Clause 15 stated:

“The economic link

15. Administrations will continue to include within their licences the same UK-wide condition relating to the economic link. Administrations will also cooperate in an urgent review of this condition to see whether there are ways in which it could be strengthened, drawing in particular on experience in other Member States.... “

[12] 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.”

[13] The Scottish National Party won the Holyrood Election and formed a government.

On 30 August 2017 Marine Scotland issued a consultation letter entitled “Scottish Government Proposal to amend Economic Link Licence condition”. The letter invited a response by 31 October 2017. The Petitioners responded to the consultation. A similar statement to the 2016 Manifesto statement was included in the SNP’s 2021 election manifesto. On 21 September 2022 the Scottish Government published the Outcome Report on the 2017 consultation.

[14] Paragraph 1 of the Outcome Report explained that

“Publishing a report on the outcome of the consultation was delayed 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.”

[15] Between the original consultation period in 2017 and the Outcome Report in 2022 there had been a number of material changes affecting the fishing industry. The United Kingdom left the EU. The UK Parliament passed the Fisheries Act 2020, which enacts a national benefit objective that fishing activities of UK fishing boats bring social or economic

benefits to the UK or any part of the UK (section 1). There were developments in relation to the devolution of fishing policy. In February 2022 the UK government published the Fisheries Management and Support Common Framework Agreement. The policy framework is now set out in the Joint Fisheries Statement November 2022.

[16] DEFRA introduced an amended economic link licence condition which applies only to English administered vessels from 1 April 2022. The landing requirement was raised from 50% to 70%. The requirement that these be landings in the UK was retained and these landings were not restricted to England. The crewing requirement was retained, but increased to 70%.

[17] 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. Also on 21 September 2022 the Scottish Government published a business and regulatory impact assessment entitled *Amending the economic link licence conditions in sea fishing licences* ("the BRIA"). The BRIA stated:

"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.”

[18] The BRIA summarised these discussions, and noted that by and large those who responded to the 2022 consultation had not changed their views on their support or opposition to the proposed change. The BRIA considered the Poseidon Report, which had been commissioned by the petitioners for the 2017 consultation.

[19] The BRIA summarised the purpose of the policy as follows:

“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)

[20] There is a factual dispute between the parties as to the loss which will be caused by the change in licence condition and also a dispute as to the Norwegian market. The

petitioners' position is that pelagic fish landed and processed in Norway are a premium product and attract higher prices. For some vessels the entire catch may be landed in Norway for the benefit of a higher price than Scotland. The price gap is £200 per tonne for mackerel and £70 for herring. As an example, the 55% landing requirement for one particular vessel would amount to an annual reduction in revenue of £1.5m. The respondents' position is that the turnover for each of the 20 large vessels in the Scottish pelagic fishing fleet is in the range of £5m to £15m each year. Operating profits are high for example 40%. That puts into perspective the cost of £674,000 per pelagic vessel under the new policy. These are losses to the vessels, not the pursuers. In 2021 half of the 20-strong pelagic fleet complied with the UK landings condition. The first petitioners operate two onshore processing facilities and in 2021 their turnover was £12,513,504 of which only £1,538,930 comes from member levies. In 2021 the second petitioner's membership levies were £1,081,307. The average mackerel price in Scotland and Norway is substantially the same, although prices vary across the season. Norway benefits from Scotland's fishing quota. The Scottish Government is providing funding to ensure that Scottish processors, like Norwegian, can access Far East markets. Scottish fish processors have spare capacity and are investing in expanding their facilities to accommodate the additional landings. Norwegian fish processors have reported that they can no longer cope with the amount of mackerel being landed. While financial guarantees are not made available by the Scottish government, comparable insurance is available. Any differences in prices offered to different vessels in the pelagic fleet will be immediately apparent as prices require to be reported to Marine Scotland.

Prima facie case

[21] The petitioners seek reduction on six grounds. The respondent's position is that the petitioners have averred only a very weak *prima facie* case on fact and law.

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

[22] 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 44460/16)). 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) that it 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 is irrational. 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 land the majority of their catch in Norway where the price of pelagic fish is significantly greater. Some of the petitioners' members land 100% of their catch in Norway. The new economic link condition will require the majority of their 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.

[23] 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). Compensation will generally not be required in a control of use case (*R(Mott) v Environmental Agency* [2018] UKSC 10, [2018] 1 WLR 1022). The petitioners, being producer organisations, were not “victims” for the purpose of the Human Rights Act 1988 in respect of possessions of their members (*Reed & Murdoch Human Rights Law in Scotland* para 2.72). However, counsel did not press that point at this stage and accepted that in appropriate circumstances associations could bring ECHR claims on behalf of their members. A change in the licence may not be an interference (*AXA v Lord Advocate, Ineos v Lord Advocate.*) There was a wide margin of appreciation (*AXA v Lord Advocate, Bank Mellat v HM Treasury (No 2)* [2014] AC 700, *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.

[24] In my opinion, the petitioners have set out a *prima facie* case. Even where licensing is a proper exercise of power to control an activity, it is still necessary to consider the impact on the particular claimant (*Mott*). The court will require to consider whether the economic

link licence strikes a fair balance between the economic interests of the petitioners (or their members) and the general interests of Scottish society (*Tr Traktörer AB v Sweden, AXA General Insurance*). These are complex issues which will require a full substantive hearing.

Ground 2: breach of a legitimate expectation

[25] Senior Counsel for the petitioners submitted that the Concordat gave the petitioners and their members a legitimate expectation that the current economic link condition would not be amended such as to diverge from the economic link condition applicable in the rest of the UK. Paragraph 15 contained a clear and unambiguous undertaking that all of the administrations who were signatories to the Concordat would continue to include within their licences the same UK wide condition relating to economic link. That created a legitimate expectation (*Re Finucane's Application for Judicial Review* [2019] UKSC 7 at para 62). Fishing businesses had made business and investment decisions on the basis that the current economic link condition would remain in play and had structured their businesses to comply with the crewing condition and the expenditure condition as a means to comply with the current economic link condition. These were materially easier conditions for pelagic fishing businesses to meet whilst maximising profits, because a greater return could be made by landing pelagic fish in Norway, where there was a high price structure for pelagic fish.

[26] Senior Counsel for the respondents submitted that the Concordats was an agreement between executive administrations and was not legally binding nor addressed to third parties. A commercial business operating under licence cannot assume that law and policy will never change (*Axa General Insurance v Lord Advocate* 2012 SC (UKSC) 122). The Concordat did not meet the legal test in *United Policyholders Group v AG of Trinidad and*

Tobago [2016] UKPC 17, [2016] 1 WLR 3383 (see also *Alliance of Turkish Businesspeople Ltd v Home Secretary* [2020] 1 WLR 2436). The Concordat has no legal force. It is addressed to other administrations, not the petitioners. The changeability of conditions is inherent in the statutory scheme. The Concordat refers to the Common Fisheries Policy which no longer applies. All that the Concordat shows is the policy at a particular time. There is no obligation to follow the policy (*Ineos v Lord Advocate* 2018 SLT 775). The respondents had made clear their position as long ago as 2016. Any representation in the Concordat had been departed from. The Concordat had been superseded by the 2020 Act. The devolution of fisheries was set out in the legislative consent memorandum for the 2020 Act. Quota management remains a UK allocation but other aspects of fisheries are devolved. Since April 2022 there has been no common economic link condition throughout the UK. The Concordat has been departed from in England. The proportionality test for departure for any representation had been met.

[27] In my opinion, this ground does not disclose a *prima facie* case. There is no obligation that the Concordat remains in force for ever: the administrations were entitled to, and have, changed their policy that the economic link condition would be the same throughout the UK (*Axa General Insurance v Lord Advocate* 2012 SC (UKSC) 122). The Concordat is no longer in existence in relation to the economic link condition. It has been superseded by new arrangements made as a result of the UK's withdrawal from the European Union and the Fisheries Act 2020. There is no longer an agreement between the various fishing administrations within the UK that the administrations will continue to include within their licences the same UK-wide condition relating to the economic link. The English administration has, prior to the decision of the Scottish Ministers challenged in this petition, departed from the terms of the Concordat and issued a new economic link condition which

differs from that of the other administrations. In all the circumstances, even if it were to be established at a substantive hearing that the concordat was addressed to the petitioners or their members, it cannot be said that the petitioners had a legitimate expectation that the economic link would, for an indefinite period and despite material changes such as Brexit and further devolution of fisheries issues, remain the same throughout the UK.

Ground 3 statutory power used for an improper purpose

[28] Senior Counsel for the petitioners submitted that the new economic link licence condition was *ultra vires* because the statutory power relied upon (schedule 3, para 1 of the Fisheries Act 2020) had been exercised for an improper purpose. Any condition may only be imposed to the extent that it is necessary or expedient for the regulation of fishing. The stated policy objective of the respondents was to promote the fish processing sector and the economic development of coastal communities (*R (Moderasi) v Secretary of State for Health* [2013] UKSC 53 at para 14. *Trafford v Blackpool Borough Council* [2014] EWHC 85 (Admin)).

[29] 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). Regard had to be had to the intention of Parliament (*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 power was expressed in terms not solely of necessity but also expediency. The exercise of the power was not for an improper purpose.

[30] Schedule 3 of the 2020 Act provides:

“Power to attach conditions to sea fishing 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);”

The power to attach conditions is a wide one. It expressly provides that the conditions need not relate directly to fishing. It expressly provides that the condition may specify the ports at which catches are to be landed. The issue is whether the power should be construed narrowly, as being restricted to the act of sea fishing, or more widely encompassing the sea fishing industry as a whole and its contribution to the economy. In my opinion this ground discloses a *prima facie* case. It is arguable that the wording should be read in the restricted manner, in which case the economic link condition may not fall within its purpose.

However there is also force in the contrary argument that the statutory wording is wide enough to include the economic link condition. The arguments will require to be given full consideration at a substantive hearing in due course.

Ground 4: unfair consultation process

[31] 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 discussions in April and May 2022 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*). 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)).

[32] 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 2022. The alleged “material changes in circumstances”, being COVID -19, Brexit and economic conditions in the UK, had been canvassed in 2022 (BRIA sec 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 2022 consultation been handled differently.

[33] In my opinion this ground discloses a *prima facie* case. The exceptionally long period between the consultation closing in 2017 and the publication of the outcome in 2022, the

material changes of circumstances in the interim due to Brexit and the 2020 Act and further devolution of fisheries, and the restricted nature of the limited consultation exercise in 2022 do raise questions as to the fairness of the consultation procedure. On the other hand, it is not clear whether there has been any unfairness to the petitioners. They have had an opportunity to make representations in 2022. It is not clear what additional material representations they would have made in 2022 in a full consultation exercise which they did not make in the limited consultation exercise, other than providing an updated version of the Poseidon report. The original Poseidon report was given detailed consideration in the BRIA, but was drafted prior to the material changes of circumstance since 2017 such as Brexit and the 2020 Act, and the petitioners say that had there been a proper consultation exercise in 2022 an updated Poseidon report would have been submitted relevant to current circumstances and the respondents would not have been considering an out of date report. These are matters which will require to be explored at a full substantive hearing.

Ground 5: Failure to take account of relevant considerations

[34] Senior counsel for the petitioners submitted that the respondents had failed to have regard to:

- (i) The detrimental effect on the income and accordingly the tax return from the pelagic fishing sector due to the significant price differential in relation to pelagic species as between Norway and Scotland.
- (ii) The lack of capacity for processing of pelagic fish in the volume anticipated by the new economic link conditions. There are currently four pelagic processing factories in Scotland and they are presently incapable of processing a yield in the volumes which would be landed under the new economic conditions. There will

likely be delays with a detrimental effect on quality of the catch and prices. Pelagic fish processors in Scotland do not intend to provide financial guarantees for pelagic landings, contrary to the practice in Scotland for other stocks and the practice in Norway for pelagic landings. Pelagic fishing businesses face being forced to land substantial proportions of their yields in Scotland without guarantee of payment.

(iii) The likely distortion to pelagic fish prices caused by the new economic link conditions. If pelagic fisherman are required to sell a majority of their yield to a small number of pelagic fish processors in Scotland, that will allow the processors to pay artificially low rates. The respondents have intimated their belief that were this to happen, new processing businesses would open to stabilise the market but that conclusion failed to have regard to the high capital investment required to establish a pelagic processing exercise. Also three of the existing pelagic processors are operated by businesses which are also involved in the ownership of other Scottish pelagic fishing vessels. It is anticipated that preferential rates may be afforded to those vessels to the detriment of the petitioners' members.

(iv) The likely reduction in landings by Scottish fishing vessels which currently would comply with the new landings targets. Those who are presently compliant will seek to reduce their landings in Scotland to the minimum necessary to comply with the landings condition. Norwegian processors are likely to seek to replace the lost landings by offering increased prices. The decision has had no regard to this consideration.

[35] Senior counsel for the respondents submitted that they had not failed to take the considerations into account, and disputed the factual basis of the petitioners' argument.

[36] In my opinion, this ground discloses a *prima facie* case. However the strength of that case will depend on a detailed analysis of the contents of the BRIA report and the resolution of disputed matters of fact. These are matters which will require to be given detailed consideration at a full substantive hearing.

Ground 6: Irrationality

[37] Senior counsel for the petitioners submitted that the decision was irrational. It had been informed by out of date evidence. The stated purpose was to support the Scottish economy, however its effect was to significantly damage the returns which would be recovered by Scottish pelagic vessel owners. The decision was one which no reasonable decision-maker could reach.

[38] Senior counsel for the respondents submitted that the context (*Kennedy v Charity Commission* [2015] AC 555) was the exercise of political judgment regarding the national benefit to accrue from the distribution of finite national marine resources. The petitioners had not established the required bad faith, improper motive or manifest absurdity (*R(Hammersmith and Fulham LBC) v Secretary of State for the Environment* [1991] 1 AC 521).

[39] In my opinion this ground discloses a *prima facie* case. However it relies on disputed facts as to the damage to the returns to the vessel owners, and it is only when these facts are established at a substantive hearing that there can be an assessment of whether the decision was irrational in its context or absurd.

Balance of convenience

[40] Senior counsel for the petitioners submitted that the balance of convenience favoured the petitioners. The decision would have a significant, immediate, prejudicial effect on the

petitioners' members' businesses. They will lose substantial income and subject their businesses to much greater financial risk and uncertainty. The majority of Scottish mackerel is landed in January each year. The petitioner's member vessels expect to land more than 50% of their 2023 mackerel quota in January 2023, with one vessel intending to land 100%. Even if the present petition were to be dealt with expeditiously, the financial damage caused by the change to the economic link condition would have a very significant effect on businesses' annual income. If they fished normally in 2023 their financial difficulties in 2024 would be exacerbated as they would be subject to quota gifting in the same year as a possible increase in landing requirement. There was no strong public interest which required the respondents' proposed changes to take effect from 1 January 2023. The respondents had already delayed in responding to the consultation process for circa 5 years. The status quo before the decision was made should be preserved.

[41] Senior counsel for the respondents submitted that the super-normal profits of the petitioners' members was capable of financing 2023 operations and paying petitioners' levies. The landing condition would be a small proportion of the annual revenue of the pelagic vessels but would provide a significant increase to the Scottish economy. If the licensing change was not able to be introduced at the start of the fishing season, it would not be able to be introduced for another 12 months without resulting in unequal treatment of licence holders. It could not be introduced part way through 2023. If fishing begins in January 2023 some pelagic vessels could catch the majority of their catch in January and February and it would be difficult to analyse compliance on a pro-rata basis. Any delay might also result in maximising landings abroad. A delay would result in an irrecoverable loss to the Scottish economy. The policy was announced in 2016 and investments have been made by the processing industry in expectation of an increase in landings. The policy will

be deliverable in the first year at the 30% landings requirement. If the petitioners were successful in due course, any loss to the petitioners or individual pelagic vessels could readily be quantified and recovered as damages from the respondents. Individual pelagic vessel owners may choose to gift quota in return for any landings below the 30% condition and land abroad. The petitioners represent 14 of the 21 pelagic vessels, ten of which complied with the 50% landing criterion. The policy is supported by representatives of other pelagic vessels and many in the processing sector. The policy will be kept under close review and in the event of an unforeseen anomaly or crisis the respondents can immediately suspend the application of the economic link condition.

[42] January is a crucial month for the harvest of mackerel and so the decision on balance of convenience takes on an element of urgency which would not be so significant if that harvest was evenly spread throughout the year. The court finds itself in a difficult position in attempting to assess whether and to what extent the introduction of the new policy at the transitional 30% rate will be prejudicial to the petitioners or their members as the parties are so far apart on crucial matters of fact. The petitioners say that the Norwegian prices are higher, the respondents say they are not. The petitioners say that vessels will suffer substantial losses, the respondents say that they will not and any losses can be absorbed within their supernormal profits. The petitioners say that they will not have the benefit of guarantees but the respondents say they can take out insurance instead. The petitioners say that their members will be discriminated against on price by processing businesses which are vertically integrated with vessels competing with their members, the respondents say that there will be no such discrimination as all prices are monitored. The petitioners say that the Scottish processors do not have the capacity to cope with the increase in landings, the respondents say that they do and it is the Norwegian processors who lack capacity. It is not

possible to resolve these factual disputes without evidence, which is not available at this early stage in the proceedings. Given the uncertainty at this stage about whether there will be prejudice to the petitioners or their members, little weight can be put on such prejudice in assessing the balance of convenience. However, the respondents have confirmed that any loss to the petitioners or the individual pelagic vessels as a result of the licensing change proceeding on 1 January 2023 may be recovered as damages from the respondents in the event that the change is found unlawful by the court. That factor weighs heavily in favour of the respondents in the balance of convenience. It is also of significance that the *interim* interdict would affect the businesses of third parties, such as processors and demersal and shellfish fishers, and indeed pelagic fishers who are not members of the petitioners, all of whom will have organised their affairs on the basis that the change is going ahead on 1 January. In all these circumstances, I find that the balance of convenience favours the respondents.

Order

[43] I shall repel the petitioners' second plea in law and refuse interim interdict.