OUTER HOUSE, COURT OF SESSION

[2023] CSOH 16

P697/22

OPINION OF LORD SANDISON

In the petition of

SUNBEAM FISHING LIMITED

Petitioner

for

Judicial review of a decision taken by the Secretary of State for Environment, Food and Rural Affairs

Petitioner: J Brown; DAC Beachcroft Scotland LLP (for Levy & McRae, Glasgow)
Respondent: Webster KC, Crabb; Office of the Advocate General for Scotland

28 February 2023

Introduction

[1] Sandeels are small eel-like fish which feed primarily on plankton and bury themselves in sandy substrates on the seabed to protect themselves from predators. They are highly nutritious and thus a preferred prey for many other species of fish, aquatic animals and seabirds. They are fished commercially and profitably for animal feed and fertilizer.

[2] The petitioner owns and operates a fishing vessel, the MFV Sunbeam, which has fished for sandeel for many years. In July 2022 the Secretary of State for Environment, Food

and Rural Affairs determined, by a means and in furtherance of powers to be later described, that UK-registered fishing vessels would not be permitted to catch any sandeel for commercial purposes in 2022.

[3] In this petition for judicial review, the petitioner, in short, seeks declarator that the Secretary of State's 2022 determination was unlawful, both in substance and as to its timing. It also seeks declaratory orders designed to ensure that the same claimed illegalities do not attend any determination to be made by the Secretary of State about the UK fleet's ability to catch sandeel in 2023. Other than in relation to the timing issue, it seeks those remedies in the context of a claim that the Secretary of State's determination was unlawful as contrary to Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms ("A1P1"), which is in the following terms:

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

Background

[4] In order to understand the matters which require to be decided in the petition, it is necessary to deal relatively extensively with background matters. The petitioner's position is straightforward: it claims that it and its predecessor bodies as owners and operators of the MFV Sunbeam participated in the sandeel fishery between 1987 and its effective closure in 2021 and have held fixed quota allocation units (FQAs) enabling them to do so since 1999. The petitioner used its own quota units in that connection and rented further quota annually from other unit holders. The vessel was equipped as and when necessary with the specialist

gear acquired by the petitioner as a necessary investment to enable sandeel fishing, which is conducted in shallow water at the edge of the Dogger Bank and similar locations in the North Sea. The petitioner claims that its vessel landed all of the UK sandeel catch in recent years, and that sandeel represented about 2.7% of the total catch in the North Sea. Norwegian, Danish, Swedish and German vessels also fish extensively for sandeel in the same areas as the petitioner did. The petitioner maintains that the only present limit on its ability to catch sandeel is the lack of quota allocated for the use of the UK fishing fleet. It maintains that sandeel stocks are stable and capable of exploitation within guidelines issued by the intergovernmental marine science organisation dealing with the sustainable use of seas and oceans, the International Council for the Exploration of the Sea (ICES), and that fishing for sandeel would be profitable for it and represent a prudent diversification from its principal operations in fishing for mackerel and herring, involving only marginal additional costs. Another option, though not its' preferred one, would have been to sell rather than exploit its own sandeel quota units, which are now said to be worthless.

[5] From the point of view of the Secretary of State, the relevant background is much more complex and nuanced, and involves the following:

Regulatory background

[6] As a coastal state, the UK is subject to the requirements of the United Nations Convention on the Law of the Sea, which obliges such states to manage the living resources in their exclusive economic zone in a sustainable manner and to cooperate with other coastal states on fish stocks that occur jointly in their respective zones (see in particular Articles 63 and 64 of the Convention). The UK co-operates with other coastal states to manage fish stocks through annual consultations underpinned by international agreements. Of

particular relevance to sandeel fishing in this connection is the UK-EU Trade and Cooperation Agreement (UK-EU TCA), specifically Articles 493 - 505 and Annex 35.

[7] Each year the UK consults or negotiates with other coastal states in respect of a Total Allowable Catch (TAC) to be shared amongst them for each stock of commercial interest, which discussions generally turn on scientific advice received from the ICES. These consultations are conducted by the UK Government with input from the devolved administrations. Each agreed TAC is recorded in a written record of fisheries consultations. The TAC is distributed amongst the interested states by an agreed mechanism. In the case of a TAC agreed between the UK and the EU, Annex 35 to the UK-EU TCA sets out the respective UK and EU shares of the stocks which straddle UK and EU waters (including the sandeel stock). The UK share of the sandeel TAC was 2.74% in 2021 and will rise to 3.20% in 2025. After consulting with the devolved administrations, the UK Government determines in terms of s 23 of the Fisheries Act 2020 whether, and if so to what extent, any of the UK share of the TAC for any fish stock is to be made available for apportionment in the exercise of prerogative powers to the various domestic fisheries authorities and possible onward allocation to industry. The determination is published and laid before Parliament. It sets out catch quotas for most stocks, which limit the quantity of fish that can be taken from that stock by UK vessels each year. The determination only deals with the UK share of the quota. It does not provide quota for other states or set quota for foreign vessels. It may also include conditions for some stocks, governing how the quota can be used.

[8] Once the Secretary of State's determination has been made, the UK quota can then be apportioned and allocated within the UK. "Apportionment" in this context refers to the sharing of quotas by the Secretary of State amongst England (including the Crown Dependencies), Northern Ireland, Scotland and Wales. "Allocation" (also known as

distribution) is a devolved responsibility in terms of s 25 of the 2020 Act and refers to the subsequent sharing of quotas amongst operators in the fishing industry. The Secretary of State is responsible for setting policy for the English share of the quota, which is then executed by the Marine Management Organisation. Scottish Ministers are responsible for setting policy for the Scottish share of the quota. UK Quota Management Rules set out how apportionment will take place. Each part of the UK publishes its own quota management rules which set out how allocation will take place.

[9] The primary means of apportioning and allocating quota has since the late 1990s been by means of fixed quota allocation units. They provide a share of the quota in a particular stock to the FQA unit holder. Subject to one immaterial exception, FQA units can be traded for value in money or money's worth by the fishing industry within the UK. The petitioner holds FQA units for sandeel. Once quota has been apportioned and allocated, it can also be traded within the UK, separately from the trade in FQA units. The petitioner has in previous years also by this means acquired quota from other operators. The Secretary of State is well aware of the trade in FQA units and in quota and, at least as a matter of generality, does not attempt to hinder or prevent that trade. In the last year in which UK vessels were permitted to fish for sandeel (2020), the petitioner landed the entire UK catch (which amounted to 83% of the available quota).

2021

[10] In 2021, delays in the finalisation of the terms of the UK-EU TCA and the consequential fisheries consultation between the UK and the EU meant that there was a need for provisional determinations to be made by the Secretary of State. During the consultation, the UK Government advocated for a zero or very low TAC for sandeel. On

14 April 2021, a determination provisionally set the UK quota for sandeel at 2,127 tonnes. Whilst that reflected a compromise between different positions, and was larger than the UK had advocated for, the UK Government's concerns did not alter, and it decided that the UK quota would not be apportioned or allocated for use. On 22 April, a revised version of the UK Quota Management Rules was published which *inter alia* set out that position. That decision was taken because the Secretary of State (in common with the Scottish Ministers) entertained certain concerns - dealt with in detail below - about the effect that the sandeel fishery might be having on biodiversity and food webs. On 23 April 2021, the Marine Management Organisation emailed provisional quota allocations to the fishing industry, repeating that no sandeel quota would be made available for 2021. On 11 June the UK and the EU published the written record of their annual consultations which recorded the UK quota for sandeel as 2,534 tonnes. On 19 July the Secretary of State published an updated determination to reflect that written record. This included setting the UK quota for sandeel to be 2,534 tonnes. As previously intimated, the UK quota for sandeel was not then apportioned or allocated for use in 2021. That position, and a brief explanation for the reasons behind it, was set out in letters from the responsible Parliamentary Under Secretary of State to the MP for the petitioner's local Banff and Buchan constituency in July 2021 and subsequently directly to a director of the petitioner in October 2021. The petitioner raised judicial review proceedings in this court in respect of its non-receipt of sandeel quota for 2021, but as a result of a failure to understand the intricacies of the regulatory system, raised those proceedings against the Scottish Ministers, who were able to point out in response that they had received no such quota to allocate from the Secretary of State. The proceedings were abandoned and the matter was not further pressed in respect of 2021.

2022

[11] As to 2022, on 29 December 2021 the Secretary of State made a determination for the 2022 fishing year, which set a UK quota of zero for sandeel, subject to review. On 11 March 2022, the UK and EU agreed to establish the TAC for sandeel in 2022 at 88,844 tonnes, with the UK quota being 2,541 tonnes. On 24 March the Scottish Government advised the UK Government that there were no plans to allocate the Scottish share of the UK quota for sandeel in 2022 if it was apportioned and on 28 June the Cabinet Secretary for Rural Affairs and Islands in the Scottish Government wrote to the Secretary of State to call for there to be no apportionment of UK quota for sandeel in 2022. On 6 July the Secretary of State published an updated determination, which set the UK quota for sandeel to be 2,541 tonnes. That quota was not then apportioned or allocated for use in 2022. The UK QMR continued to note, as it had since April 2021, that the sandeel quota would not be apportioned or allocated.

2023

[12] In respect of 2023, on 23 December 2022 the Secretary of State made the first determination for the fishing year, which set a UK quota of zero for sandeel, subject to review once the annual UK/EU consultation is completed. If there is to be an apportionment of UK sandeel quota, the Secretary of State intends to effect that as soon as possible, so as to allow maximum time for the quota to be used, but there is no guarantee that any apportionment or allocation will in fact take place.

Policy and scientific background

[13] The UK Government's decisions not to apportion the UK quota for sandeel in 2021 and 2022 were based on its assessment of policy considerations and scientific research. Following the UK-EU TCA, the UK was able to act as an independent coastal state with respect to the management of its waters. The UK Government considered that there was evidence to suggest that additional restrictions on sandeel fishing would support the UK's commitment to an ecosystem-based approach to fisheries management (as set out in the Fisheries Act 2020) and help the UK achieve various biodiversity targets including Good Environmental Status (GES) in fish, seabirds and food webs.

[14] The Marine Strategy Regulations 2010/1627 are intended to assist the UK to comply with its international obligations to protect and preserve the marine environment. As long ago as 2012, the Marine Strategy Part One publication reported concern about fisheries pressure on sandeel affecting seabirds, in particular kittiwakes, citing evidence from a sandeel fishery off south-eastern Scotland, which was said to have significantly depressed the adult survival and breeding success of black-legged kittiwakes compared with years prior to the fishery opening and after it was closed in 2000. In 2015, the Marine Strategy Part Three publication continued to express concern about downward trends in breeding success of seabirds in the Greater North Sea and northern Celtic Seas. It referred to statutory controls across the devolved administrations such as a sandeel fishing closure off North-East England and East Scotland since 2000 as a direct measure for seabird conservation, and voluntary bans on sandeel fishing around Shetland. It stated that:

> "There is evidence that the sandeel fishing closure off North-East England and East Scotland has had a positive impact on the breeding success of kittiwake colonies adjacent to the closed area. The recent change to smaller scale management of sandeel stocks is a positive move".

[15] In October 2019 DEFRA published an updated Marine Strategy Part One document which required the UK to take action to achieve or maintain Good Environmental Status (GES) in its seas by 2020. GES entails clean, healthy, safe, productive, and biologically diverse oceans and seas. The document noted that GES for the whole marine food web was uncertain and that breeding seabird populations were not consistent with GES, perhaps as a result of the lower availability of small fish such as sandeel. It committed the UK Government to improving understanding of the reasons why seabird and waterbird populations around the UK coast remained at risk and to use appropriate measures to improve their status, as well as to the implementation of measures to support fishing at sustainable levels and to reduce the impact of fishing on the status of commercial and other fish populations. In addition to the obligations of the Marine Strategy, the Fisheries Act 2020 also identifies in terms of its section 1 objectives that:

> "fish and aquaculture activities are managed using an ecosystem-based approach so as to ensure that their negative impacts on marine ecosystems are minimised and, where possible, reversed".

An "ecosystem-based approach" is defined by section 1(10) of the 2020 Act as an approach which ensures that the collective pressure of human activities is kept within levels compatible with the achievement of GES.

[16] Several scientific journals have in recent years published papers examining sandeel availability and its relationship with the wider ecosystem. The scientific evidence is considered by DEFRA to support the suggestion that sandeel abundance benefits the food web and the wider ecosystem, and that the impact of fisheries on local sandeel populations may have adverse effects on predators with high site fidelity. A lack of large-scale larval dispersal combined with limited larval exchange between sandeel areas is thought to mean that local aggregations of sandeel may be vulnerable to depletion by fisheries, which can

increase the risk of adverse effects on local predators even if the total North Sea stock remains within biologically safe limits. In the Greater North Sea, the GES target has not been met for seabirds, with 35% of species experiencing frequent and widespread breeding failures between 2010-2015. In June 2021 the RSPB published a report entitled "Revive our Seas: The case for stronger regulation of sandeel fisheries in UK waters". DEFRA has been provided with a modelled assessment of the ecosystem benefits of full prohibition of sandeel fishing in the UK waters of the North Sea, which predicts that such a prohibition would lead to an increase in seabird biomass of 7% in around 10 years. That assessment has, however, not yet been put in the public domain.

[17] DEFRA has also determined that there was a likely need for additional and further action to ensure the sufficient protection of sandeel and the wider ecosystem dependent upon them. On 22 October 2021 the Fisheries Administrations (Marine Scotland, DEFRA and the Welsh Government) made a joint Call for Evidence on future management of sandeel. The Administrations indicated that they remained concerned that there was limited evidence of either the recovery of the relevant stocks or the wider ecosystem as a result of the management measures (including the non-allocation of the 2021 quota) taken to date, that that was hindering the UK's ability to reach GES for seabirds, and that urgent action was required to protect stocks and the wider ecosystem from increasing pressures. There were 36 responses to the Call for Evidence, including from the fishing industry producer organisations. DEFRA considered that there was a reasonably high level of awareness amongst stakeholders of the relevant concerns, and that further evidence on fishing, bio-diversity and food webs would ensure that the most up-to-date scientific evidence was available. A report was commissioned in 2022, and DEFRA is currently reviewing its policy on the impact of industrial fishing for sandeel on the wider marine

ecosystem in order to develop a proposal for Ministerial approval to consult on a number of further management measures.

[18] On 25 February 2022, ICES produced advice on fish stocks including sandeel stocks. That advice included recommendations that in various areas of the North Sea there should be zero catches of sandeel. On 11 March, the UK and EU delegations considered sandeel stocks and agreed to establish the TAC for sandeel in 2022 at 88,844 tonnes, with the UK being allocated 2,541 tonnes. That represented a 4% decrease on the TAC for 2021. However, the UK approach was to follow the ICES advice, and the TAC was set only for the management areas where ICES had recommended a catch above zero (aside from permitting a monitoring TAC to enable scientific research to continue).

[19] The EU/UK consultation on the 2023 sandeel TAC has yet to take place.

Petitioner's submissions

[20] In written and oral argument on behalf of the petitioner, counsel accepted that the Secretary of State ought to be accorded a wide margin of appreciation in having regard to a range of competing considerations in the process of arriving at his section 23 determinations, including environmental or conservation objectives, and in deciding what relative weight to accord to such considerations. He accepted that it had been open to the Secretary of State to find in the material before him an evidential basis for the general conclusion that prohibiting sandeel fishing would produce environmental benefit, and that in principle, therefore, it had been open to him lawfully to prohibit or substantially to restrict sandeel fishing in UK waters.

[21] However, the petitioner advanced two criticisms of what had been done. Firstly, the petitioner contended that it was essentially futile to introduce a supposed conservation

measure that prohibited only about 2% of sandeel fishing in UK waters while leaving the remaining fishery unaffected, given the absence of any evidence that this would have more than a symbolic impact. Secondly, there had been no apparent consideration of the petitioner's rights under A1P1, and no attempt to balance any benefit with the adverse impact on the petitioner of the decision. The two criticisms were linked by the issues of proportionality which arose; the less cogent or immediate the achievable policy objective, the greater the regard that should have been had to adverse consequences that might follow from pursuing it.

[22] The petitioner's FQAs were readily to be seen as "possessions" within the meaning of A1P1. It was well settled that in that context "possessions" had an autonomous meaning and was not limited to ownership of property in the strict sense. That question had been extensively discussed and correctly answered by Cranston J in *UK Association of Fish Producer Organisations* v *Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [109] - [113]. The objective economic reality was that FQAs and quota itself could be, and were, bought and sold for value as component parts of a greater business enterprise. The enterprise itself and its component parts were all the petitioner's possessions within the meaning of A1P1. In *R (States of Guernsey and another)* v *Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847 (Admin), [2016] 4 WLR 145, Jay J had, at [103] - [109], effectively endorsed the approach and reasoning of Cranston J in *UKAFPO*. Assistance might also be found in Lady Smith's decision in *Watt* v *Watt* [2009] CSOH 58, 2009 SLT 931, in which valuation for divorce purposes of shareholdings in companies that operated the vessels with quota reflected the real and measurable economic value in FQA units. The opinion of Lord Uist in *Christina S FR 224 & Ors* v *Scottish Ministers* [2013] CSOH 85 that FQA units were not possessions for A1P1 was not based on

full argument or citation of authority and should not be followed. It erroneously ran together the distinct questions of whether FQAs were "possessions" and whether what was complained of in the case amounted to an interference with those possessions. Some additional support for the petitioner's submissions could be found in Lord Ericht's opinion in *Scottish Fisherman's Organisation* v *Scottish Ministers* [2023] CSOH 2, 2023 SLT 39, and in particular the conclusion that there was a prima facie case under A1P1 so far as relating to fishing licences as "possessions".

[23] The general approach which ought to be taken to the interpretation and application of A1P1 had been authoritatively set out by Lord Reed in *Axa General Insurance Ltd* v *Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 at [107] - [108]. The proper scope of the concept of legitimate interference with possessions had been considered by the Supreme Court in a context (restriction of traditional salmon fishing in the Severn estuary) similar to the present in *R (Mott)* v *Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022. As Lord Carnwath had there observed at [32], the historic distinction in the A1P1 jurisprudence between cases involving mere controls on use and those involving *de facto* expropriation was "neither clear cut nor crucial to the analysis", and it was more helpful to consider whether the burden imposed was excessive or disproportionate when asking whether the decision maker had struck the "fair balance" that is required.

[24] The petitioner's complaint of excessive or disproportionate impact on it as a result of the Secretary of State's determination regarding the 2022 season ought to be sustained. Specifically:

(i) The sandeel fishery was a hitherto lawful trade that had been carried on by the petitioner to considerable profit over many years, in consequence of significant capital investment made by it for that specific purpose.

(ii) Vessels from the EU and other coastal nations continued to fish for sandeel in UK waters in a manner unaffected by the Secretary of State's decision; and in doing so take about 98% of the total allowable catch in UK waters.

(iii) The TAC was itself the product of extensive negotiation between the EU and other relevant states and might be assumed to have been fixed having regard to a broad consensus on environmental considerations. Although the Secretary of State was entitled to decide that the UK should go further than the EU consensus on conservation grounds, it remained relevant that there was such an EU consensus.

(iv) The decision complained of entirely prevented the petitioner from exploiting its existing rights to catch sandeel. It was thus very much at the *de facto* expropriation end of the spectrum.

(v) The petitioner appeared to be the only UK operator affected. The Secretary of State must have known that the UK sandeel quota was being fished, and that no vessel other than Sunbeam was fishing it. Despite that, there was no suggestion that the petitioner's convention rights had even been thought about. It had lost substantial recurring profit and thus the capital value of the ability to generate such recurring profit. Its capital investment in gear had been rendered worthless.

(vi) In assessing proportionality, regard ought to be had to the extremely limited conservation impact that the decision could have. Even on the DEFRA figures at which the Secretary of State hinted, the effect of his determination was nugatory. There was no proper basis for any suggestion that in and of itself the prevention of the MFV Sunbeam alone of all the vessels that pursue sandeel from doing so would have any measurable environmental impact. At this juncture the measure was properly to be seen as of symbolic rather than practical value in achieving that

conservation objective. While the petitioner did not doubt the value that symbolism might have, and in particular the view that sometimes it was appropriate for one state to take a lead on environmental matters in the hope of building support from others, for present purposes the point was simply that symbolism raised clearly different proportionality considerations than would arise in relation to a measure having direct environmental impact.

(vii) No indication had been given of any future policy proposal, presumably because the existing UK/EU transitional arrangement had some time to run and no decision had yet been taken as to what might follow it, since that in turn would be bound up with negotiations ranging far beyond fisheries policy. However, there had been no indication of an intention to prohibit sandeel fishing generally in UK waters once it became possible to do so. Had there been such an indication it might have been a relevant factor in assessing what weight should be given to the symbolic first step that had been taken.

(viii) Given that the petitioner appeared to be the only operator affected and given the relatively modest size of the catch, it would not impose a disproportionate burden for the policy objective to be met by a scheme that involved compensation for the loss of the ability to catch sandeel. The Secretary of State had obvious means at his disposal to address this issue other than payment of monetary compensation, such as by adjusting allocations in respect of other species to reflect the withdrawal of the right to pursue sandeel.

(ix) Alternatively the policy objective was not so obviously urgent (having regard to its very limited practical effect) that it would be defeated by being introduced in a phased manner with a period of notice to allow adjustment by operators.

On the timing issue, the petitioner's concern was to ensure that it was not placed again in the situation of uncertainty of having no final determination of the allocation issue until the practical opportunity of fishing for any sandeel quota that might be made available had expired as a result of the ending of the relative fishing season, as had happened in 2022. There was no good reason for the determination not to be made timeously. The Secretary of State could undertake to do so in future years and that would dispose of the issue, but if no such undertaking was offered the court should declare that that what had happened in 2022 was unlawful, as a guide to his future conduct.

Respondent's submissions

General

[25] On behalf of the Advocate General for Scotland, responding to the petition as representing the Secretary of State for Environment, Food and Rural Affairs, senior counsel submitted that the minister should be accorded a wide margin of discretionary judgment in areas of socio-economic policy, under reference to *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 at [49]. The protection of the environment was an increasingly important consideration in determining where the public interest lay – *Hamer* v *Belgium* (App. 21861/03) - and accordingly a less intrusive review by the court was required given the location of the issue within the macro-political field and the relative expertise of the decision-maker: *UKAFPO* at [92.9]. It should be noted that there was no inherent right to fish. On the contrary, section 14(1) of the Fisheries Act 2020 provided simply that "Fishing anywhere by a British fishing boat is prohibited unless authorised by a licence". No clear, unambiguous or unqualified undertaking or representation had been given as to sandeel apportionment (cf *UKAFPO* at [99]), and a commercial business operating under licence

could not assume that law and policy would never change to its disadvantage - *Axa* at [38] to [40]. The declarators sought as to future determinations were inspecific and premature.

"Possessions"

[26] The FQA units held by the petitioner allowed it to access a share of any allocated catch quota, but there was no right inherent in those FQA units to have any catch quota allocated, only to a percentage of any quota as might in fact be allocated. That meant that FQA units were not possessions for the purposes of A1P1, because they did not constitute an asset with a right to any quota - *Christina S FR* (*supra*) at [32] and [34]. The petitioner had no settled entitlement to any catch quota - cf *Kopecky* v *Slovakia* (2005) 41 EHRR 43 at [45] to [52]. A1P1 did not create a right to acquire property - *Denisov* v *Ukraine* (App. 76639/11), at [137]. Cranston J had reached the wrong conclusion on this point in *UKAFPO*, as had Jay J in *States of Guernsey.* Reference was also made to observations to similar effect in *Őneryildiz* v *Turkey* (App. 48939/99) at [124], to *Greek Federation of Customs Officers and others* (App. 24581/94) at [1], and to *O'Sullivan McCarthy Mussel Development Ltd* v *Ireland* (App. 44460/16) at [85] to [91].

Deprivation or interference

[27] Further, if FQAs were possessions, the actions of the Secretary of State had not deprived the petitioner of its FQA units or any benefits they might afford. They remained of such value to the petitioner as they ever had. It could continue to sell or buy them as it saw fit. It was inherent in the character of FQAs that in any year the quota in which they afforded a share might be substantially reduced, even to zero - *UKAFPO* at [116]. That did not amount to a deprivation of possessions in terms of A1P1. At its highest, it might amount

to a form of control of the use of the FQAs; cf *O'Sullivan McCarthy* at [104]. That was a lawful consequence of the Secretary of State's assessment of where the public interest lay on the basis of the ecological concerns which had been expressed and while awaiting the results of the call for evidence which had been put out. The determination had been made for one year only, not on a permanent and ongoing basis. Reference was again made to *Axa* at [107] - [108]. The petitioner had no legitimate expectation of any apportionment of quota in 2022. None had occurred in 2021, and the petitioner's legal challenge to that situation, directed against the Scottish Ministers instead of the Secretary of State, had been abandoned. What had happened in relation to the quota had been foreseeable having regard to the legislative and policy framework, including the TCA - *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [45] and [48].

Proportionality

[28] In any event, the Secretary of State's determination not to apportion quota for 2022 struck a fair balance between the public interest and the private interest to have peaceful enjoyment of property rights. A1P1 rights could not in any way impair the right of a state to enforce such laws as it deemed necessary to control the use of property in accordance with the general interest - *Re Brewster* at [44]. Respect should be given to the UK Government's position in taking a moral and diplomatic stance in the international sphere - *R (Friends of Antique Cultural Treasures Ltd)* v *Secretary of State for Environment, Food and Rural Affairs* [2020] EWCA Civ 649, [2020] 1 WLR 3876 at [76] - [77] and [113].

[29] The petitioner had not been treated differently or disproportionately when compared with others whose position the Secretary of State's determination had the power to affect, which did not include foreign vessels. So far as the Secretary of State was concerned, there

were 16 entities holding FQA in the UK sandeel quota, all of whom had been affected in exactly the same way by his determination. The petitioner held about one-third of that FQA, but there was a Northern Irish operator which held a slightly larger share. It was accepted that the petitioner had landed all sandeel caught by use of the UK FQA in 2020, the last year in which fishing was permitted, and that that implied that the petitioner had traded in the market to acquire FQA or at least quota in that year. It was further accepted that there was no material that could be laid before the court suggesting that the Secretary of State had considered the possible effect of his determination on the petitioner's convention rights. On the other hand, while it was clear that the successful claimant in *Mott* had had his entire livelihood taken from him by the decision complained of in that case, the petitioner's sandeel fishing operations in 2020 appeared to have contributed only about 16% of the overall value of its landed catch, most of which came from its other operations in mackerel and herring fishing.

[30] The Secretary of State considered the determination a significant and worthwhile conservation measure. Furthermore, the petitioner, as a commercial enterprise, had had direct and indirect communications with the UK Government and should have been expected to have been aware of the concerns about sandeel fishing - cf *Fredin* v *Sweden* (1991) 13 EHRR 784 at [53] to [55]; *O'Sullivan McCarthy* at [104], [115] - [117]. Lack of compensation was merely a factor to be taken into account in determining whether a fair balance had been met, and did not of itself constitute a violation of A1P1 – *Depalle* v *France* (2012) 54 EHRR 17 at [91] and [92].

[31] As to the timing complaint, whilst the 2022 determination had post-dated the sandeel fishing season in 2022, there had been no basis for a legitimate expectation of a determination by any particular date and a declarator of unlawfulness in that regard would

be pointless. Further, since the substantive determination had been lawful, its timing was academic and declarator as to that matter should be refused – *Wightman* v *Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111 per the Lord President at [27].

Decision

"Possessions"

[32] The first question for decision is whether the Secretary of State's determination affected anything properly to be regarded as a possession of the petitioner within the meaning of A1P1. There is no dispute that the concept of "possession" in this context has an autonomous meaning which is not limited to ownership of material goods and is independent from any formal classifications of domestic law. In *UKAFPO*, Cranston J carried out a careful analysis of the principles applicable in the resolution of the question as it arises in the present case. Under reference *inter alia* to *Tre Traktörer AB* v *Sweden* (1989) 13 EHRR 309 in the ECtHR and to *R (Nicholds)* v *Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067, *R (Malik)* v *Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092 and *R (Countryside Alliance)* v *Attorney General* [2007] UKHL 52, [2008] 1 AC 719 he concluded that a variety of economic interests connected with the running of a business were capable of being regarded as "possessions". In the case of such an interest having a monetary value which could be marketed for value by way of sale, lease or license (as opposed to interests 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) qualification as a "possession" would be clear. Because the quota units in that case, like those in this, were the objects of

open and lawful trade by way of sale and lease, used as security for borrowing and regarded as capital assets for taxation purposes, they qualified on that basis as "possessions".

[33] In the *Christina S FR 224* case, Lord Uist was dealing with a slightly different situation but appeared attracted by the argument that, because quota units did not give their holder any actual right to quota in any certain amount, or indeed in any amount at all, they would not be "possessions" for the purposes of A1P1. The answer to that appears from the *States of Guernsey* case, in which Jay J noted that it was necessary not to confuse the question of whether something was a possession with the separate question of whether what was being complained of was an interference with it. The same case deals equally succinctly with a related point arising out of the respondent's repeated insistence that the petitioner had no "legitimate expectation" that quota would in fact be apportioned and allocated in respect of its FQA - if something qualifies as an existing possession (which is the contention of the petitioners here in relation to its FQA), then the question of the presence or absence of any legitimate expectation as to what the future may hold for that possession does not arise. Such considerations apply only to things which are contended to be contingent or future possessions, although again they may weigh, perhaps heavily, in deciding whether there has been any relevant interference with an existing possession, if so what the precise nature of that interference is, and in balancing issues of proportionality of the interference. In summary, the fact that FQAs carry with them no entitlement to quota and thus to the income which may flow from the exploitation of quota does not deprive them of their status as objects of trade, though it may affect their value as such. I have no hesitation in regarding that status as a sufficient condition to qualify FQAs as "possessions" for the purposes of A1P1 for the reasons identified by Cranston J's analysis in *UKAFPO*.

[34] The cases cited by the respondent do not detract from that analysis. *Kopecky* and *Őneryildiz* on the one hand, and *Denisov* and *Greek Federation of Customs Officers* on the other, were considering how the limits on how far things that were not "existing possessions" (respectively, claims to restitution of confiscated property or for compensation for destroyed property, and an expectation of earning money from an office of profit) might nonetheless qualify as proper objects for the application of A1P1. They have nothing in particular to contribute to resolution of the issues in this case.

[35] Further, it is not possible to proceed on the narrow basis that the status of FQAs as "possessions" or not provides in itself the answer to the true first question which arises in this case, namely whether the Secretary of State's determination affected any possession of the petitioner falling within the ambit of A1P1. The answer to that question appears clearly from *O'Sullivan McCarthy*, a case concerning a temporary prohibition on mussel seed fishing - an activity which the applicant conducted under government license - in which the ECtHR formulated the overarching question as being whether the circumstances of the case, considered as a whole, conferred on the applicant title to a "substantive interest" protected by A1P1. It cited the survey of the court's relative jurisprudence carried out in *Malik* v *the United Kingdom* (App. 23780/08), observing that the court had previously indicated in cases concerning the grants of licences or permits to carry out a business that the revocation or withdrawal of that permit or licence could interfere with applicants' rights to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business, without having felt it necessary to determine whether the licence or permit was itself a possession, preferring instead an analysis which saw restrictions placed on licences, etc., as merely the means whereby interference with a possession constituted by the underlying business had been effected. It then continued:

"88. In line with the above, the Court considers that the present case concerns a 'possession', namely the underlying aquaculture business of the applicant company. It is true, as the Government pointed out, that all of the various licences and authorisations held by the applicant company retained their validity in 2008. In this respect, the case differs from cases previously decided by the Court, which involved the cancellation or revocation of a licence or permit, putting an end to a commercial activity … The Court observes, however, that it has also found that Article 1 of Protocol No. 1 applied even where the licence in question was not actually withdrawn, but was considered to have been deprived of its substance (*Centro Europa 7 S.r.l. and Di Stefano v Italy* [GC], no. 38433/09, §§ 177-178, ECHR 2012).

89. Mindful of the need to look behind appearances and investigate the realities of the situation complained of in the present case, the Court considers that the temporary prohibition on mussel seed fishing that applied during the periods in question in 2008 is properly to be regarded as a restriction placed on a permit – the mussel seed authorisation issued to it for 2008 – connected to the usual conduct of its business.

90. For the Court, the facts of the case thus disclose an interference by the domestic authorities with the applicant company's right to the peaceful enjoyment of its possessions, including the economic interests connected with the underlying business. However, the fact that the impugned interference consisted of a temporary prohibition of part of the applicant company's activities under licence or permit, that the authorisation was not withdrawn or revoked, and that in any event the authorisation by virtue of which the applicant company conducted its business was subject to conditions, will all form part of the Court's analysis of the nature and extent of that interference …".

The same approach falls to be adopted in the present case. Whether or not FQAs are "possessions" in their own right, they provide the means whereby a business - that of the petitioner fishing for sandeel - might lawfully be carried out. If rights which might otherwise have flowed from the FQAs in any given year are withheld by the Secretary of State, that is capable of representing an interference with the petitioner's right to the peaceful enjoyment of its possessions, including the MFV Sunbeam itself, its specialist sandeel fishing gear, and indeed the various economic interests connected with the underlying business. The facts that the putative interference is at least ostensibly temporary in nature, that the FQAs continue to be held by the petitioner, and that it is in the nature of FQAs that they do not carry any right to a particular (or any) apportionment or allocation of

quota will all form part of the analysis of the nature and extent of that interference and all that flows therefrom, but are not capable of displacing the conclusion that, whatever the position in relation to the FQAs themselves, the economic interests connected with the underlying business are themselves relevant "possessions" for the purposes of A1P1.

Interference

[36] Having determined that the petitioner has possessions relevant to A1P1, the next step is to consider whether there has been an interference with those possessions or any of them and, if so, the nature of the interference, in particular whether it constitutes a deprivation of the possession in question, is a control of its use, or is a more generalised interference with its peaceful enjoyment, bearing in mind that the importance of classification should not be exaggerated (*Axa* at [108], *Mott* at [32]). In the case of the MFV Sunbeam itself and the specialised sandeel fishing gear with which the petitioner has equipped itself, it is easy to see the interference effected by means of the determination not to apportion otherwise-available sandeel stocks as a control on their use. But for that determination the Sunbeam would (subject to whatever might have happened in relation to allocation by the Scottish Ministers) have put to sea for periods during 2022 to catch sandeel with its gear adapted for that purpose. The Secretary of State's determination has precluded the petitioner using the vessel and the gear to that end, and has thus controlled the use to which they might otherwise have been put for the purposes of enhancing the economic interests connected with the underlying business. The proper classification of any interference with the petitioner's FQAs themselves by way of the determination of the Secretary of State is perhaps less obvious, given that it is of the nature of FQAs that whatever effective rights they bring is inherently subject *inter alia* to that determination. If it

is necessary to decide whether the determination constituted relevant interference with the FQAs, and if so what the nature of that interference was (and I do not consider that it is, because the petitioner is in practical terms concerned only with interference with its business and other assets), then I would hold that it was such interference, again by way of the imposition of a control of the use to which FQAs might otherwise have been put, namely to share in the UK/EU agreed TAC for 2022.

Violation of A1P1?

[37] The final stage of determining whether the interference with the petitioner's possessions discussed and identified above constituted a violation of its A1P1 rights consists in deciding, as described in *Axa* at [108], whether it has been:

> "shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focuses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights … In that regard, the Strasbourg court accepts that a margin of appreciation must be left to the national authorities."

There must be:

> "a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden …" (*O'Sullivan McCarthy* at [115]).

[38] As there is no suggestion in the present case that the Secretary of State's determination separately contravenes any requirement of lawfulness, the question of whether it strikes a fair balance between the public interest on the one hand and the petitioner's fundamental rights on the other is what requires to be considered. The first

stage in that exercise is to consider whether, and if so, to what extent, the prevention of UK vessels from fishing for sandeel serves the environmental objectives which are said to justify it. In this regard the petitioner accepts, consistently with the importance of environmental protection to society as a whole and the wide margin of discretionary judgment afforded to ministers in that context, that in principle it was open to the Secretary of State to take the view on the basis of the scientific and other material before him that prohibiting sandeel fishing by UK vessels would produce environmental benefit. Rather, the difficulty lies in assessing the proportionality of the contemplated benefit with the corresponding detriment to the petitioner's possessory interests. Counsel for the Secretary of State was unable to suggest that any consideration at all had been given to that question in the process leading to the making of the determination. It follows that there is no relative assessment to which the court must afford an appropriate degree of deference; rather, it has to approach the issues by itself without such assistance as might have been gained from a consideration of what the Secretary of State actually thought of them at the time.

[39] In this connection the petitioner founds strongly on the consideration that the Secretary of State's determination, which affects only 2.8% of the UK/EU TAC, has not been shown to have more than symbolic value for environmental purposes. It is correct that no clear explanation is before the court which sets out with any degree of particularity what the benefits flowing from the determination are thought to be. As already noted, an affidavit provided to the court by a civil servant with much experience in this policy area states that DEFRA has been provided with a modelled assessment of the ecosystem benefits of full prohibition of sandeel fishing in the UK waters of the North Sea, which predicts that such a prohibition would lead to an increase in seabird biomass of 7% in around 10 years. However, since the determination does not effect a full prohibition of such fishing, not even

for 1 year, let alone 10, and the Secretary of State did not see fit - for no reason made clear to me - to put the modelled assessment before the Court for direct examination and consideration, I do not find it possible to draw any definite conclusion from that evidence. I am equally unimpressed by the suggestion that the determination ought to be regarded as having inherent value as a moral and diplomatic stance, as in the *Friends of Antique Cultural Treasures Ltd* case. There, evidence was placed before the court, and accepted by it, that in the context of the international ban on the trade of ivory, the underlying policy objective could:

> “be achieved only by the creation of an international hegemony and mutual international support which has the effect of minimising the opportunities for demand suppressed in one state to spring back up elsewhere”

and that the trading ban was:

> “integral to the efforts of the UK in persuading other states to act likewise. If the UK had not imposed stringent import, export and domestic bans it would lose moral or political credibility at the international plane and it would lose the ability to form an active and influential part of that international hegemony” [76] - [77].

There is no evidence in this case that that the removal of 2,541 tonnes of sandeel from the market in consequence of the determination is liable to result in the supply of that or any other amount from source that would not otherwise have been exploited, nor that the UK would lose any moral or political credibility or influence with the EU by choosing to fish the quota which lengthy and detailed negotiations had afforded it. On the other hand, neither do I find it possible to conclude, as the petitioner suggests, that the determination complained of should be regarded as having only symbolic value. In consequence of it being made, up to 2,541 tonnes of sandeel - amounting to many thousands of fish - will remain in the sea which might otherwise have been caught, making a contribution of some kind to the future population and to the food chain which cannot be assumed to have no

practical value at all. I conclude that the Secretary of State's determination has some, albeit limited, environmental benefit.

[40] Turning to consider the effect of the determination on the petitioner, it is appropriate to set the discussion against the general background, set out above, that there is no general right to fish, that regulatory mechanisms exist which can and do routinely restrict the catch that can lawfully be taken from various stocks in any year, and that the petitioner had been given no express or implicit assurance that the previous policy on sandeel fishing would continue. This is not a case where a hitherto entirely lawful and unregulated activity was suddenly and unexpectedly proscribed. The existence of a regulatory background capable of preventing the carrying on of an activity was considered relevant to the striking of the appropriate balance in *O'Sullivan McCarthy* at [104] and [116]. That said, the petitioner was still entitled to proceed on the basis that the regulatory powers in question would only be exercised in compliance with its convention rights; I do not, therefore, consider that the mere existence of a regulatory background can in itself be decisive in the relevant balance.

[41] Of more moment may be the further observations in *O'Sullivan McCarthy* at [117] to the effect that a commercial operator in a particular field of endeavour "can be expected to display a high degree of caution in the pursuit of its activities, and to take special care in assessing the risks that may attach to those activities" and that there may be circumstances in which a person complaining of a breach of its A1P1 rights "should have been aware of a possible risk of interruption of, or at least some consequences for, its usual commercial activities", a factor which the court concluded could not be disregarded when assessing the burden of an interference on that person. As set out in detail above, the effect of sandeel fishing on seabird numbers, and thus on the wider maritime ecology, had been a matter of escalating and public concern for at least a decade by 2022. Further, the 2021 determination

that there would be no British sandeel quota released for use that year, and the explanation for that determination provided specifically to the petitioner by the Under Secretary of State, ought to have given rise to an apprehension if not an expectation on its part that the position would remain the same in 2022. While I do not accept that the botched attempt by the petitioner to challenge the 2021 determination in this court at all prevents it from mounting this challenge to the 2022 determination, the fact that the latter determination cannot be said to have been remotely unpredictable necessitates a close examination of the extent to which any burden on the petitioner is truly the result of the determination as opposed to the result of a failure on the part of the petitioner to read the plain writing on the wall and to take appropriate and available steps to mitigate the effect of a likely regulatory intervention in connection with the sandeel fishery on its business.

[42] The petitioner is clearly and understandably concerned that in practical terms the MFV Sunbeam is the only vessel affected by the determination complained of, and claims that the determination's effect on it is accordingly individually disproportionate. However, on closer examination it is apparent that the determination affects only the petitioner because it has put itself, in recent years, into the position of operating the only UK vessel fishing for sandeel. It has done that by buying in the market access to the UK quota in sandeel to which it does not already have access in consequence of its relative FQAs. Although there is no reason to suppose that that practice would not have continued had commercial sandeel fishing been permitted in 2022, the reality is that the petitioner itself holds only about one-third of the FQAs in issue and any further exposure to the consequences of the determination is voluntary for it. The determination can affect only UK-registered vessels and that is accordingly the comparator group upon which a consideration of disproportionate effect must proceed. The determination applies equally to

every vessel in that fleet and in practice affects the operators of such vessels as hold sandeel FQA, of which there are more than a dozen. On analysis, then, the apparently disproportionate effect on the petitioner as the operator of the only vessel in practice affected by the determination transpires to be the consequence of its choice (which it was and is not obliged to continue to make) to immerse itself in sandeel fishing to a far greater extent than its "possessions" (and in particular its FQAs) necessitate.

[43] Turning to the issue of whether the determination has an excessive impact on the petitioner, it appears to be the case that it has made capital investment to put itself into the position of being able to fish for sandeel, particularly in acquiring and maintaining the appropriate gear for its vessel. However, it was not made clear quite what that investment amounted to, when it was made, or the extent to which it may have been depreciated over time. That makes it difficult to place much weight on that feature of the case. Likewise, although the determination amounts to a total prevention of sandeel fishing, that is in consequence of a control on its use of the petitioner's possessions rather than of an expropriation of them and, further, sandeel fishing is very far from being the sum and substance of the petitioner's undertaking, contributing only a relatively modest amount to its catch, which largely consists of mackerel and herring unaffected by the determination complained of.

[44] So far as the question of compensation (or at least mitigation of the consequences of the determination) is concerned, while there have been cases of apparent similarity to the present where the provision of compensation has been regarded as significant to the conclusion that there had been no breach of A1P1 rights - in particular, *Posti and Rahko* v *Finland* (2002) 37 EHRR 6 - it is clear that A1P1 gives no general expectation of compensation for adverse effects and that its provision, as with the provision of alternative mitigatory

measures such as phased introduction of a ban or the allocation of quota in an alternative catch, will ordinarily fall within the wide margin of discretion in the imposition of necessary environmental controls enjoyed by national authorities - see, eg, *Mott* at [37]. In other words, if the Secretary of State considers, on the basis of a body of evidence which had grown and consolidated over a period of time, that a particular activity is harming the environment, or is probably doing so, it may prove very difficult to fault a conclusion on his part that it should be prevented completely at once and without mitigations, even if a different and equally reasonable conclusion might have been reached. Counsel for the Secretary of State again suggested in the context of compensation that other coastal states might be discouraged from banning commercial sandeel fishing if they felt that such a move would, for legal or practical reasons, require to be attended by compensatory measures, but in the absence of any evidence at all in support of that suggestion, I place no weight on it. Likewise, the suggestion that any loss suffered by the petitioner as a result of the removal of its ability to fish for sandeel might in due course be made up for by increased quota in other stocks being made available as a consequence of the UK's increasing post-Brexit access to such stocks appears to me to be far too speculative to receive any weight.

[45] Gathering these various considerations in the final balance, I conclude that the Secretary of State's 2022 determination which is complained of may properly be regarded as a modest but meaningful contribution to valuable maritime conservation and ecological goals. Even having full regard to its modest nature, its effect on the petitioner is not disproportionate or excessive for the reasons already stated. Lack of compensation for, or equivalent mitigations of, the closure of the fishery is in those circumstances an outcome which is within the wide margin of appreciation afforded in this area to national authorities.

[46] It follows that the Secretary of State's 2022 determination is not struck at by A1P1 considerations, and that the declarator to that effect sought by the petitioner must be refused. Likewise, there is no basis for supposing that the 2023 determination may be attended by any unlawful character arising out of A1P1 and thus no reason for the court to seek to control its terms on that account. Had matters been otherwise, I would not have permitted the various technical and procedural objections advanced on behalf of the Secretary of State to stand in the way of effective regulation of the 2023 determination.

Timing

[47] It will finally be recalled that a separate criticism made of the Secretary of State was that his 2022 determination was issued on 6 July 2022, by which time the period during which sandeel could as a matter of practicality be caught for commercial purposes in 2022 had either expired or at any rate was virtually at an end. The Secretary of State's response to that complaint, shorn of its circumlocutions, was essentially that it did not matter when the determination was issued, so long as it was in its substance a lawful determination. That position cannot be accepted. It has been recognised at least since the decision of the House of Lords in *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 2 WLR 924 that statutory powers fall to be exercised in a way which promotes the policy and objects of the legislation which confers them. The power conferred on the Secretary of State by section 23 of the Fisheries Act 2020 to "determine … the maximum quantity of sea fish that may be caught by British fishing boats" during a particular period cannot sensibly be read as contemplating in any ordinary circumstances a delay in the issue of such a determination to a point in time when that which it designed to facilitate and regulate, namely the commercial exploitation of a stock of fish, is no longer practically possible.

[48] While the Secretary of State's response to the criticism raised is accordingly entirely misplaced, there is nonetheless a good answer to that criticism, which is that a provisional determination under section 23 in respect of sandeel quota for 2022 was in fact was made much earlier than July 2022, in that an initial determination (of zero) was made as early as 29 December 2021. While that was said to be subject to review (which is lawful in terms of section 6(a)(ii) of the 2020 Act), and while the petitioner may have hoped meantime that it would be reviewed upwards, it served as the operative determination until its final confirmation in July 2022, nearly four months after the UK/EU consultations in relation to sandeel quota for 2022 finished in agreement on 11 March. The complaint about the timing of the final determination in 2022 accordingly fails on the facts, rather than in consequence of the Secretary of State's response in point of law to it. The relative declarator sought by the petitioner falls to be refused.

Conclusion

[49] For the reasons stated, I shall sustain the respondent's fifth plea in law, repel the petitioner's pleas, and refuse the prayer of the petition. While it is not possible to afford the petitioner any of the substantive remedies it seeks, various features of what happened in the course of the determination process make it easy to understand why it felt constrained to raise these proceedings. Questions also arise about some aspects of the Secretary of State's response to the issues raised in the petition. It may be that these matters will fall to be reflected appropriately in the disposal of any motion that may be made in respect of the expenses of the process.