



Neutral Citation Number: [2013] EWHC 1959 (Admin)

Case No: CO/4796/2012

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/07/2013

**Before :**

**MR JUSTICE CRANSTON**

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**Between :**

**The United Kingdom Association of Fish Producer Organisations** **Claimant**

**- and -**

**Secretary of State for Environment, Food and Rural Affairs** **Defendant**

**Marine Management Organisation** **Interested Parties**

**New Under Ten Fishermen's Association**  
**Greenpeace Ltd** **Interveners**

**Tom de la Mare QC and James Segan (instructed by Andrew Jackson) for the Claimant**  
**Jonathan Swift QC and Deok-Joo Rhee (instructed by Treasury Solicitors) for the Defendant**

**Kassie Smith QC and Elizabeth Kelsey (instructed by Harrison Grant) for Greenpeace/NUTFA**

**Justine Thornton (instructed by Browne Jacobson) for the Marine Management Organisation**

Hearing dates: 1-3 May 2013

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**Approved Judgment**

**Mr Justice Cranston :**

**I INTRODUCTION**

1. This claim concerns the allocation of fishing quota by the Secretary of State for Environment, Food and Rural Affairs (“the Secretary of State”), in his capacity as head of the English fisheries administration. Under the Common Fisheries Policy the European Union allocates fishing quota to Member States. Since 1999 the Secretary of State has in turn distributed that quota by a system of fixed quota allocation units. Generally speaking fixed quota allocation units are allocated to the licensee for each vessel. The number of units which a fisherman holds determines the percentage share of the United Kingdom’s quota for a particular stock which he can fish, after adjustments to the United Kingdom quota that the Secretary of State might do.
2. On 10 February 2012 the Secretary of State announced changes to the way in which fishing quota was to be allocated for the years 2012 and 2013. This is the decision challenged in this judicial review. For 2012 the decision reduced the quota to be allocated to members of English fish producer organisations in respect of certain stocks. For 2013 the decision reduced the number of fixed quota allocation units held by members of English fish producer organisations in respect of the same stocks. Under the decision these reductions in quota and fixed quota allocation units were transferred to what was described as the English under 10 metre fishing fleet (the inshore fleet). The basis of the decision was to maximise the use of the quota available under the Common Fisheries Policy. The decision followed an extensive consultation and appeal process, which are not challenged in these proceedings.
3. In essence what is being said in this judicial review is that the decision deprives one part of the English fishing fleet of a valuable entitlement, without compensation, to gift it to another part of the fleet. In doing this the Secretary of State is said to have acted unlawfully in defeating the former’s legitimate expectations, interfering with its property rights, and acting in a discriminatory manner.

**II BACKGROUND**

4. The parties in this judicial review are first, the claimant, the United Kingdom Association of Fish Producer Organisations. It is a trade association representing all the fish producer organisations in England, Wales and Northern Ireland. The producer organisations take a number of legal forms. Some are companies, others are associations of various types. Membership has generally been open to any vessel licensed by any of the four fishing administrations in the United Kingdom, England, Scotland, Wales and Northern Ireland. In practice members of producer organisations are most of the over 10 metre vessels in the English fishing fleet. Some producer organisations, such as the Cornish Fish Producer Organisation, have under 10 metre members. There are similar producer organisations in Scotland, Wales and Northern Ireland.
5. The crucial role of the fish producer organisations in relation to this litigation is that quota is allocated to them based on the fixed quota allocation units held by vessels in their membership and on “dummy” licences (a licence not attached to a particular vessel but held by a producer organisation and enabling it to hold fixed quota allocation units according to its rules). Each producer organisation then manages its

members' fishing quota. Quota is allocated directly to it and it will hold it collectively on behalf of its members or pass it on to the member concerned. Some producer organisations set monthly catch limits, which may be supplemented by quota units held by individual members; others issue annual vessel or company quota. Producer organisations are responsible for ensuring that their members comply with their rules. While they must have procedures to penalise members who over-fish, there is no sanctioning of under-fishing.

6. The defendant is the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State"). His department is the Department for Environment, Food and Rural Affairs ("Defra"). The Secretary of State has a variety of roles in relation to fisheries. A key role is his part in the European Union's Common Fisheries Policy, where he advances the United Kingdom's interests within the Council of Ministers. Thus he negotiates the United Kingdom's allocation of quota under the Common Fisheries Policy. Within the United Kingdom, as a result of devolution, important tasks in fisheries administration are divided between the Secretary of State (for England), Marine Scotland, the Welsh Assembly Government and the Department of Agriculture and Rural Development of Northern Ireland. Together these are known as the fisheries administrations or departments. There is a Concordat between them. Within England the Secretary of State has responsibility for the allocation of fishing quota, at present through the system of fixed quota allocation units.
7. The Marine Management Organisation, the Interested Party, was constituted under the Marine and Coastal Access Act 2009. Its statutory purpose is to make a contribution to the achievement of sustainable development. Under section 14 of the 2009 Act the Secretary of State has power to enter into agreements with the Marine Management Organisation authorising it to perform any of his marine functions. Thus the Marine Management Organisation licenses fishing vessels registered to English ports. It also monitors the uptake of quota to ensure that the United Kingdom does not exceed the quota allocated to it by the European Union. Moreover, it has managed and allocated the fishing quota of the inshore fishing fleet, which has been held centrally on behalf of all such vessels which are not members of a producer organisation. To do this it has used landing records to estimate how many vessels were likely to land fish each month. It has then set monthly limits on landings based on these expectations (taking into account the seasonal nature of some activity), but made adjustments if more or less volume than expected was landed. The Marine Management Organisation has performed a similar function for over 10 metre vessels which were not members of a fish producer organisation.
8. The First Intervener is the New Under Ten Fishermen's Association. It is a relatively recently formed organisation with under 10 metre vessels in England and Wales as members. Its members include trawlers and netters, liners and shell-fishermen, and fishermen who fish both quota and non-quota species. The latter include, for example, fin fish and shell fish. Unlike the producer organisations the association has no role in allocating the fishing quota of its members. In 2011 it launched a joint campaign with Greenpeace, the well known environmental organisation and the Second Intervener in this litigation. Despite differences, the two organisations concluded that there was sufficient common thinking on some issues to serve as a foundation for combined action in support of sustainable fishing and the wider marine environment.

9. The Interveners' submissions began with the proposition that fish stocks are a public resource, recognised as such as long ago as Magna Carta: see Attorney General for the Province of British Columbia v Attorney General for Canada [1914] AC 153, 168-170 (PC). Consequently there can be no property right in fish until they are caught. That submission was a useful reminder but common ground. The claimant eschewed any submission that the ownership of fish follows ipso facto as a result of holding fixed quota allocation units. The Interveners then underscored sustainability as an aim of the European Union's Common Fisheries Policy. Sustainability is contained as an important objective of the constitutive Regulation of the European Union, discussed later in the judgment. The Interveners also pointed to the support which the European Commission and European Parliament have given fishing by means of smaller fishing vessels because of the economic and social advantages. They also highlighted, as we see below, how sustainability was referred to as a policy objective in the background documents to the decision under challenge in this judicial review. However, the implications for sustainability of different sized fishing vessels are a hotly contested issue. The Secretary of State did not attempt to defend his decision by reference to it directly. Thus there is no need for me to enter into the territory of sustainability and whether in general the under 10 metre fleet engages in more sustainable fishing than other fishing vessels.

#### The fishing fleet

10. As will have become apparent the English fishing fleet is divided between over 10 metre and under 10 metre vessels. (The length of a fishing vessel is calculated according to European Union law: Regulation (EEC) 2930/86, article 2(1).) Over 10 metre vessels which are members of fish producer organisations are referred to as "the sector"; over ten metre vessels which are not members of producer organisations as the "non-sector"; and under 10 metre vessels as "the inshore fleet". Overall the fleet consists of some 3000 registered vessels, around 70 percent of which are active. Most are based in the south eastern, south western and western regions of England.
11. The over 10 metre fleet has fewer, larger vessels and employs fewer people than the under 10 metre fleet. Due to its greater capacity, technical efficiency and higher quota allocation, however, it lands over seven times more fish and shellfish by quantity, over four times more by value, than the inshore fleet. Most landings are of quota stocks and the majority of fixed quota allocation units are held by the over 10 metre part of the fleet. There are over 2500 under 10 metre vessels. Some 1000 of these have uncapped licences permitting them to land more than 300 kg of quota species a year. The majority of landings are of non-quota stocks, particularly shellfish. More than one half of the vessels in the inshore fleet are under 8 metres in length. The inshore fleet employs some 65 percent of the workforce of the fleet as a whole.
12. The difference in the obligation between over and under 10 metre vessels to report landings of fish has resulted in a number of owners selling their larger boats, and in some cases also their quota units, and commissioning new vessels, the so-called "super under-10s" or "rule-beaters". These vessels have a much greater catching capacity than the traditional under 10 metre vessels. In total 9.5-10 metre vessels land significantly more fish in terms of value and volume than the remainder of the inshore fleet combined.

13. The fishing fleet is subject to regulation. The Merchant Shipping Act 1995 and the Merchant Shipping (Regulation of Ships) Regulations 1993, 1993 SI No 3138, require fishing vessels to be registered, and the port at which they are registered determines their nationality. All fishing vessels must also be licensed: section 4 of the Sea Fish (Conservation) Act 1967 and the Sea Fish Licensing Order 1992, SI 1992 No 2633. Fishing by British registered or owned fishing boats without a licence, and in accordance with its conditions, is an offence. Licences can be varied from time to time and revoked or suspended if it appears to be necessary or expedient for the regulation of sea fishing or where there is a contravention. For many years there has been a policy of not granting new fishing licences. If a new vessel is to be licensed it must be through the purchase and transfer of an existing licence, when an existing licensed vessel is sold, scrapped, sinks or is de-registered. Licences have thus become a valuable asset. In Re Rae [1995] BCC 102 Warner J held that a fishing licence was property within the meaning of the Insolvency Act 1986: at 114H. Licensing is undertaken by each fisheries administration for vessels registered at ports within its jurisdiction.
14. The role of fish producer organisations has been touched upon. Important for the purposes of this judgment is that membership of a producer organisation is not restricted by reference to the place where a vessel is registered. Thus vessels in the English, Scottish, Welsh and Northern Irish fishing fleets might not be members of producer organisations in their own jurisdiction. Thus on 1 January 2012 English producer organisations had, in addition to 301 English vessels, 60 Scottish and 11 Welsh vessels as members. Nine English vessels were members of Scottish producer organisations, although the membership of Scottish producer organisations was overwhelmingly Scottish (386 out of 400 vessels). Eighteen of the 176 members of the two Northern Irish producer organisations were English vessels and 11 were Scottish.

### III EU COMMON FISHERIES POLICY

15. The Common Fisheries Policy of the European Community introduced in 1983 as a conservative measure a system of total allowable catch for certain fish stocks or groups of stocks: Council Regulation (EEC) 170/83. Member States were allocated a fixed share of quota for each relevant stock, based on the past record of fishing activity by that Member State's fishing fleet. Coupled with the system of total allowable catch was the concept of fishing effort, introduced in 1992: Council Regulation (EEC) 3760/92. Restrictions on fishing effort, specifically on the time vessels were allowed to spend at sea, were added to the range of conservation measures. The 1992 Council Regulation also obliged Member States to have national licensing regimes to regulate access to fisheries.
16. In 2002 the European Union adopted Council Regulation (EC) 2371/2002, which currently governs the Common Fisheries Policy. Recital 2 of the Regulation explains the scope of the Common Fisheries Policy as extending to conservation, management and exploitation of living aquatic resources and aquaculture, as well as to the processing and marketing of fishery and aquaculture products, where such activities are practised on the territory of Member States or in Community waters or by Community fishing vessels or nationals of Member States. Recital 3 notes that since many fish stocks continue to decline, the Common Fisheries Policy should be improved to ensure the long-term viability of the fisheries sector through sustainable

exploitation of living aquatic resources based on sound scientific advice and on the precautionary approach. Recital 4 reads as follows:

“The objective of the Common Fisheries Policy should therefore be to provide for sustainable exploitation of living aquatic resources and of aquaculture in the context of sustainable development, taking account of the environmental, economic and social aspects in a balanced manner.”

17. The scope of the Common Fisheries Policy as defined in Article 1 of the Regulation mirrors recital 2. The objectives in article 2 reflect what is contained in recitals 3 and 4, although the objectives also spell out that the European Union should minimise the impact of fishing activities on marine eco-systems and should aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities, and taking into account the interests of consumers.
18. Fishing effort is defined in Article 3(h) of the Regulation as the product of the capacity and activity of a fishing vessel. Fishing opportunity is defined in Article 3(q) as meaning “a quantified legal entitlement to fish, expressed in terms of catches and/or fishing effort”.
19. Article 20 is entitled “Allocation of fishing opportunities”. Article 20(1) deals with the decisions of the Council of Ministers on catch and/or fishing effort limits and the allocation of fishing opportunities among European Union Member States, as well as the conditions associated with those limits. Fishing opportunities are to be distributed among Member States in such a way as to assure each Member State relative stability of fishing activities for each stock or fishery. Under Article 20(2) the Council decides on the allocation of new fishing opportunities. In practice the amount of quota Member States receive is decreasing because of the need to maintain fisheries at a sustainable level.
20. Crucially, Article 20(3) addresses the allocation of fishing opportunities by each Member State to vessels flying their respective flags. It provides as follows:

“3. Each Member State shall decide, for vessels flying its flag, on the method of allocating the fishing opportunities assigned to that Member State in accordance with Community law. It shall inform the Commission of the allocation method.”

Article 20(3) is the source of the Secretary of State’s power to allocate fishing quota. Because of devolution the Secretary of State has conferred the power on Scottish, Welsh and Northern Irish administrations in relation to their fishing fleets. The discretion conferred on Member States under the article is bounded by the requirement that it be exercised in accordance with principles of European law.

21. Article 20(5) allows Member States to exchange the fishing opportunities allocated to them after notifying the European Commission. Article 23(4) provides that where a Member State has exceeded its fishing opportunities the Commission can impose deductions from that Member State’s future fishing opportunities.

22. Case C-372/08, Atlantic Dawn v Commission [2009] ECR I-74 was an appeal from the Court of First Instance where a group of Irish fishermen had sought the annulment of Council Regulation (EC) No 147/2007. The latter was made pursuant to Article 23(4) of Council Regulation (EC) 2371/2002 and reduced mackerel quota allocated to Ireland for the years 2007 to 2012 because of over-fishing. In the course of its decision, the Court of Justice of the European Union considered the argument that the Court of First Instance had misconstrued Article 20(3). The Commission contended that Member States have very wide discretion in the matter of allocating and deducting fishing opportunities so that there was no provision of Community law which required the Irish authorities to restrict the impact of such deductions to vessels which had contributed to the over-fishing, nor was there any Community provision which prohibited them from doing so. The court agreed.
23. The Court said that it was clear from the first sentence of Article 20(3) that once the Council has decided, inter alia, on catch and/or fishing effort limits under Article 20(1), it is for each Member State, and not the Community legislature, to decide on the method of allocating the fishing opportunities assigned to it. Given that fishing quotas are not directly assigned to individuals by the Community legislature, the provisions at issue always need to be supplemented by subsequent intervention on the part of a Member State. The choice by the Irish authorities of a particular method for allocating fishing opportunities (according to vessel size), and the obligation to inform the Commission of it under the second sentence of Article 20(3), did not deprive the national authorities of any room for manoeuvre.

“38. First, the Member States' obligation to inform the Commission of their chosen allocation method is intended merely to ensure a degree of transparency as regards Member States' choices and does not imply that the Commission has the right to oppose the methods which Member States propose. Accordingly, that obligation does not preclude alterations in the methods for allocating fishing quotas at national level. Nor does the fact that a Member State has regularly resorted to a particular allocation method make any difference to this analysis of the situation.

39. Secondly, the choice of an allocation method by no means leads the discretion enjoyed by Member States under Article 20(3)...to be exhausted and does not preclude Member States from adapting the distribution of fishing quotas to the particular circumstances that may arise from one year to the next, as in the present case where the need to allocate new quotas arose as a result of the illegal landings made by some members of the national fleet entitled to fish for mackerel.

40. Accordingly, neither the obligation to inform the Commission under the second sentence of Article 20(3) ...nor the temporary choice of a method for allocating fishing quotas ensures that the fishermen of a Member State will have a particular allocation method applied to them or be assigned a particular quantity of fishing quotas...”

24. Case C-313/99, Mulligan v Minister for Agriculture and Food, Ireland [2002] ECR I-05719 concerned milk quotas. Article 7(1) of Council Regulation (EC) 3950/92 provides that the sale of a holding should transfer any reference quantity attached to it:

“in accordance with detailed rules to be determined by the Member State, taking account of the areas used for dairy production or other objective criteria and, where applicable, any agreement between the parties.”

The Court held that under that provision a Member State may provide that part of the reference quantity is not to be transferred with the holding but is to be added to the national reserve by means of a deduction mechanism. Such a measure had to be in accordance with the general principles of European Union law such as legitimate expectations: [36]. Moreover, a Member State implementing its obligations under European law had to do so:

“with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements flowing from that principle ... Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under Community law, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights in an area governed by Community law”: [47].

25. Under Article 20 of Council Regulation (EC) 2371/2002 the method of allocation of fishing opportunities is a matter for each Member State. That method can be a system of rules but the Court makes plain in Case C-372/08, Atlantic Dawn that the method can be flexible and tailored to the circumstances which arise. The Council Regulation at issue in Case C-313/99, Mulligan is quite different, in obliging Member States to have “detailed rules”. All that is required of a Member State under Council Regulation (EC) 2371/2002 is that the discretion conferred on it must be exercised in accordance with European Union law. That is made clear by Article 20(3), that the method of allocating fishing opportunities should be “in accordance with Community law”. Thus European Union law principles such as legitimate expectations and non-discrimination apply.
26. R v Bossom [2006] EWCA Crim 1489; [2006] 4 All E.R. 995 is a domestic decision which underlines this point. There fishermen had been convicted of breaching a condition of their fishing licences by over-fishing cod. On appeal they submitted that the relevant licence condition was ultra vires European Union law principles. Giving the judgment of the Court of Appeal Criminal Division, Gage LJ said that there is no European Union provision prescribing any method of allocation to be adopted for quota allocated to Member States. Administration of the quota is therefore an area over which a Member State has a discretion, so long as that discretion is exercised in accordance with EU law: [25]. In that case there was no basis for suggesting that the



relevant United Kingdom provisions were disproportionate, discriminatory, unclear or imprecise.

#### IV THE FIXED QUOTA ALLOCATION SYSTEM

##### Background to the fixed quota allocation system

27. The Secretary of State introduced the system of fixed quota allocation units on 1 January 1999. Previously quota was allocated to sector vessels on the basis of a rolling average catch over the preceding three year period. This led both to what was termed the “race to fish” and “ghost fishing”, where catches were made unnecessarily or misrecorded so as to maintain track record and therefore future fishing opportunities. These issues were identified in a report published in July 1996 by the Common Fisheries Policy Review Group, established by the then Fisheries Minister, William Waldergrave MP.
28. Subsequently, a working group of industry and departmental representatives was set up to consider the introduction of a fixed quota allocation system. Its February 1997 report noted the main advantages of such a system as being greater year on year stability in managing quota allocations; less pressure on fisherman and producer organisations to maintain their track record by utilising their full quota allocations; a disincentive to paper fishing or ghost fishing; the ability to swap or gift quota without suffering a reduction in future quota allocations; greater investment in the fleet by ensuring that track records were retained while vessels were being replaced or modernised; and a reduction in the bureaucracy and complexity of the existing arrangements. The working group envisaged that under the new system the stake for each vessel or unattached licence entitlement would be in effect its percentage share of United Kingdom quota. Since the percentage shares for most vessels would be minute, those shares were best converted into units. Thus a track record of 100 tonnes of cod might be converted into 1000 units of cod (of 100kg per unit). Each unit would be worth either more or less in future years, depending on the circumstances. The quota allocation of a producer group would depend on the number of units held by the vessels in its membership on 1 January of each year. This would give rise to a fixed share of United Kingdom quota if no changes occurred in a group’s membership from one year to the next.
29. The working group considered whether fixed quota allocation units should be operated at group level (e.g. producer organisations), or at vessel (licence entitlement) level but managed in-year at group level. It said:

“[Both] had the advantage that if a group or vessel underfished its allocation in one year it would not be penalised in subsequent years. This would reduce the pressure to fish to maintain track records and would also allow groups to gift quota allocation to those who might be able to make use of it.”

The working group noted that most under 10 metre quota allocations were subject to underpinning, a form of top slicing. The fixed quota allocation system would constitute a safeguard for the inshore fleet since its allocation would be based on its track record for the reference period.

### The scheme and its operation

30. The government announced the introduction of the fixed quota allocation system for quota stocks in domestic waters on 11 June 1998. It was to come into effect from 1 January 1999. The announcement explained that the principal difference from the existing arrangements would be that future quota allocations would be linked to the catches made by fishing vessels during a fixed reference period rather than the 3 years immediately preceding each quota year. The reference period chosen was 1994 to 1996. Otherwise the main features of the existing management rules would continue, with yearly allocations by Ministers. However, a consequence of the new system would be that the track record of a group would not be affected if it underfished a quota allocation. The pressure on groups to take their allocations in full in order to maintain track record would therefore be removed. A period of inactivity would no longer disadvantage an individual owner. Other advantages of the fixed quota allocation system included greater certainty in managing quota allocations; reducing complexity; issuing annual quota allocations more rapidly; and the facility to swap or gift fish without suffering a reduction in future quota allocations.
31. Under the new system the fisheries departments would establish and maintain a central register of quota units for all vessels. Each producer organisation would also need to maintain a register of the units held by the vessels in its membership. Annual quota allocations would be based on the total number of units held by the vessels in membership of each group (producer organisations, the non-sector and the under 10 metre fleet) on 1 January each year, together with any additional quota derived from the licence entitlements attributed to it. Under the new arrangements it would not be possible for the owner of an individual vessel to dispose separately of the quota units associated with his licence, since quota units would only transfer with a licence. But a producer organisation could continue to buy up vessels and their licences in order to retain the quota units for the benefit of its members. There were no plans to adopt individual transferable quotas.
32. The House of Commons Select Committee on Agriculture conducted an inquiry into Sea Fishing in 1999. Its July 1999 report recognised that there was a trade in licences and quota. It opined that fishermen having a fixed share of the United Kingdom quota for a particular stock gave more stability to the system and hence “added to the value of the asset”. The Fisheries Minister, Elliot Morley MP, told the committee that the trade in quota was a very big business and that it was worth probably over £1 billion to the industry. He said that the pooling of resources to buy in quota and then share it out was exactly the right way forward. As to the trade in licences and quota the committee said:
  - “85. The sense of ownership resulting from the purchase of quota is somewhat misleading as the legal owner of licences and of quota remains the UK Government. There is naturally some unease among fishermen at the uncertain status of their agreements to buy or to lease from other vessel owners. At the moment, the UK Fisheries Departments have to approve and register changes in licences. The situation on quota is more complicated, particularly with the trend towards leasing. Although fishermen draw up legal agreements which are endorsed by the relevant producer organisations and notified to the Government, what is being exchanged is not a property

right ... There is a genuine concern here. The fishermen who have invested so much capital in their business need to be certain that what they have bought is legally their own. The Government has recognised this anxiety in part by ratification of all the transactions undertaken in the last year at the end of 1998, a procedure it now intends to repeat on an annual basis. It has also indicated that licences and quota entitlements are assets which could be accepted by banks as security for loans. Yet, as Mr Morley [the Fisheries Minister] stressed, ‘in the end, the title does belong to the state.’ This means, as the [Sea Fish Industry Authority] observed, that ‘there is the risk that the licence, will at some point, become valueless.’”

The committee noted that licences and quota entitlements were assets which could be accepted by banks as security for loans and that many banks saw fishing as a very good investment.

33. The government responded to the committee’s recommendations in October 1999. As regards the recommendations that there be clear guidance on the legal title to licences and quota, and that the government should devise proposals for managing the trade in licences and quota, the government said:

“The arrangements for the renewal, transfer and aggregation of fishing vessel licences and the allocation of quota, are the subject of close consultation between industry and Fisheries Departments in the UK and are understood by most fishermen. There are no plans to change the existing position whereby licences and quotas apply at the discretion of Ministers but with fishermen’s interests protected by the legal concept of legitimate expectation ... With the new system [of] fixed quota allocations fishermen and their producer organisations have greater certainty regarding quota allocations and more flexibility to adopt quota management arrangements best suited to their needs.”

34. Following the report of the House of Commons Select Committee and the government response, the four United Kingdom fisheries departments prepared a paper in March 2000 on managing the trade in licences and quotas. The paper noted that the introduction of the fixed quota allocations system guaranteed fishermen and their producer organisations a fixed percentage share of United Kingdom quota, along with the flexibility to decide how it was to be managed. The questions arose as to whether there should be an unrestricted or a freer trade in quota.
35. A working group on quota trading was established. It comprised government and industry representatives and reported in July 2000. Its report revealed broad industry support for a mechanism for trading in quota. It noted that trading in quota was not precluded by the United Kingdom’s existing quota management arrangements. (Paragraph 15 of the Rules referred to below allows in-year realignments of quota if certain conditions are met). The working group proposed that there should be provision for recording permanent transfers of quota through the annual reconciliation of fixed quota allocation units. There was reference by the working party to the

interests of fishermen being safeguarded by the legal concept of legitimate expectation.

36. In September 2000, the Fisheries Minister, Elliot Morley MP, announced that he was bringing forward a review of the fixed quota allocation system. Since the introduction of the system, he said, there had been greater stability and a reduced incentive to fish simply to maintain quota shares.
37. The fisheries departments prepared papers for the review in the first part of 2001. These restated the advantages of the fixed quota allocation system identified in the February 1997 working party report. The fixed quota allocation system guaranteed fishermen and their producer organisations a fixed percentage share of United Kingdom quota. In particular it was noted that fishing vessels were now able to take advantage of other commercial opportunities such as guardianship work for pipelines and cables without the risk of losing track record. Members of the industry could hold or acquire fixed allocation units in the knowledge that they need never fish to retain them. The number of quota swaps had increased, which reflected the effective separation of quota entitlement when licensing transactions took place. The fixed quota allocation system meant a greater freedom to transfer quota without a prejudice to future fishing opportunities. Under the system producer organisations could maintain central pools of quota in perpetuity. The system prevented further loss of fishing opportunities where, for example, vessels were unable to fish.
38. In the course of the review strong support emerged for developing a mechanism to assist the trade in quota. The papers assembled by the fisheries departments noted that among the arguments in favour of doing this was that the absence of an adjustment mechanism had not prevented the trade in quota. Fishermen and producer organisations had entered into legal agreements to effect the transfer of quota on an annual basis. Among the arguments against facilitating a trade in quota was that the majority of fishermen were not engaged in it and that in introducing the system of fixed quota allocations the fisheries departments had said clearly that no provision would be made for a trade separate from the transfer or aggregation of fishing licences. If a minority of fishermen wished to trade in quota they could do so by drawing up legal agreements. Under the heading "Legal considerations", the following appeared:

"Quota will continue to be allocated at the discretion of Ministers irrespective of any changes which may be made to the fixed quota allocations system. Fisheries Departments will be issuing guidance for industry on entitlement to both quota and fishing vessel licences."
39. Following the review Defra consulted the industry. The consultation letter in October 2001 noted that despite the lack of provision in the fixed quota allocation system, fishermen had continued to transfer quota on a permanent basis by making use of the in-year swaps mechanism in the rules. Although provision for the trade in quota was not originally envisaged, there were situations in which it would seem appropriate to cater for it directly. However, the consultation letter explained, Ministers took the view that the transfer of fixed quota allocation units should be linked specifically to licensing transactions (whether transfers, aggregations or changes in ownership) as opposed to an unrestricted trade in quota units. The consultation letter added:

“[Fixed quota allocation] units represent catches made in the defined reference period and are used solely for allocation purposes. Fishermen do not, therefore, have property rights over fixed quota allocation units or quota. Nonetheless they are afforded a substantial degree of protection and certainty through the development and operation of the UK’s quota management rules and the Ministers’ assurance that significant changes will not be made to existing arrangements without full and proper consultation.”

40. Following the consultation the fisheries departments introduced guidance under which it was possible after 1 September 2002 to transfer fixed quota allocation units separately from licences but in limited situations. This became paragraph 3(3) of the Rules, set out below. Fixed quota allocation units could be separated from licences if, for example, a vessel was sold, a replacement vessel was acquired, or a vessel was decommissioned or sank. However, under these new arrangements fixed quota allocation units could not be removed from an active licence. As a result fishermen continued to draw up legal agreements for the transfer of quota in accordance with the previous swaps arrangements described in the October 2001 consultation letter. This provided the background to the reconciliation exercises.

#### Reconciliation exercises

41. Early in the life of the fixed quota allocation system attention was given to the need for annual reconciliation exercises to keep track of the transfer of units. A paper prepared by the fisheries departments in March 2000 noted that quota transactions had continued. However, there was no mechanism for ensuring that such quota passed permanently from one fisherman to another. Such transactions could only be honoured by the parties agreeing to conduct in-year swaps on an indefinite basis. There was concern within the industry about the security of such exchanges if, for example, the donating party changed ownership or was liquidated. The concern would intensify as the years rolled by. Similarly, the number of transactions to be honoured each year could grow, thus complicating the future in-year management of quota allocations. The paper raised the possibility of some form of annual adjustment mechanism which would facilitate the trade in quota units.
42. Annual adjustments were not introduced but the fisheries administrations have conducted periodic reconciliation exercises. The first was in 2001-2, the second in 2005 and the most recent in 2011. These have enabled fishermen to have incorporated in the records of the fisheries administrations their use outside the Rules of in-year swaps agreements to transfer and sell fixed quota allocation units. To participate in the 2011 exercise parties had to complete a form to be returned to the relevant fisheries administration. To participate in the 2011 exercise parties had to complete a form to be returned to the relevant fisheries administration. The form allowed fishermen to set out which fixed quota allocation units they wished to be transferred from which licence or licence entitlement. The units might be transferred to another licence entitlement, to the licence of a fishing vessel, to a dummy licence held by a producer organisation or to the holding statement of a fixed quota allocation replacement vessel.

Tax etc. treatment

43. Capital gains tax must be paid in respect of chargeable gains on an asset, an asset being defined to include all forms of property including “any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired”: Taxation of Chargeable Gains Act 1992, s. 21(1)(c) . Regarding rollover relief, section 155 of the 1992 Act includes as chargeable assets:

“Fish quota (that is, an allocation of quota to catch fish stocks, which derives from the Total Allowable Catches set in pursuance of Article 8(4) of Council Regulation (EEC) No. 3760/924 and under annual Council Regulations made in accordance with that Article, or under any replacement EU Instruments).”
44. The application of capital gains tax to fishing quota arose in the context of a decision of the European Commission concluding that there had been impermissible state aid: Commission Decision of 3 June 2003. 2003/612/EC. Fishing quota had been purchased by the Shetland Fishermen’s Organisation with money made available by the Shetland Islands local authority. The decision recorded that the United Kingdom accepted that track records and quota entitlements were considered assets under the legislation, and that permanent transfers of quota were regarded by Her Majesty’s Customs and Excise as a capital item for the purposes of capital gains tax and related rollover relief. The decision also recorded the United Kingdom’s view that while fixed quota allocation units represented, year on year, a variable level of fish quota, they themselves “remain as a permanent share of available fishing opportunities”.
45. The matter was further considered in Fullarton v Inland Revenue Commissioners [2004] STC 207, which concerned an assessment of capital gains tax on the basis that the sale of a fishing vessel, its licence and its track record disposed of three separate assets. The Special Commissioners upheld the assessment and said: “A licence, a Track Record or trade quota and a vessel are separate assets each of which can be and frequently are separately sold”: at 210c (see also at 211h).
46. In its Capital Gains Manual, Her Majesty’s Revenue and Customs affirms the position that: “A vessel’s track record is regarded as a separate asset for Capital Gains Tax purposes held by the owner or owners of the vessel concerned.” The manual notes that the fixed quota allocation system is expected to continue for the foreseeable future and that it is possible to acquire additional track records from other vessels by purchase or transfer. The manual adds that where track records are acquired for consideration this will be allowable acquisition expenditure.
47. At the hearing of the judicial review there was evidence of two instances from 1998 where VAT was paid on the sale of a fishing vessel’s track record.
48. In Watt v Watt [2009] CSOH 58; [2009] SLT 931, which arose out of a divorce, Lady Smith accepted that the fixed quota allocation units the husband held could be valued: [94].

### The 2007 decommissioning scheme

49. In 2007, the Secretary of State introduced the Decommissioning of Fishing Vessels Scheme Regulations 2007, 2007 SI No 312, designed to tackle overcapacity in the fleet. Under the scheme, vessel owners were entitled to retain the fixed quota allocation units associated with their vessel licence even when a vessel was decommissioned. The regulations were considered by the Ninth Delegated Legislation Committee of the House of Commons. During the committee's deliberations, Bill Wiggin MP asked the Minister for Local Environment, Marine and Animal Welfare, Ben Bradshaw MP, why the decommissioning scheme did not involve the state also taking back the quota. The Minister answered:

“The quota is not ours to take back. Quotas are set, and they are owned by the skippers of the vessels, who can transfer them to another boat. We are not able to take that quota back, but we have reduced the quota year on year ...”

Almost immediately the claimant published a press statement to the effect that such an unequivocal statement provided some comfort to fishermen, although it noted their vulnerability when, at the same time, Defra had engaged in a swap with Germany to the benefit of only the under 10 metre fleet. A briefing note published by the claimant along with the press release asserted that the owners of fixed quota allocation units had legitimate expectations.

### The rules

50. Annually the fisheries administrations have issued Rules for the management of the United Kingdom's fisheries (“the Rules”). The Rules for 2011, which were in force at the time of the decision challenged in this judicial review, set out the stocks covered and the groups eligible to receive allocations, including producer organisations and the under 10 metre fleet. Under paragraph 2.1, “Ministers may, at their discretion, agree to issue quota allocations to” producer organisations, the under 10 metre fleet and others. Paragraph 3 covered the basis of allocation. Paragraph 3.1 explained that under the system of fixed quota allocations operating since 1999, quota allocations were based on the fixed quota allocation units associated with vessel licences and licence entitlements. For the under 10 metre fleet quota units were not associated with vessel licences but held and managed as a block by the fisheries administrations. Paragraph 3.2 repeated that fixed quota allocation units were based primarily on landings during the reference period 1994 to 1996.
51. Paragraph 3.3 noted that holdings of fixed quota allocation units were recorded in the central register held by the fisheries administrations. It continued:

“[Fixed quota allocation] units can move in association with any fishing vessel licence entitlement that is being transferred or aggregated onto another vessel, or separately in the following circumstances:

- (i) The holder of a licence entitlement may transfer his [fixed quota allocation] units, in their entirety or in part, at any point during the life of the entitlement...

(ii) A vessel owner wishing to acquire a replacement vessel may transfer the [fixed quota allocation] units from his licence to an "[fixed quota allocation] holding statement" pending the acquisition of the licence for the replacement vessel, and may subsequently transfer units from the statement under a one-off option during the life of the statement.

(iii) The owner of a [under 10 metre] vessel, who is required to dispose of [fixed quota allocation] units...may transfer the units from his licence.

(iv) Where licences are used for the purposes of the correction or modification of engine power the [fixed quota allocation] units may be transferred to other licences."

Under paragraph 3.4 quota allocations (appropriately adjusted, as provided for in the rules) were to be made to each group in proportion to the total quota units for each stock associated with the group. Where fixed quota allocation units were being transferred separately from licences under any of the arrangements described in paragraph 3.3, allocation calculations were generally to take account of transfer requests received by the fishing administrations by 31 December of the preceding year. Allocation to the under 10 metre fleet was underpinned: paragraph 3.9. Provision was made in paragraphs 3.10-3.11 for under 10 metre vessels where fixed quota allocation units were being acquired; in paragraph 3.12, for fixed quota allocation units, where vessels had had their licences suspended; and in paragraph 3.15, where vessels were decommissioned.

52. Over-fishing was covered by paragraphs 5-7 of the Rules. In particular paragraph 5.10 dealt with the situation whereby groups in the United Kingdom which were not responsible for over-fishing, might still be penalised. Fishing administrations would consider how the groups which over-fished should provide compensation for the disadvantaged groups, for instance by making repayment in another acceptable stock. If the latter required compensation in the same stock the groups which over-fished would have to provide such compensation in subsequent years: paragraph 5.10. Fishing administrations reserved the right to require the payment of deductions for over-fishing, including any which currently remained unpaid, in another stock (normally in the year following the over-fish): paragraph 7.2(iii). Quota which under European Union arrangements the United Kingdom was able to bank from the current year into the next, because it was underused, could be distributed to the groups which under-fished in the current year, according to end-year landings: paragraph 8.3.
53. Paragraph 12 contained arrangements when there was a movement of an under 10 metre vessel between the inshore fleet and a producer organisation. On an under 10 metre vessel joining a producer organisation there was to be no transfer from the collective holding of fixed quota allocation units or quota of under 10 metre vessels: paragraph 12.1. Before rejoining the under 10 metre (inshore) fleet a vessel had to divest itself of any fixed quota allocation units associated with its licence: paragraph 12.4.
54. Quota increases from international swaps were normally to be distributed according to the rules: paragraph 13. With domestic quota swaps and transfers, groups were generally free to agree terms between themselves: paragraph 14.2. In limited



circumstances the rules allowed for quota to be reallocated within the year: after consultation with those concerned the fishing administrations could take quantities of individual stocks from any group which appeared unlikely to be able to catch its allocation in full, and could reallocate this amongst those groups most likely to make use of it: paragraph 15.1. Finally, the rules were subject to variation.

“18.1 The rules set out in this paper are subject to review and amendment to respond to changes in circumstances, for example as a result of decisions made by the Council of Ministers.

18.2 [Fishing Administrations] reserve the right, after consultation wherever possible, to depart from these rules should the need arise.”

### The 2012 Concordat

55. In May 2012 the United Kingdom’s four fisheries administrations agreed a Concordat on the management of the country’s fish quotas and licences. Under it, each fisheries administration will only issue licences to vessels registered in and administered from ports in its territory. This is to ensure that vessels within the jurisdiction of a particular fisheries administration have a closer geographical link than previously. Under the Concordat each administration is allocated shares, agreed annually, of the United Kingdom’s fish quota for distribution to their fleets. These are based on the number of vessels in each jurisdiction and the fixed quota allocation units attached to their licences. There is no permanent split of United Kingdom quota. For the under 10 metre fleet, allocations are split between administrations on the basis of the vessels administered by each administration at 1 November each year. The Concordat contemplates the establishment of a publicly accessible register of quota allocation holdings and transactions. In respect of fixed quota allocation units, the Concordat states:

“The Administrations reiterate that [fixed quota allocations] do not provide any right to a share of UK quota. Administrations acknowledge nonetheless that [fixed quota allocation] holdings involve at present a general expectation of receiving a share of UK annual quotas. Administrations also acknowledge there is a trade in [fixed quota allocations].”

### V THE CONTESTED DECISION

56. In June 2009 Defra established a project entitled “Sustainable Access to Inshore Fisheries” to develop a strategy for the long term future of the English inshore fishing fleet. This was in recognition of the difficulties caused by an imbalance between fleet capacity and permitted fishing opportunities. Attempts to encourage gifts of unused quota to the under 10 metre fleet had come to nothing. In-year reallocation of quota under rule 15.1 of the Rules was regarded as unsatisfactory both because it was not permanent and because it took place towards the end of the fishing season.
57. To support the project Defra established an independent advisory group, bringing together expertise both from within and outside the fishing industry. The group

produced its final report in mid 2010. It noted that fishing opportunities for the under 10 metre fleet could be enhanced by measures such as quota swaps with other Member States of the European Union and domestic producer organisations. Under 10 metre vessels could also lease quota. The group asserted that quota for the under 10 metre fleet, or the lack of it, was only part of the problem. Management of the existing quota had also to be addressed. The advisory group noted in this context that a system of quota trading had developed in the over 10 metre sector, which appeared to be working relatively well for fish producer organisations and their members. Quota trading, it said, had to be a key part of self-management within the whole industry.

58. In response to the group's report the government constituted an Industry Working Group to examine the problems facing the inshore fishing fleet. One topic discussed was unused quota. The government prepared a consultation paper and the Industry Working Group saw a draft in mid January 2011.
59. In April 2011 Defra published the consultation document. The consultation document began with the government's vision for fisheries management. English fisheries, it said, played an important role in providing food, jobs, wealth, and other social and cultural benefits, particularly in coastal communities. They had to be managed in a way that was environmentally, economically and socially sustainable. The aim was to manage fisheries, inter alia, to allow fish stocks to be exploited sustainably, to enable the fishing industry to make a sustainable living and to reflect the diverse circumstances, ecology, and fishing practices of different regions. Fixed quota allocation units defined fishing rights and gave some clarity regarding fishing opportunities available to individual fishing businesses each year.
60. As regards the under 10 metre fleet, the consultation document explained that the Marine Maritime Organisation had sought to acquire extra quota for it through in-year trading, but that was unpredictable. The available quota was lower than existing fishing capacity, making it difficult to manage. The uncertainty made it hard for fishermen to plan their businesses and to obtain best prices for catches. Small scale fishing, and fleets in communities with a fishing heritage, had the potential to deliver cultural, environmental and economic benefits.
61. The consultation document then explained that some of the United Kingdom's quota was not fished, which it described as a missed opportunity. While weather restrictions, stock availability, market conditions and other factors could influence uptake in any given year, the consistent under-fishing pattern against some stocks suggested a more fundamental problem. In some cases, this un-fished quota would be of great benefit for the under 10 metre fleet. Thus the consultation document proposed facilitating the restructuring of the English fleet with some additional quota for under 10 metre vessels, secured through a limited realignment of consistently under-used quota and a small redistribution (3 percent) of fixed quota allocation units within the English fleet. The consultation was open until June 2011. The claimant takes no point in this judicial review about its fairness or adequacy.
62. In September 2011 all English producer organisations were invited to a discussion of the methodology to be used to identify stocks and quantities of fixed quota allocation units to be reallocated. The methodology was adjusted in the light of comments and

as Defra applied it. Applying the criteria eventually resulted in the identification of 12 out of more than 110 stocks as possible candidates for reallocation.

63. In November 2011 Defra published a summary of the responses to the consultation document. Some respondents said that more than 3 percent of quota needed to be reallocated to the inshore fleet; the producer organisations and their members said that any reallocation was unfair when they had paid money to accumulate quota and members were struggling to make a living. In terms of detail some respondents suggested that instead of using the period 2007-2010 proposed in the consultation document for reallocating quota, it was better to use 1994-1996, which was the period originally used to distribute fixed allocation quotas. Defra's response was that 1994-1996 was not appropriate since it was only after 2007 that there was reliable information on catches by the under 10 metre fleet. Defra undertook to consult further with the industry on the methodology for identifying under-utilised quota.
64. As part of its response to the consultation the claimant commissioned a report from Erinshore Economics Ltd ("the Erinshore Report"). That report reviewed the proposals, in particular the benefits and costs which had been set out in the impact assessment accompanying the consultation. In particular, the Erinshore Report estimated the cost to the sector of the loss of quota by redistributing the 3 percent at approximately £1.9 million. The calculations were based on 2010 units of quota available to producer organisations. The report used in its methodology tradeable volumes of quota at so much per tonne for different types of species from different areas. In a letter in December 2011, Defra accepted that the price at which quota was traded provided a more accurate reflection of its value to fishing businesses than the methodology of market price it had used for its impact assessment. Defra added that it would welcome additional information on the origin of the figures in the Erinshore report to enable further work.
65. Defra also sought information from the English producer organisations to identify vessels in their membership which consistently left quota unused. None of the producer organisations responded. It also requested information to assist in excluding from the analysis Scottish, Welsh and Northern Irish vessels which were members of English producer organisations. Again no data was forthcoming. On 8 February 2012 Defra sought from the producer organisations sufficient donations of stock to conduct pilot schemes as suggested in some of the comments from the industry on the consultation. None of the producer organisations offered quota for this purpose.

#### The decision

66. On 10 February 2012 Defra announced that it would be implementing the proposal to undertake a permanent realignment of fixed quota allocation units associated with consistently underutilised quota in the reference period 2007-2010. The decision applied to English licensed vessels only and was addressed to the English producer organisations. This was to be a permanent realignment of quota and therefore of the associated fixed quota allocation units. Having considered the complexity of the analytical process, and wishing to give certainty to producer organisations for 2012 before final allocations were issued, Defra's letter explained that the realignment of fixed quota allocation units would be postponed until 2013. Realignment would involve only English licensees who were members of English producer organisations.

67. Appendix 1 set out the comments from consultees and Defra's response to them. Thus Defra explained that the first stage of the methodology sought to identify stocks where there were more significant amounts of under-utilised quota. Only stocks which met the test for England were carried forward in the analysis. England was defined as English based producer organisations. In response to a comment that the reasons behind under-utilisation had not been explored, Defra replied that it recognised that there were various reasons, for example, failures in how quota was swapped, quota limit problems in mixed fisheries, poor weather conditions, economic drivers (e.g. fuel prices), and poor market conditions (low demand or market saturation). However, it said, there were still a number of stocks for which there has been consistent under-utilisation year on year, which suggested a more fundamental issue with the way that quota was currently allocated. Appendix 1 continued that in revisiting the analysis, Defra had taken into consideration the take up of stocks by vessels of different nationality to ensure that it only realigned stocks of interest to the English under 10 metre fleet. As regards what was said to be the detrimental impact on the ability to secure investment against fixed quota allocations, the appendix said:

“Fishermen do not have property rights over [fixed quota allocation] units or quota and this has been the case since their inception. Furthermore, [fixed quota allocations] do not guarantee a set tonnage of fish but rather give holders access to a share of quotas which fluctuate year on year.”

At several points Appendix 1 referred to under-utilised quota as being a missed opportunity.

68. Appendix 2 to the decision letter set out details of the methodology for realigning consistently unused quota. Stocks for realignment were identified in the four year reference period 2007-2010. The idea was to take as the starting point the year within the reference period when the smallest amount of quota had been unused, i.e. had not been caught, swapped, leased or gifted. The amount of quota actually identified for reallocation was 80 percent of the amount of unused quota this identified. (Only stocks with a minimum of 100 tonnes of consistently unused quota, or high value fisheries with a significant proportion of quota remaining unused, were included.) The only quota then reallocated was quota for stocks of which in at least one of the years in the reference period vessels in the under 10 metre fleet had caught at least 90 percent of their quota. Therefore it could reasonably be expected that the under 10 metre fleet would fish for the reallocated quota. Geographical location of the stock was also taken into account to check whether the under 10 metre fleet would fish it. (For example, two stocks, West of Scotland pollack and West of Scotland nephrops were excluded on the basis that, because of the distance, the English under 10 metre fleet was unlikely to be interested.) Appendix 2 explained that there had been checks by the Marine Management Organisation as to whether quota may have been unfished through poor weather late in the year. Once the stocks were identified, data from individual producer organisations was examined, with leeways in the calculation.
69. Appendix 3 contained the fish stocks and total fixed quota allocation units to be realigned (10,494 units).
70. Producer organisations were informed of the outcome of the quota realignment and given the opportunity to appeal. The Secretary of State considered nine appeals in the

early part of 2012. None of the appeals were made on the basis that the realigned quota was not consistently unused in the reference period. The results were notified to producer organisations in early April 2012. Following the appeals the total fixed stock allocation units proposed to be realigned was reduced from 10494 to 7901 units. That represents only 0.1 percent of 8,261,953 fixed quota allocation units in the United Kingdom as whole, 0.4 percent of the 2,166,260 units held by English producer organisations.

71. As indicated earlier, only a small number of fishing stocks are affected by the decision. English producer organisations held 97140 units of these stocks, 8.1 percent of which were reallocated. The breakdown of the 7901 units to be reallocated divides between the reallocated stocks as follows: sole in area 7D, 680; plaice in area 7A, 908; cod in area VII D, 151; whiting in area 7B-K, 1164; pollack in area 7, 1727; North Sea nephrops, 40; North Sea lemon sole and witches, 2507; and herring in area 7 E-F, 724. To put this in perspective, of the total United Kingdom quota for these stocks, the quota thus reallocated for 2012 was 9 percent of sole in area VII D, 10 percent of plaice in area 7A, 1 percent of cod in area 7D, 5 percent for whiting in area 7B-K, 7 percent of pollock in area 7, 0.03 percent of North Sea nephrops, 6 percent of North Sea lemon sole and witches, and 16 percent of herring in area 7E-F.
72. As for the intention behind the decision, to reallocate stocks to the under 10 metre fleet, landings by the English vessels of these stocks in 2011, as a percentage of total landings by under 10 metre vessels, was as follows: 100 percent for sole in area 7D; 73 percent of plaice in area 7D; 100 percent of cod in area 7D; almost 100 percent of whiting in area 7 B-K; 99 percent of pollock in area 7; 50 percent of North Sea nephrops; 98 percent of North Sea sole and witches; and almost 100 percent of herring in area 7 E-F.
73. At the request of the South Western Fish Producer Organisation, R & J Maritime Ltd prepared a valuation in 2012 of the fixed quota allocation units to be realigned from producer organisations to the under ten metre fleet as a result of the decision under challenge in this judicial review. R & J Maritime Ltd are regularly instructed by banks to value fishing vessels, licences and quota. Its report was based on the assumption that fixed quota allocation units can be assigned a market value since the entitlement to catch and land the fish recorded can be transferred or leased to another licensed fishing vessel. The valuation given was £1,065,000. For the Secretary of State the Treasury Solicitor requested an explanation of the basis on which the valuation was undertaken. The claimant's solicitor purported to explain but in my opinion took matters no further forward. R & J Maritime Ltd produced a further valuation, this time of £1,405,000.

## VI SUBSTANTIVE LEGITIMATE EXPECTATION

74. The first ground of challenge to the decision under challenge in this judicial review is that it unlawfully frustrates the substantive legitimate expectations of the holders of the 7,901 fixed quota allocation units to be reallocated under it. The first legitimate expectation, the claimant contends, is that quota will be allocated on the basis of fixed quota allocation units. In its submission since 1999 there have been consistent and unambiguous representations to this effect. Thus the Rules, in paragraph 3.3, refer to quota allocations being made to each group in proportion to the total units for each stock associated with the group. **When** the government announced the fixed quota

allocation system in June 1998 it said that annual quota allocations to producer organisations would be based on the total number of units held by member vessels. The papers prepared for the 2001 review asserted that the system guaranteed fishermen and their producer organisations a fixed percentage share of United Kingdom quota. In the Shetland State aid investigation, the government informed the European Commission that fixed quota allocation units remained a permanent share of available fishing opportunities. The consultation paper in April 2011, leading to the decision, referred to fishing quota allocation units as defining fishing rights and as giving clarity on fishing opportunities available to individual fishing businesses.

75. The second legitimate expectation the claimant identifies is that quota allocations associated with fixed quota allocation units will not be lost if a fisherman does not fish his full allocation. The claimant points again to the June 1998 announcement, that a fisherman's track record would not be affected by underfishing and a period of inactivity would not be to his disadvantage. There was also Mr Morley MP's statement in September 2000 to similar effect and mention of the idea in the papers prepared for the 2001 review. These also referred to the flexibility which the system confers in enabling fishermen to take advantage of other opportunities such as pipeline and cable work. In the claimant's submission none of these statements contained any qualification which would have indicated to the reasonable reader that if they under-fished their allocation the Secretary of State might decide not to allocate them quota. There were representations which expressly assured fishermen that this would not happen and that the policy's continuance was guaranteed or permanent.
76. Moreover, the Secretary of State's practice had been to abide by these undertakings over the 13 years the fixed quota allocation scheme has been in force. The claimant underlined that the Secretary of State had never failed to make an allocation of quota in accordance with them. Fixed quota allocation units have always attracted an allocation of quota and never been taken away for under fishing.
77. In reliance on these representations and the consistent practice, the claimant contends, the fisheries industry has invested large sums (often borrowed) in acquiring vessel licences and quota. That has been to the knowledge and assistance of the Secretary of State. The fishing industry is therefore heavily dependent upon the predictable, consistent and lawful allocation of quota. It has also paid substantial sums in capital gains tax on the basis that fixed quota allocations are of sufficient permanence and liquidity to amount to tradable assets. For the Secretary of State to destroy the very basis of those investments by selectively refusing to allocate yearly quota to certain holders of fixed quota allocation units on the basis that those holders have not fished their whole allocation is therefore unlawful. In the claimant's submission the strength of the legitimate expectations is reinforced by the fact that the Secretary of State publicly assured Parliament in October 1999 that the legal concept of legitimate expectation would provide fishermen effective protection. That notion was repeated in the July 2000 report of the working party on trading in quota.
78. None of this means, the claimant accepts, that the Secretary of State cannot abandon the fixed quota allocation scheme or reduce the amount of the United Kingdom's total allowable catch allocated under it. If the Secretary of State is to do this, however, it must act prospectively. Instead the Secretary of State has acted retrospectively. The decision operates on events which have taken place in the past: Secretary of State for Energy and Climate Change v Friends of the Earth [2012] EWCA Civ 28; [2012] Env

L R 494, [45]. Thus the decision adopts four reference years, 2007-2010, for assessing under-use, years which had already elapsed. It penalises fishermen for having not used quota in the reference period falling in the past. If the Secretary of State had announced that the policy of not taking away fixed quota allocation units for underfishing was being withdrawn with immediate effect, fishermen would have had the opportunity to alter their behaviour accordingly. Alternatively, transitional provisions could have protected fishermen's vested rights.

79. Finally, the claimant submits, that alternatives should have been more extensively explored. A pilot could have been run to see if the additional quota would have been used by the under 10 metre fleet. Other possibilities included introducing incentives to fish or, through rules of fish producer organisations, a mandatory obligation on members to fish.

### The law

80. The doctrine of substantive legitimate expectation operates in certain circumstances as a constraint on the power of public authorities to change public policy. Both domestic and European Union law are relevant. European Union law applies in this area because of article 20(3) of Council Regulation (EC) 237/2002, as explained earlier in the judgment.

#### (a) Domestic law

81. There are some differences within the domestic case law as to the metes and bounds of the doctrine of substantive legitimate expectation. What is required is to identify the principles laid down in the authorities binding on this court. First, there must be a promise with the necessary character to generate a legitimate expectation. In R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61; [2009] 1 A.C. 453 Lord Hoffmann stated the principle that a legitimate expectation can be based only upon a promise which is clear, unambiguous and devoid of relevant qualification: [60]. On the facts Lord Hoffmann (with whom Lords Rodger and Carswell agreed) held that the Foreign Secretary's statement did not contain any unambiguous promise in respect of the right of the Chagossians to return to their Islands, whereas Lords Bingham and Mance considered that there were clear statements recognising such a right: [61], [71], [174].

82. In the course of his speech in Bancoult, Lord Hoffman said that it was not essential that an applicant should have relied upon the promise to his detriment,

“although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise might be justified in the public interest, particularly in the area of what Laws LJ called “the macro-political field”: see R v Secretary of State for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1131”: [60].

In Begbie Peter Gibson LJ said obiter that it would be very much the exception, rather than the rule, that detrimental reliance would not be present: 1124 B-C. Sedley LJ said that it was difficult to see how reliance would not be necessary where the basis of the claim was that a person-specific discretion would be exercised, by contrast to

cases where the government had made known it intended to exercise powers affecting the public at large: 1133 D-F.

83. In (R on the application of Patel) v General Medical Council [2013] EWCA Civ 327 Lloyd Jones LJ (with whom Lloyd LJ and Lord Dyson MR agreed) applied Lord Dyson’s judgment in Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32; [2012] 1 AC 13, at [30] to hold that, in determining whether a promise is clear, unambiguous and devoid of relevant qualification one asks how, on a fair reading, it would be reasonably understood by those to whom it was made: [44] – [45]. Lloyd Jones LJ referred to the “pressing and focused” character of the General Medical Council’s assurance in that case: [51]. That is the language of Laws LJ in R (on the application of Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755, [46].
84. In Bhatt Murphy Laws LJ rejected the substantive legitimate claim advanced by the claimant. (I return to the facts below.) Critically, he held, there was no evidence of any assurance, promise or practice that the policy would be set differently in any respect.

“... there was nothing more than the scheme's existence: at most a factual expectation that it would continue in effect until rational grounds for its cessation arose. As I have sought to explain, such an everyday state of affairs is categorically inadequate to generate a legitimate expectation which the courts will enforce”: [63].

The Master of the Rolls agreed with Laws LJ’s judgment.

85. In Bhatt Murphy Laws LJ said obiter that although in theory there may be no limit to the number of beneficiaries of a promise for the purpose of a legitimate expectation, in reality it is likely to be small if the court is to make the expectation good: [46]. In Paponette the defined class benefiting from the legitimate expectation the Privy Council held to exist was some 2000 maxi-taxi owners and operators.
86. If there is a promise which is clear, unambiguous and devoid of relevant qualification, the issue then becomes the public authority’s justification for resiling from it. It is here that the courts face the danger of substituting themselves as policy makers. The legal authorities offer limited guidance. There is the highly persuasive authority that a public authority must take into account the promise, and the fact that the proposed act would amount to a breach of it, as relevant factors in deciding to act inconsistently with it: Paponette v Attorney general of Trinidad and Tobago [2010] UKPC 32; [2012] 1 AC 13, [46]. Beyond that the ground is less sure.
87. A starting point is R (on the application of Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363. There the issue was whether the family links policy for immigrants should be applied in the way a court had interpreted it, and not in its original form. The Secretary of State had revised the policy in the way he always understood it and then applied it retrospectively to the claimant. Referring to R v North and East Devon Health Authority ex p. Coughlan [2001] QB 213, Laws LJ (with whom Thomas LJ and Nelson J agreed) said that various passages in that judgment demonstrated that an abiding principle which underpinned the legitimate



expectation cases was the court's insistence that public power should not be abused: [51]. In the circumstances there had been no abuse of power by the Secretary of State: [67]. However, Laws LJ added, the notion of abuse of power offered no principle. Laws LJ then proffered his oft quoted remarks, that the principle of legitimate expectation really lay in fairness, more broadly stated, it was a requirement of good administration by which public bodies ought to deal straightforwardly and consistently with the public: [68]. Accordingly, a public body's promise or practice as to future conduct could only be denied in circumstances where to do so was its legal duty, or it could be objectively justified as a proportionate response, of which the court is the judge, having regard to a legitimate aim pursued in the public interest: [68]. Applying that approach Laws LJ arrived at the result that the Secretary of State was entitled to apply his original policy: [71].

88. Laws LJ returned to the doctrine of substantive legitimate expectation in R (on the application of Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755. The first decision under challenge in that case was to withdraw a discretionary scheme to compensate victims of miscarriages of justice. The result was that redress was confined to the statutory scheme. The decision was to apply with immediate effect on 19 April 2006 to all applications received after that date. The other decision was to reduce the level of costs payable to solicitors acting in miscarriage of justice cases. Until then the Independent Assessor almost invariably allowed costs at solicitors' standard fee rates for private work. That decision too applied with immediate effect on 19 April 2006 but in the case of applications already received, or under consideration by the Assessor, the change applied only in relation to legal costs incurred after that date. There was also a discretion for the Assessor to pay costs at the old rate where merited.
89. Laws LJ noted that a claim that a substitute policy has been established in breach of a substantive legitimate expectation engages a more rigorous standard than Wednesbury review and is judged by the court's own view of what fairness requires: [35]. (His Lordship did not explain the reason for departing from Wednesbury outside the ambit of the European Convention on Human Rights.) Laws LJ then considered the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit.

“[41]...[B]oth these types of legitimate expectation are concerned with exceptional situations ... [A] public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon... There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel...

[42] But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation,

where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself...What is fair or unfair is of course notoriously sensitive to factual nuance.”

90. Laws LJ rejected the argument that a substantive legitimate expectation generated a need for more generous transitional arrangements for solicitors taking miscarriage of justice cases. The fact was that solicitors had a right to terminate what might now be unremunerative retainers: [60]-[63].
91. Sedley LJ agreed that the transitional provisions, coupled with ability of solicitors to terminate a now unremunerative retainer, satisfied their substantive expectations: [65]. Sedley LJ then added a gloss: the terms on which change was effected, he said, were capable of frustrating a legitimate substantive expectation. That explained transitional provisions to cushion those who would otherwise be unfairly affected. Such provisions might take the simple form of giving prior warning that the change was coming or could take the form of provisions for the temporary continuation of certain of the benefits of the policy: [70]. The Master of the Rolls agreed with both judgments but reserved his position in relation to Sedley LJ’s gloss.
92. The threads of the English doctrine of substantive legitimate expectation can be drawn together in the following propositions;
  1. The undertaking must be clear, unambiguous and without relevant qualification: Bancoult, [60].
  2. On ordinary principles an undertaking can derive from a representation or a course of conduct. However, the mere existence of a scheme is inadequate in itself to generate a substantive legitimate expectation: Bhatt Murphy, [63].
  3. Whether there is such an undertaking is ascertained by asking how, on a fair reading, the representation or course of conduct would reasonably have been understood by those to whom it was made: Patel, [44]-[45], applying Paponette, [30].
  4. Although in theory the defined class being large is no bar to their having a substantive legitimate expectation, in reality it is likely to be small if the expectation is to be made good: Bhatt Murphy, [46]. In Paponette the successful class to whom a collective promise had been made was some 2000.
  5. Detrimental reliance is not an essential requirement. However, it may be necessary where the issue is in the macro-political field or a person-specific undertaking is alleged: Bancoult, [60]; Begbie, 1124 B-C, 1133 D-F.
  6. To justify frustration of a substantive legitimate expectation, the decision maker must have taken into account as a relevant consideration the undertaking and the fact that it will be frustrated: Paponette, [45]-[46].

7. Legitimate expectation is concerned with exceptional situations: Bhatt Murphy, [41].

8. Justification turns on issues of fairness and good administration, whether frustrating the substantive legitimate expectation can be objectively justified in the public interest and as a proportionate response. Abuse of power is not an adequate guide: Nadarajah, [70].

9. The intensity of review depends on the character of the decision. There will be a more rigorous standard than Wednesbury review, with a decision being judged by the court's own view of fairness. A public body will not often be held bound to maintain a policy which on reasonable grounds it has chosen to change. There will be less intrusive review in the macro-political field. As well, respect will be accorded to the relative expertise of a decision-maker: Bhatt Murphy, [35],[41]; Patel,[60]-[62], [83].

10. Transitional arrangements, and whether there has been a warning of possible change, are not essential but may be relevant to the court's assessment of justification: Bhatt Murphy [18]-[20],[56]-[57],[60]-[61],[65]-[70]; Patel,[77], [83].

(b) European Union law

93. The formulaic character of European Union law means that it is more easily stated than domestic law, although that does not necessarily mean that it is any easier in its application. In Case T-554/08, Evropaiki Dynamiki v Commission, 24 April 2012, the General Court said that the principle arises when it is clear that the European Union authorities have given a person precise assurances, leading him to entertain legitimate expectations. That applies irrespective of the manner in which it was communicated. Precise, unconditional and consistent information coming from authorised and reliable sources amount to such assurances. Without precise assurances a person may not plead infringement of the principle: [51].
94. This formulation is expressed to refer to European Union authorities, but the same test applies to the Secretary of State when allocating fishing opportunities: R v MAFF ex parte Hamble Fisheries [1995] 1 CMLR 533, [29], per Sedley J. As in domestic law precise assurances are capable of being conveyed by conduct as well as words: Case C-289/91, Mavridis v Parliament [1983] ECR 1731, [21].
95. The Grand Chamber emphasised that the principle is fundamental in European Union law in Case C-17/03, Vereniging voor Energie v Directeur van de Dienst Unitvoering en toezicht energie [2005] ECR I-5016, [73]. Any trader on part of whom an institution has promoted reasonable expectations may rely on the principle: [74].

“However, if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to

affect his interests, he cannot plead that principle if the measure is adopted”: [74].

96. The Grand Chamber went on to emphasise as well the principle of legal certainty, that rules involving negative consequences for individuals should be clear and precise, and their application predictable for those subject to them: [80].
97. Under European Union law a legitimate expectation can be defeated by an overriding public interest. As Professor Craig explains in his magisterial study, EU Administrative Law (2<sup>nd</sup> ed, Oxford, 2012), the Court of Justice of the European Union engages in a balancing exercise if a legitimate expectation has been found to exist.

“[A] prima facie legitimate expectation may be trumped by an overriding public interest. The Court, has therefore, sought to balance the need of the EU to alter its policy for the future, with the impact that such alteration might have on traders who based their commercial bargains on pre-existing norms:”[577].

98. The issue arose in Case C-183/95 Affish BV v Rijksdienst voor de keuring van Vee en Vlees, [1997] I-4315. There the European Commission had taken a decision imposing a total prohibition on the importation of consignments of fish products from Japan following health concerns. One of the attacks on the legality of the decision was that it infringed the principle of protecting legitimate expectations since, at the time when it was adopted, certain consignments had already been dispatched. The Court asked itself whether the decision should have made express provision for transitional measures in respect of consignments already en route. It held that even if there had been legitimate expectations, an overriding public interest might preclude transitional measures from being adopted; the protection of public health constituted an overriding public interest of that kind: [57].

#### No legitimate expectation

99. In my view the claimant’s legitimate expectation ground falls at the first hurdle. There has been no clear, unambiguous and without qualification undertaking that the fixed quota allocation system would continue in its existing form. On a fair reading that would not be the reasonable understanding of what the Secretary of State has said. In many ways the representations which the claimant invokes amount to no more than an explanation how the system operates. Moreover, the representations identified by the claimant were not devoid of relevant qualification.
100. Thus ministerial discretion in the issue quota allocations is underlined in the Rules, such as paragraph 2.1 of the 2011 Rules. The announcement in June 1998 explained that the United Kingdom’s quota would continue to be managed on an annual basis and that yearly allocations would continue to be made as previously. Ministerial discretion and legal ownership lying with the government were concepts underlined before the Select Committee on Agriculture and on subsequent occasions. (Mr Bradshaw MP’s remarks in 2007 are the exception. But they were uttered in a different context and have every appearance of being an unscripted response to an opposition intervention.) References in background submissions and by government lawyers in other contexts such as Shetland Islands state aid case take the matter

nowhere. Given the government's stated position as in the examples, nothing could be reasonably understood as a representation that fixed quota allocation units were a matter of substantive entitlement and that the system would remain in place without amendment. There is some force in the Interveners' point that statements about fishing quota and the fixed quota allocation system have always to be understood against the background that fish are a public resource.

101. Although one of the purposes of introducing the fixed quota allocation system was to prevent over fishing, there is also nothing in what the Secretary of State has said whereby he has disabled himself from changing it to address consistent non use of quota. In an important sense the thrust of the fixed quota allocation system when introduced in 1999 was to ensure that quota allocated to the United Kingdom was better utilised. Under the previous system quota was lost if a fishing vessel did not use its full allocation in the three previous years. There was a race to fish and ghost fishing simply to maintain quota.
102. Admittedly by fixing allocations to the 1994-1996 reference period the fixed quota allocation system has ensured that should there be under fishing in any particular year that would not automatically disadvantage the fishermen as regards future quota entitlements. By no means can that be taken as a representation or constitute a practice that in the event that quota was consistently under-utilised or unused no adjustments would be made to the system to remedy it. The Rules under which quota is allocated are issued annually and are a statement of the position at that time. The stability they guarantee is not equivalent to permanency. The Rules in paragraph 18 contemplate review and amendment and specifically incorporate a power to depart from them should the need arise.
103. There are the occasional statements that fishermen will be protected by the principle of legitimate expectation. If not tautologous, these cannot stand in the way of the Secretary of State making adjustments to the system of fixed quota allocation to address the problem of consistent under-utilisation or unused quota. That would run counter to the policy of seeking to ensure its maximum use. That quota has been allocated consistently with the fixed quota allocation system for the last thirteen years cannot ground a legitimate expectation that it would never be revised. In any event the claimant accepts that the Secretary of State is entitled to abandon the system. Neither the in-year swaps under the Rules, nor the reconciliation exercises undertaken in 2001-2, 2005 and 2011, could give rise to a substantive legitimate expectation about guaranteed or permanent quota. The need for the reconciliation exercises suggests the opposite. The tax treatment of fixed quota allocation units goes nowhere; the Revenue has always exhibited a remarkable ability to extend its reach to bolster the public finances. It can have no bearing on the issue of the indefinite maintenance of the fixed quota allocation system as it is at present.
104. If, contrary to this conclusion, substantive legitimate expectations have been generated, are they defeated by other requirements of the doctrine? The fish producer organisations and the fishermen to whom the decision is directed are a sufficiently defined class. In as much as detrimental reliance may be required, I am prepared to accept that it has been demonstrated, albeit that the evidence that vessel licences and quota have been acquired on the basis of the representations the claimant has identified is thin. Investment and trade decisions are frequently short term with no expectation that matters will remain as they are for any great length of time. Further,

the evidence of any detriment following the decision is even thinner since only consistently unused quota was reallocated under it. If the quota was being used during the four year reference period 2007-2010 it would not have fallen within the ambit of the decision. For the reasons already given, it can hardly be said that capital gains tax has been assessable on fixed quota allocation units because of any understanding that there would be no adjustments to the system.

105. That leaves justification of the decision in upsetting any legitimate expectation. Analysis begins with the subject matter. The Common Fisheries Policy and its administration lies towards the macro-political end of the policy making spectrum. It is highly contentious and a matter of intense political discussion. Fish are a scarce resource and decisions relating to it have important, social, economic and environmental implications. The Secretary of State was well aware that, as a relevant consideration, fish producer organisations took the view – contrary to his – that the decision would upset, to couch it in legal terms, what they asserted was their substantive legitimate expectation. A prudent fisherman could have foreseen change. The Court of Justice of the European Union had made clear in C-372/08, Atlantic Dawn, [2009] ECR I-74 that Member States are not precluded from alterations in the method of allocating fishing quotas at national level: [38]. The management of fish to ensure utilisation of fish stocks is obviously a legitimate aim of public policy: see Gudjonsson v Iceland (2009) 48 EHRR SE7. On such matters of economic and social policy the Secretary of State had available to him a wide discretion.
106. Not only is the decision under challenge justified, but in my view the means chosen are proportionate. Earlier I described the safeguards built into the methodology used in the decision to identify how quota should be reallocated. Various filters were applied so that only consistently unused quota was reallocated. All this goes to the fairness of the decision. Moreover, the methodology used was modified in the light of comments received from producer organisations such as those contained in the Erinshore Report. The outcomes of the methodology were then subject to appeal. Alternative avenues to maximise the use of quota such as gifts and in-year reallocations under Rule 15.1 had come to nothing or were unsatisfactory.
107. Finally, there is no basis for contending that the decision under challenge was retrospective or that transitional provisions were necessary. The decision used a past reference period, the years 2007-2010. But that was a starting point to identify consistently under-utilised and unused quota. Using a past reference period avoided the risk that the decision would be distorted by avoidance practices as in the past (for example, the race to fish and ghost fishing before introduction of the fixed allocation quota system). Once quota was identified from the reference period the methodology involved the application of a variety of filters to isolate unused quota. Removing these small amounts of consistently unused quota does not make the decision retrospective. No past transaction has been reopened or varied.

## VII DEPRIVATION OF /INTERFERENCE WITH, POSSESSIONS

108. The second ground of challenge is that the contested decision involves an unlawful deprivation of, or interference with, possessions protected by article 1 of protocol 1 to the European Convention on Human Rights (“ECHR” or “the Convention”) and article 17 of the European Union Charter of Fundamental Rights (“the Charter”). Both provide that persons may not be deprived of their possessions, except in the

public interest and in accordance with the conditions provided for by law. A proviso to article 1 of protocol 1 is that deprivation is subject to the general principles of international law. There is authority that this enshrines an entitlement to compensation: Opinion of Advocate General Jacobs in Case C-347/03, Friuli Venezia v Ministero delle Politiche Agricole e Forestali: [2005] ECR I-03785, [93]. Article 17 of the Charter of Fundamental rights is explicit on the point: the deprivation of possessions is subject to fair compensation being paid in good time for their loss.

Are fixed quota allocations possessions?

109. The concept of a possession for the purposes of article 1 of protocol 1 of the ECHR has an autonomous meaning and is not limited to ownership of physical goods. “[C]ertain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision”: Centro Europa 7 Srl v Italy (2012) 32 BHRC 417, [171]. There a legitimate expectation of being allocated a broadcast frequency, linked to the property interest of a broadcast licence, was held to be a possession: [179]. A seminal decision in the Strasbourg jurisprudence is Tre Traktörer AB v Sweden (1989) 13 EHRR 309, where the court found that the withdrawal of a liquor licence had had an adverse effect on the goodwill and value of a restaurant. These economic interests connected with the running of the restaurant were possessions within article 1 of the first Protocol: [43], [53]. There must be a reasonable and legitimate expectation as to the lasting nature of the right: Gudmunsson v Italy (1996) 21 EHRR CD 89, 89.
110. In a well known passage in R (Nicholds) v Security Industry Authority [2006] EWHC 1792 (Admin); [2007] 1 WLR 2067, Kenneth Parker J (as he now is) invoked as a test whether licences or permissions have a monetary value and can be marketed for consideration, either through outright sale, leasing, or sub-licensing. Thus milk quotas and certain spectrum licences fell within the concept of possessions in article 1 of protocol 1, but not licences or permissions which were neither marketable nor had been obtained at a market price, even though they had a value to the holder because, without them, it could not carry on the licensable activity: [74]-[75]. That approach has been approved in both the Court of Appeal in R (Malik) v Waltham Forest NHS Primary Care Trust [2007] EWCA Civ 265; [2007] 1 WLR 2092, [42]-[44] and the House of Lords in R (Countryside Alliance) v Attorney General [2008] 1 AC 719 [22], per Lord Bingham. In Malik a medical practitioner was suspended from the performers’ list entitling him to practice within the NHS. The Court invoked the distinction between goodwill, which is a possession, and an expectation of future income, which is not. In that case there was a legal prohibition on selling the goodwill in a doctor’s practice. Thus it had no economic value, so that the personal right of the doctor to practice through inclusion on the performers’ list was not a possession: [29], [40], [65], [73], [86].
111. In its submission that neither quotas nor fixed quota allocation units could be possessions under the Convention or the Charter, the Interveners invoked the principle that fishing stock is a right held by the public. It necessarily follows, in their submission, that permissions to fish cannot be privately enjoyed as a property right and therefore cannot constitute a possession, especially when they have been conferred on fishermen free of charge. While accepting that fishing licences and, once allocated, fishing quota, may be possessions for the purposes of article 1 of the protocol 1, the Secretary of State contended that fixed quota allocations do not

qualify. They are no more than a tool, an abstract unit of measurement, and do not give rise to an entitlement to a precise amount or share of quota. Given their design they are no more than a representation of a vessel's track record for quota species caught between 1994 and 1996. In these submissions fixed quota allocations may represent a hope of a future allocation of quota, which falls within the scope of administrative discretion. The trade in fixed quota allocations occurs outside the Rules; the reconciliation exercises are in effect a pragmatic policy in the nature of an amnesty; and however banks, tax authorities or others might treat fixed quota allocations, that had nothing to do with their legal character or the legality of a transaction involving them.

112. For better or worse the concept of possessions has been given an expansive interpretation. The claimant's analogy with the English law notion of *profit a prendre* does not hold up since no one can own the fish of the sea. Moreover, the term possessions had an autonomous meaning in European law so reference to English law concepts is not helpful. However, Rule 3.3 recognises, albeit in limited circumstances, that fixed quota allocation units can be transferred separately from a fishing licence entitlement. The reconciliation exercises have given recognition to the trade in fixed quota allocation units occurring outside the ambit of the Rules.
113. And the reality of the situation is that, albeit built very much of sand, there is a trade in fixed quota allocation units. As seen earlier in the judgment this has attracted official recognition time and again. Units are not only traded but also used as security for bank finance. Valuers place a figure on them even if the methodology is relatively opaque. The tax authorities have seized upon the economic reality to treat them as a capital asset where disposal is capable of generating a capital gain. To use the language in Nicholds, fixed quota allocation units have a monetary value and can be marketed for consideration. In my view fixed allocation quota units are possessions falling within Article 1, Protocol 1 of the Convention and article 17 of the Charter.

#### An unjustifiable interference or deprivation

114. The claimant contends that the contested decision is an interference with or a deprivation of possessions. Holders of the 7,901 fixed quota allocation units will be allocated no quota against those units for 2012 and 2013, which will then be transferred to other fishermen in 2014 without compensation. In the claimant's submission the decision as it relates to 2012 and 2013 is a *de facto* transfer of ownership, defeating the substantial value of a fixed quota allocation unit, and the decision as it relates to 2014 will be an actual transfer of ownership. Thus fixed quota allocation units will be taken away from those who currently hold them and given free of charge to the inshore fleet. The economic substance of the situation is that, in future years, the new holders will benefit from the quota allocated on the basis of these transferred units.
115. In my view the contested decision does not constitute an interference with or a deprivation of possessions. The Strasbourg Court has said that the task is to look behind appearances and investigate the realities of the situation: Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, [63]. That remark was in a case where, although properties were in fact never expropriated, they were subject to expropriation permits and prohibitions on construction for many years. In Malik Auld LJ held that, if there had been a possession, there was no evidence before the judge of



interference with it, in particular, no effective loss of remuneration or of any actual or prospective loss of patients: [50]. Rix LJ put the same point more generally: if a relevant possession had been involved, there would only have been an interference for the purposes of article 1, protocol 1 “if there had been material economic consequences”: [77]. Moses LJ agreed with both judgments.

116. In this case the realities are that the quota affected by the decision has been consistently unused. Producer organisations and their members have no proprietary interest in the fishing stock itself and fixed quota allocation units, as explained earlier, give no rights to any specific amount of fishing stock in advance of the annual Ministerial decisions on quota. It is inherent in their character that for any one year the quota held by a producer organisation on behalf of its members might be substantially reduced from previous years, even to zero, depending on the decision of the Council of Ministers. There is no evidence of the material economic consequences Rix LJ referred to in Malik indicative of any interference with possessions. The claimant has produced valuations of the fixed allocation quota units affected by the decision. As I observed previously the methodology is opaque. Quite apart from that it is a puzzle that if the fixed allocation quota units in 2012 were worth the £1,405,000 R & J Maritime Ltd placed on them, they were not exploited. The economic reality is that for a variety of reasons it was not worthwhile for the fishermen entitled to these units to exploit the fishing stock they represented. Once unused in 2012 the opportunity to fish that stock disappeared. It seems to me that the £1,405,000 valuation is purely theoretical. The reality is that fishermen have taken a business decision not to exploit part of their quota. That unused quota has now been reallocated to others, who it is expected will place a higher economic value upon it.

### Justification

117. In any event my view is that any interference or deprivation is in accordance with law and justified. For the reasons given the decision is not in breach of any substantive legitimate expectation nor it is retrospective. The terms of the decision are clear and in accordance with the discretion the Secretary of State has under the scheme recognised by the Court of Justice of the European Union in Case C-372/08, The Atlantic Dawn [2009] ECR I-174. It cannot be said that any interference or deprivation with possessions if it has occurred is not provided by law: see R v Environment Secretary, ex p Spath Homes Ltd [2011] 2 AC 349, 383 G-H, per Lord Bingham, with whom the others agreed on this point.
118. In Spath Homes the House of Lords was dealing with rent control and emphasised in relation to article 1, protocol 1 of the Convention the wide discretion the courts accorded government in that field: at 396A, per Lord Bingham. A similar readiness to fall in with the legislature’s views in different areas of social policy – consumer protection and animal welfare – was evident in the House of Lords decisions of Wilson v First County Trust Ltd [2003] UKHL 40; [2004] 1 AC 816, [70] per Lord Nicholls, [138] per Lord Hobhouse, [169] per Lord Scott, and R (Countryside Alliance) v Attorney General [2007] UKHL 52, [2008] 1 AC 719, [47], per Lord Bingham, [78] per Lord Hope, [129] per Lady Hale and [155] per Lord Brown. The same approach must apply here. The decision falls under the Common Fisheries Policy and so was not taken by Parliament itself. However, the social policy here ranks along with the subject matter in these cases. The decision was based on detailed reasoning, followed consideration of alternatives, was carefully constructed with a

number of filters to identify unused stock, involved extensive public consultation, and conferred the opportunity on the fishermen affected (which they took) to appeal its impact.

119. In as much as only unused quota was affected by the decision there is no need for compensation. The claimant points to sources which placed a value on the reallocated quota. There is no need to restate my views about these valuations. The fact is that certain quota was unfished over the four year reference period 2007-2010. It was not swapped, leased or otherwise dealt with. The only conclusion to be drawn is that in market terms there were no willing buyers. The quota had no market value.

#### VIII UNLAWFUL DISCRIMINATION

120. The third ground of challenge is that the decision breaches the European Union prohibition on discrimination, which requires that “ ... comparable situations must not be treated differently ... unless such treatment is objectively justified”: Case C-581/10, Nelson v Deutsche Lufthansa, [2013] 1 CMLR 1191, [33]. It is said by the claimant that the decision fails to satisfy this test since it treats comparable situations in a different way. That follows because quota is being realigned only from English licensees who are members of English producer organisations. So not only are Scottish, Welsh and Northern Irish licensees not affected, neither are English licensees who are members of Scottish, Welsh or Northern Irish producer organisations.
121. Yet, the claimant continued, the beneficiaries of the realigned quota are the members of the United Kingdom inshore fishing fleet as a whole. Despite earlier assertions the Secretary of State now accepts that there was no English under 10 metre fleet at the time of the decision. If the effect of the decision will be to grant quota to a United Kingdom fleet – the under 10 metre fleet – all United Kingdom licensees were in a comparable situation and should have been required to make commensurate surrenders of fixed quota allocation units. English licensees in English producer organisations should have been in no different a position from Scottish, Welsh and Northern Irish licensees in English producer organisations, and from all members of Scottish, Welsh and Northern Irish producer organisations. Yet English fixed quota allocation unit holders are being required to carry the burden of losing their valuable quota to benefit the whole United Kingdom under 10 metre fleet without Scottish, Welsh or Northern Irish counterparts being required to make equivalent sacrifice.
122. The claimant’s submissions were advanced by reference to details of the uptake quotas as a proportion of total United Kingdom landings during 2011 for three of the eight reallocated stocks: North Sea lemon sole and witch, North Sea nephrops, plaice in Area A 7 and whiting in Area 7 B-K. As seen earlier in the judgment three of these stocks – North Sea lemon soles and witches, North Sea nephrops and whiting – account for 3,711 of the 7,901 reallocated fixed quota allocations. In respect of these three stocks substantial proportions of the English producer organisations from which the fixed quota allocation units are to be taken as a result of the decision have non-English membership as regards the percentage of stocks landed. Moreover, North Sea nephrops and plaice in area 7A together account for 948 of the 7901 reallocated units. For these two stocks substantial proportions of the United Kingdom under 10 metre pool activity is not English (50 percent and 27 percent respectively).

123. In the claimant's submission the matter cannot be justified by devolution. At the time of the decision, competence for the United Kingdom's annual quota allocation under the Common Fisheries Policy rested with the Secretary of State acting for the United Kingdom as a whole and under Rules which applied to the United Kingdom as a whole. Before the Concordat it was within the Secretary of State's competence to implement a United Kingdom wide solution. The decision did not even apply to all English licensees, over which the Secretary of State had competence, for it excluded English licensees if they were in Scottish, Welsh or Northern Irish producer organisations.
124. Finally, the claimant submitted that the discrimination it identified could not be objectively justified. It was not the only practicable means since a United Kingdom wide solution could have been adopted. At the very least, the three stocks identified where the discriminatory effects are concentrated should have been excluded from the exercise. A Member State cannot rely on practical difficulties to avoid its obligations under European Union law: Case C-317/02, Commission v Ireland (18 November 2004), [29]; R v MAFF ex parte Astonquest Ltd [2000] Eu LR 371, 389G-390A, per Robert Walker J.
125. In my view there was no discrimination. Public policy making can rarely be the finely tuned exercise forensic analysis demands. As far as was practicable this was a carefully calibrated exercise of attempting to identify unused quota which would be fished by the under 10 metre fleet. It is the case that the decision does not apply to English licensees who are members of Scottish, Welsh or Northern Irish producer organisations. But this derives from the role of producer organisations in managing the quota of their members. It is they which hold the information. Defra tried to obtain data to assist with identifying which vessels had consistently left quota unused but, as explained earlier in the judgment, none of the producer organisations provided a response. Thus it was that the Secretary of State needed to address the decision at the level of producer organisations, not vessels.
126. Moreover, the Scottish, Welsh and Northern Irish producer organisations do not fall within the management of the English fisheries administration. Since the majority of their members are not English licensees the Secretary of State as the English fisheries administration confined the decision to the English producer organisations. That was practical policy making in the light of the devolution settlements, something which the Court of Justice of the European Communities has recognised: C-428/07, R (Horvath) v Secretary of State for Environment, Food and Rural Affairs [2009] ECR I-6355, [55]-[57]. In my view there can be no objection to the Secretary of State adopting the view that many of the English licensees in the membership of Scottish and other producer organisations did not fish in areas of interest to English under 10metre vessels. That again was pragmatic policy-making in operation.
127. As explained earlier, the methodology the Secretary of State used took into account the take up of stocks by different national vessels to ensure that only stocks of interest to the English under 10 metre fleet were reallocated. The fact that the decision may have had the incidental effect that certain non-English under 10 metre vessels might also benefit from the reallocation, as with North sea nethrops and plaice in area 7A does not mean that the Secretary of State acted in any discriminatory way. In any event, under the Concordat, there are now separately held pools for under 10 metre

vessels for each of the four fisheries administrations and matters can be more carefully calibrated for the future.

128. If contrary to my conclusion there was discrimination, the decision was in my view objectively justified for the reasons considered earlier in the judgment. It sought to maximise the utilisation of available quota and to address the shortage of quota in the under 10 metre fleet in so far as related to English licensed vessels. There was no materially less favourable treatment as regards the over 10 metre fleet. Non-sector vessels and the under 10 metre vessels did not have their quota reduced because no relevant unused quota was identified by the methodology. The only practicable means for effecting the reallocation from sector vessels was at the producer organisation level. As already mentioned devolution meant that it would not have been appropriate for the Secretary of State to include non-English producer organisations within the scope of the decision simply on the basis that certain of their members were English licensed vessels. Any anomalies in this respect are now addressed by the Concordat.
129. The Secretary of State used a methodology to ensure, as far as practicable, that quota was taken only from English licensed vessels in the sector fleet and reallocated for the benefit of English licensed vessels in the under 10 metre fleet. In my view a crucial feature is that the English producer organisations failed to assist with data to identify quota that had been consistently unused by English licensed vessels who were members. The number of fixed quota allocation units to be transferred was reduced through the appeal process when producer organisations provided evidence that some of their vessels were licensed by other fisheries administrations. The methodology also sought to identify quota to be reallocated so that to the full extent possible it would be caught predominantly by English-licensed vessels in the under 10 metre fleet. The figures given earlier in the judgment demonstrate that this goal was largely met.

## IX CONCLUSION

130. For the reasons given the claimant's challenge must fail.