



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 11

P552/19

OPINION OF LORD PENTLAND

in Petition of

THE SALMON NET FISHING ASSOCIATION OF SCOTLAND AND OTHERS

Petitioners

for

Judicial Review of a decision of the Scottish Ministers and Marine Scotland

Petitioners: MacColl QC, A McKinlay; Urquharts

Respondent: Crawford QC, E Campbell; Scottish Government Legal Directorate

24 January 2020

Introduction

[1] This petition for judicial review came before me for a substantive hearing. The first petitioners are the Salmon Net Fishing Association of Scotland (“the Association”). The Association was formed in 1906 to represent the interests of persons holding title, as heritable proprietors or as tenants under heritable leases, to fish for and take salmon by net. Such titles are found in coastal areas around Scotland; some of the titles have existed for hundreds of years. Three office-bearers of the Association, Mr James William MacKay, Mr Peter Hutchison, and Mr George Keith Allan, represent the Association for the purposes of the present proceedings. Mr MacKay and Mr Hutchison have direct or indirect interests in heritable titles permitting net fishing for salmon in coastal waters. The second petitioner

is Mr William Anderson Paterson; his firm, William Paterson & Son, is the owner and lessee of six such heritable titles. The respondent to the petition is the Lord Advocate, representing the Scottish Ministers (“the Ministers”).

[2] The sole substantive remedy sought in the petition is a declarator that the continued prohibition on retaining salmon caught in coastal waters in regulation 3 of the Conservation of Salmon (Scotland) Regulations 2016 (“the 2016 Regulations”), as amended by the Conservation of Salmon (Scotland) Amendment Regulations 2019 (“the 2019 Regulations”), taken together with the compensation scheme set out in the Ministers’ letter to the Association dated 12 April 2019 (“the 2019 compensation scheme”), is outwith the Ministers’ legislative competence, *ultra vires*, and of no effect.

[3] At the outset, it is important to note that the prohibition and the 2019 compensation scheme are challenged in the petition on the express ground that they are outside legislative competence. Notwithstanding that, Mr MacColl QC, who appeared for the petitioners, made clear in his oral submissions that the prohibition itself was not challenged in principle; the focus of the petitioners’ case was on the alleged unfairness of the 2019 compensation scheme. Although the terms of the declarator suggest otherwise, the 2019 compensation scheme, as I will explain, was not made by legislation.

[4] The ground of challenge on which the petitioners rely is that the 2019 compensation scheme does not strike a fair balance between the property rights of the Association’s members and the general interests of the wider community because it is arbitrary in its nature and in its effects. The scheme is said to infringe the rights of the members (ie all the members) of the Association under Article 1 of the First Protocol to the European Convention on Human Rights (“A1P1”). In the adjusted petition, the Association admits that it has no rights under A1P1, but explains that it represents the interests of its members

who do have such rights by virtue of their heritable titles. The Ministers, for their part, accept that any governmental actions having the effect of depriving a person of his property or preventing a person from exercising peaceful enjoyment of his property must strike a fair balance; they maintain that the 2019 compensation scheme achieves this. The Ministers also challenge the petitioners' case on the basis that they have failed to establish the impact of the 2019 compensation scheme on any individual title holders. The Ministers argue that, in the circumstances of the present case, it is not appropriate to take a blanket approach to the question of whether A1P1 has been infringed.

[5] The petitioners aver that many individual netsmen earn their living from the revenue generated through use of their legal rights to carry out coastal salmon fishing. In some other cases, the rights to fish for salmon are owned and operated by larger commercial organisations, which employ a number of workers to run their businesses. For a variety of reasons, some title holders do not currently exercise their rights to fish, but the petitioners aver that such titles still have a value to the owners based upon *inter alia* their potential for sale, lease, future exploitation, and as a basis for the receipt of payment from conservation organisations in return for agreeing not to fish.

The background to the 2016 Regulations

[6] To set the scene for consideration of the parties' competing positions, it will be helpful if I set out briefly the main aspects of the background to the making of the 2016 Regulations.

[7] It is well known that Atlantic salmon have cultural and economic importance in Scotland, as they do elsewhere in Europe. So far as the ownership of salmon fishing rights

under Scots law is concerned, Rankine set out the fundamental principles in this way (*The Law of Landownership in Scotland*, 4th ed, 1909, page 304):

“Whether on account of the great value of the salmon as an article of food and commerce, or of its close connection with the sea, which was in a peculiar degree under the King’s control, or of the ruinous complexity of interests which must otherwise have arisen, the right of salmon fishing - as distinguished from the ownership of individual salmon captured - has in Scotland from early times ... been regarded as one of the *regalia minora*; in other words, a right separate from the ownership of land, and presumed to be retained by the Crown in granting feus of land adjacent to sea and river.”

[8] Rankine went on to explain (*op cit*, page 305) that since in point of fact the King was unable to exercise his prerogative right, and in early times it never occurred to him to lease out the fishings temporarily, the result was that express rights of salmon fishing became very usual, either as separate grants or, more commonly, in connection with lands adjoining the fisheries. As I have mentioned, the Association’s members are owners of rights to fish for salmon by nets, either as heritable proprietors or as tenants under heritable leases.

[9] Since estimates were first made in about 1971, the number of salmon returning from their marine migration to Scottish rivers has steadily declined. Salmon is a species listed and protected under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Directive”). In October 2015 the European Commission commenced infraction proceedings on the ground that Scotland did not have a suitable management system for meeting the United Kingdom’s obligations under the Directive insofar as it sought to conserve and protect Atlantic salmon, particularly in regard to coastal netting operations.

[10] The Commission was concerned about the protection of Atlantic salmon populations in Scottish rivers designated as Special Conservation Areas (“SACs”) under the Directive and the United Kingdom’s failure to comply with Article 6(1) thereof. In particular, the

Commission considered that the United Kingdom had failed to comply with its obligations under Article 6(1) of the Directive to establish necessary conservation measures involving, if need be, appropriate management plans. The Commission's letter of 22 October 2015 stated *inter alia* as follows:

"The UK and in particular Scotland hosts the most significant part of the EU population of the salmon. Its conservation status in the Atlantic region is 'unfavourable-bad'; however, its status is 'unfavourable-inadequate' in Denmark, Ireland and the UK. From an EU-perspective, the Scottish salmon population is therefore a stronghold of highest EU importance and there is in consequence a particular responsibility for Scotland to ensure all measures needed for the conservation of this species are implemented."

[11] Guidelines issued by the North Atlantic Salmon Conservation Organisation ("NASCO") for the management of salmon fisheries define a mixed stock fishery as one that exploits a significant number of salmon from two or more river stocks. Fisheries of mixed stocks, particularly in coastal waters, present particular management and conservation challenges because they cannot effectively restrict fishing to stocks that are at full reproductive capacity where there are other stocks that are below conservation limits mixed in with the stocks being fished. The accepted conservation practice is that management measures should, in such circumstances, aim to protect the weakest of the contributing stocks.

[12] The 2016 Regulations were made, under powers given by the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 ("the 2003 Act"), in response to the European Commission's notice of infraction proceedings and in light of evidence of declining salmon stocks and the poor conservation status of such stocks. Regulation 3(1) provided as follows:

"No person may retain any salmon caught in any coastal waters in a salmon fishery district."

[13] The term “salmon fishery district”, as defined in section 34 of the 2003 Act, covers most of Scotland’s coastal waters in which salmon are caught by nets. All the titles held by the Association’s members and office-bearers are within salmon fishery districts; so too are the second petitioners’ titles.

[14] There was no time limit imposed on the prohibition introduced by the 2016 Regulations. The Ministers agreed that the prohibition would, however, be reviewed within a period of 3 years. This would allow for the collection of further data so that the Ministers through Marine Scotland (a directorate of the Scottish Government) could develop a more robust understanding of the nature and potential impact of mixed stock fisheries on SACs and other in-river fisheries. The evidence to be gathered during the 3-year period would form the basis for a decision as to whether and, if so, where the prohibition should remain in force, and whether and, if so, where coastal netting of salmon could be resumed.

The 2016 compensation scheme

[15] The Ministers established a compensation scheme (“the 2016 compensation scheme”) for netsmen whose businesses were adversely affected by the prohibition contained in the 2016 Regulations. The 2016 compensation scheme was based on the cost of “mothballing” for 3 years the salmon fishing operations (ie keeping them in good condition during the limited term of the prohibition so as to allow possible future use). The idea was to allow title holders to resume fishing with minimal cost and inconvenience in the event that the prohibition did not extend beyond 3 years.

[16] The broad basis of the 2016 compensation scheme was: (1) where there was an established compensation agreement for conservation reasons (such as an agreement with a district fishery board), the compensation payable under such an agreement was matched;

(2) larger commercial operators received compensation to reflect their lost income during the 3-year period; and (3) in the case of smaller operators, the level of compensation was based on the 3 year average reported weight of salmon caught, multiplied by the average price of salmon per kilogram (£14).

The scientific evidence obtained following the 2016 prohibition

[17] In an affidavit prepared for the purpose of the present proceedings, Mr Simon Rimington Dryden, the former head of the salmon and recreational fisheries team at Marine Scotland, set out the main findings of the scientific studies commissioned by the Ministers following the 2016 prohibition. There were two studies carried out: the first, by Downie and others, reviewed the use of historic tag data to infer the geographic range of salmon river stocks likely to be taken by a coastal fishery; the second, by Armstrong and others, examined the application of acoustic tagging, satellite tracking, and genetics to assess the mixed stock nature of coastal net fisheries.

[18] The conclusion of the Downie review was that the evidence showed that coastal net fisheries exploited salmon which originated from a range of rivers, often some considerable distance from where the fisheries operated. This finding was supported by the results of the Armstrong study. There was evidence that coastal net fisheries exploited a mixed stock resource. In view of these findings, Marine Scotland decided that the appropriate course was to adopt a precautionary approach by assuming that all Scottish coastal net fisheries utilised multiple stocks unless it could be shown otherwise. In addition to the specific netting research, Marine Scotland also took account of the annual International Council for the Exploration of the Sea Report of the Working Group on North Atlantic Salmon. This evidence was thought to provide the best estimate of Scotland's wild salmon population. In

short, it was found that fewer salmon were returning to Scottish waters than in the recent past; those returning were smaller, in poorer condition, and of lower reproductive capacity. It was estimated that the downward trend of returning salmon was continuing such that Scotland's overall salmon population was considered to be less than half of what it had been in the early 1970s.

The Ministers' decisions in 2018 and 2019

[19] In view of these findings, the Ministers announced in about October 2018 that they intended to maintain the prohibition on taking and retaining salmon caught in coastal waters. It was considered that retention of the prohibition was necessary in order to continue to comply with the Directive and with the NASCO guidelines. The Ministers undertook that they would review the necessity of the prohibition on an annual basis. If it was found to be no longer required or justified, it would be removed. The Ministers aver that the data currently available to them does not permit an accurate prediction to be made of when, if ever, the prohibition will become unnecessary.

[20] The 2016 Regulations were amended, with effect from 1 April 2019, by the 2019 Regulations. The latter regulations did not specifically provide for a continuation of the prohibition; it was simply allowed to remain in force.

[21] The Ministers took the view that compensation was required in light of the extension of the prohibition. Mr Dryden explained in his affidavit that a number of options were considered and discussed with the Association. The first possible option involved compensation continuing to be paid on the basis of "mothballing" in order to allow further time for the assessment of Scotland's wild salmon population. This option was considered to be inappropriate because the scientific evidence pointed towards the prohibition having

to remain in place for an indeterminate period. The overall trend in the number of adult salmon returning to Scottish waters continued to be a downwards one and there was no clear evidence that this trend would be reversed in the foreseeable future. The second option was based on the idea of buying out the heritable rights of those coastal netting stations which had been active between 2011 and 2015. The view was taken that there was no evidential basis on which the value of the heritable rights could be properly valued in isolation from the assets that generated financial gain to the operator. A further factor militating against the second option was that a number of the Association's members strongly argued that they would not be prepared to sell their heritable rights as these had been in their families for generations; these members submitted that the value of the heritable rights was not capable of being assessed in purely monetary terms. Moreover, the possibility could not be discounted that coastal netting might be permitted to resume at some future time if justified by the improved health of the salmon population. The third option (and the one that was selected) was to be a one-off payment intended to allow the netsmen the opportunity to dispose of and diversify as opposed to mothballing their operations. If in the future the prohibition is removed, the Ministers have undertaken not to attempt to recover any compensation paid.

[22] From about October 2018 meetings were held between Marine Scotland and the Association. An initial offer of compensation was based on loss of net profits over a 7-year period. The 7-year period was derived from previous policy work associated with fixed quota allocations attached to Scottish Government commercial sea fishing licences. Marine Scotland had considered new policy options for the allocation of these quotas and had concluded that current holders of the quota allocations would require a minimum of 7 years notice in the event that the quotas were to be reallocated.

[23] The offer included a *de minimis* net profit margin of 12.6 per cent. This was in recognition of the fact that 16 of the 18 recipients of compensation under the 2016 scheme had been unable or unwilling to provide certified accounts to demonstrate the nature and extent of their commercial activities. Marine Scotland considered that this was a generous net profit margin which would allow operators to recover the full value of their capital assets.

[24] For its part, the Association sought “as a minimum” a continuation of the status quo on compensation “with no end date” and with index linking “to counter inflationary pressures”. In response, the Ministers explained that they were not in a position to offer index linked compensation or to continue payments in perpetuity. They said that they were prepared to consider modifications to the offer and invited the Association to discuss how they thought that the formula was flawed.

[25] In the course of discussions with the Association, the Ministers stated that they would be willing to remove the *de minimis* provision and to offer compensation based on each business’s actual profit margin as shown by certified accounts and also to seek to resolve recovery of the full capital value of assets separately.

[26] Following the making of further representations by the Association, the Ministers agreed to extend the 7-year period to 10 years. They accepted that the 3-year period during which compensation had previously been paid (ie 2016 to 2019) would not be taken into account in calculating the loss of profits. This concession recognised that the initial compensation scheme had been for the distinct purpose of “mothballing” and as such could be discounted as a period during which operators could be expected to plan for future diversification. The Ministers also agreed to allow indexation on the price per kilogram of salmon and grilse of 2.5 per cent per year cumulatively from years 2 to 10; this was later

extended so as to apply to years 1 to 10. They agreed to increase the 5 year average salmon landings, excluding zero years, by 5 per cent for all operators who were active in the period between 2011 and 2015; this was to compensate for voluntary delays to the start of the netting season.

[27] Discussions continued for several months. The Ministers' final position on compensation was set out in a letter from Mr Michael Palmer (a senior official) to the Association dated 12 April 2019. So far as relevant for present purposes, the letter was in the following terms:

"...I consider that we have now reached the end stage of our negotiations and that it is appropriate to explain the final position which the Scottish Government has reached in respect of the method by which it intends to calculate compensation payments to coastal netsmen in light of the decision to retain the prohibition contained in regulation 3 of the Conservation of Salmon (Scotland) Regulations 2016.

...

The Scottish Government's position remains that it is appropriate and reasonable to move from payment for 'mothballing' operations to compensation for cessation of operations in the foreseeable future. We could not justify otherwise in terms of the consequences for the public purse.

We continue to believe that our offer, based on pure net profit, reasonably compensates operators for the continuation of the prohibition whilst, crucially, not extinguishing the heritable rights to fish for salmon in coastal waters should stocks recover over the long term. We are not able to move on these principles.

Our final offer is therefore a further one-off single compensation payment to non-dormant operators based on:

- a 2019 market sale price of £23.58 per kg for wild Scottish salmon and, separately, £13.33 per kg for grilse;
- a cumulative 2.5% increase in the market sale prices, year on year;
- a net profit, assessed on a historic case by case basis, but with a de minimis of 12.6%;

- a 10 year period with a 3.5% social discount, based on the average annual kg weight of salmon and grilse landed in the period 2011-2015 inclusive, with zero years excluded;

and

- a 5% increase in the average weight of salmon landed to reflect the voluntary delay to the start of the netting season that many operators observed.

Our calculations based on this framework, and assuming the de minimis net profit of 12.6% for all operators, show a total, one-off compensation payment of circa £939,000. This is in addition to the circa £1.7m which has already been paid.

Our offer to remove the 12.6% net profit de minimis provision and alternatively to calculate each operator's compensation based on their actual profit margin (as evidenced through certified accounts) and to seek to resolve recovery of the full capital value of their assets separately also remains on the table.

I note that your letter explicitly acknowledges that '.....it will be for the Scottish Government to engage with individual members and property owners on a case by case basis, to determine if any individual agreements can be reached'. I am writing today to the eighteen coastal operators (to whom we will ultimately make a further offer of compensation once our discussions with the SNFAS are complete) to update them on the situation and attach a copy of the text of that letter."

[28] Following that letter Mr Dryden duly wrote to each of the individual operators on 16 May 2019 informing them that the Ministers had concluded discussions with the Association without coming to an agreement. The letters offered a single one-off further payment of compensation for the continuation of the 2016 prohibition. The letters continued as follows:

"Previous compensation payments made in 2016 were based on the annual level of income foregone by no longer taking part in the fishing activity, so that it enabled operators to mothball their operations during the three-year review period. We are now faced with a different scenario. The science shows that coastal netting stations operate in mixed stock fisheries. Marine Scotland (MS) should therefore aim to protect the weakest of the contributing stocks and, whilst MS will continue to assess the status of Scotland's wild salmon populations, we acknowledge that there is a high risk that this assessment will continue to conclude that a significant number of rivers have stocks that are below conservation limits for a prolonged period.

We have therefore proposed a further offer of compensation which is designed to reasonably compensate operators for the loss of net income (profit). It deliberately

moves away from an annual compensation figure for moth-balling operations to a one-off compensation figure which reflects the fact that operators may need to phase out direct and indirect costs over time.

Your offer has been established by calculating the assumed net income (profit) which could have been generated over a 10-year period from 2019 to 2028 inclusive..."

[29] The offer letters continued by setting out the details of the compensation package in line with the letter of 12 April 2019. Acceptance of the offer was to be in full and final settlement of any and all claims, arising at the time of acceptance or in the future. In all, sixteen compensation offers were made, of which two have been accepted. Marine Scotland is not aware of whether the two operators who have accepted the offers are members of the Association.

The petitioners' submissions

[30] Mr MacColl submitted that the continued prohibition amounted to a deprivation of the title holders' property for the purposes of A1P1. He stressed that the primary purpose of the heritable titles was to fish for and retain salmon. The effect of the prohibition was to make the titles useless in practical terms. If, contrary to the petitioners' principal contention, the prohibition did not amount to a deprivation of property, it was at least a material control of use. Mr MacColl acknowledged that ultimately the exact categorisation of the interference with property rights was not crucial. Whether there was a deprivation or a control of use, compensation had to be reasonably related to the value of the affected property rights, having regard in particular to the potentially indefinite duration of the prohibition. Since the prohibition was expected to endure for the foreseeable future, the whole purpose and value of the heritable titles was being stripped away.

[31] Senior counsel submitted that it was important to note that the 2019 compensation scheme focussed on loss of income for a limited period only; this failed to reflect a fair valuation of the property rights. In *Lithgow v United Kingdom* (1986) 8 EHRR 329, paragraph 121, the European Court of Human Rights had acknowledged that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under A1P1. Here the overall approach of the 2019 compensation scheme was irrational because it failed to take account of the effect of the prohibition on the fundamental purpose and value of the heritable property rights. Reference was made to *R (Kelsall) v Secretary of State for the Environment* [2003] EWHC 459, paragraphs 62 and 63, where Stanley Burnton J (as he then was) held that provisions in the Fur Farming (Compensation Scheme) (England) Order 2002 were unfair and irrational because they operated unfairly as between different farmers and generally; they discriminated between brown mink farmers and farmers of different breeds without justification; and they produced arbitrary effects.

[32] Mr MacColl went on to argue that the 2019 compensation scheme was structurally flawed because it failed to address the specific circumstances of the individual title holders. It was, counsel submitted, a one size fits all model. In the case of each and every title holder the prohibition had the effect of destroying the fundamental purpose of the heritable title. By allowing compensation based only on loss of income for a limited period of 10 years, the 2019 compensation scheme failed to recognise the true nature and effect of the prohibition. Mr MacColl submitted that the 2019 compensation scheme infringed the rights of all the title holders.

[33] Mr MacColl made clear that the petitioners did not seek to challenge the existence of a rational basis for the continued prohibition. Instead, the focus of the challenge was, he

said, on the imposition of a potentially indefinite ban without providing fair and proper compensation. In support of that broad ground of challenge, the petitioners identified a number of alleged deficiencies in the 2019 compensation scheme. These may be summarised as follows.

[34] First, it was argued that the potentially indefinite duration of the ban meant that the offer to compensate for loss of net profits over a 10-year period was arbitrary and irrational. The 2019 compensation scheme had no logical relationship with the property rights affected. This point was said to be underscored by the fact that there had been an increase in the compensation period from 7 to 10 years in the course of discussions between the Ministers and the Association. The possibility that the prohibition might be lifted in the future was a remote one, which held no value for the holders of the heritable titles. Members of the Association could not reasonably be expected to maintain infrastructure and assets indefinitely. In the circumstances, the emphasis put by the Ministers on the possibility of the prohibition being lifted at some future point was misplaced and did not withstand scrutiny.

[35] Secondly, it was argued that the title holders would continue to incur liabilities and fixed costs during the period of the prohibition. These costs would extend to mortgage payments on properties; local authority rates; the costs of maintaining and servicing equipment; hire purchase costs for plant and equipment; insurance costs; electricity and fuel charges; storage costs; and staff and directors' salaries. Reference was made to information contained in affidavits from some members of the Association. If the decision was taken to wind down the activities of a fishery, that would itself give rise to significant costs. If a fishery had to be brought back into production in the future, there would be costs involved in doing so.

[36] Thirdly, the petitioners submitted that the compensation scheme ignored the value of moveable assets owned by the fisheries. It was said that an indefinite ban would render many of the assets worthless. The Ministers had provided no details on their alternative proposal to resolve the recovery of capital assets separately. That proposal had not been repeated in the offer letters of 16 May 2019.

[37] Fourthly, Mr MacColl submitted that the compensation scheme was flawed because it failed to offer any compensation for owners whose fisheries were dormant or were fished only to a limited extent between 2011 and 2015. For a variety of reasons, such as ill-health or the effects of pollution, a number of the Association's members did not actively or fully exploit their ownership rights between 2011 and 2015; such rights were nonetheless of value.

[38] Fifthly, the scheme was said to be unbalanced because it made no allowance for the fact that some title holders had not actively fished between 2011 and 2015 as a result of voluntary conservation agreements they had entered into with local fishery boards in exchange for compensation. The 5 per cent fish weight uplift was said to be insufficient.

[39] Sixthly, the petitioners founded on the fact that some netsmen had been offered a single one-off payment under the new compensation scheme that was lower than the total annual payments made to them under the 2016 scheme. Some of the affidavits referred to this.

[40] Seventhly, the use of 2011 to 2015 catch data was argued to be arbitrary. The number of salmon caught at particular locations had ebbed and flowed materially over the years. The new compensation scheme employed a period of historically low catch levels.

[41] Finally, it was said that the new compensation scheme was unsound because it failed to take account of profits made from smoking salmon after it had been caught. The open

market value of smoked salmon could greatly enhance profitability. There were references to this in the affidavits.

[42] For all these reasons, the petitioners submitted that the compensation proposed in 2019 did not strike a fair balance between the rights of individual property owners and the general interests of the wider community. It was arbitrary and without reasonable foundation. It breached the rights of the individual property owners, including Mr Mackay, Mr Hutchison, and Mr Paterson, and the Association's members.

The respondent's submissions

[43] On behalf of the Lord Advocate, Miss Crawford QC submitted that there was a fundamental flaw in the petitioners' approach. It was trite that A1P1 rights were held by individuals and, as such, any assessment of whether those rights had been breached required consideration of individual circumstances. It was not permissible to adopt a blanket approach, as the petitioners sought to do in the present case. Insufficient detail had been supplied of the burden allegedly imposed on the individual title holders. It was, therefore, impossible to say whether the burden was excessive notwithstanding the compensation offered.

[44] In any event, the 2019 compensation scheme was a fair and reasonable one. It was designed to provide a one-off payment to compensate for the prohibition for an indeterminate period. It was reasonably based upon the net profits of the individual netsmen for a 10-year period. The netsmen had been notified that they should seek to diversify their activities. They could take immediate steps to do so, utilising and/or retaining the benefit of the compensation. In the event that the prohibition was to be lifted in the future, the netsmen retained their heritable titles and would be able to exploit them.

[45] Miss Crawford submitted that the basis upon which the loss of profit was determined was reasonable and logical. It was tailored to the circumstances of the individual netsmen by reference to their catch volumes and profit margins. The Ministers had properly taken into account the representations made by the Association. The price per kilogram was based on market data; it incorporated a year by year increase. A favourable social discount was allowed. An increase in average catch figures was applied in order to reflect the fact that some (but not all) of the netsmen had previously agreed to delay the start of their fishing seasons. A generous *de minimis* net profit margin of 12.6 per cent was allowed. An offer to explore reimbursement of capital assets had been put forward, but had not been accepted. The 5-year period upon which catch figures were calculated was reasonable. There was no basis for assuming that the salmon population and catch figures would have increased had the prohibition been lifted. The trend in the numbers and size of salmon caught was a downwards one. That trend was ignored for the purpose of the compensation formula.

[46] In the case of those title holders who had not actively fished between 2011 and 2015 the prohibition could not be said to impose an excessive burden on them. Any interference with the peaceful enjoyment of dormant fisheries was negligible. It was reasonable for the Ministers to conclude that no compensation should be given to netsmen who were not utilising their titles. Title holders who had facilities for smoking salmon were not prohibited from making use of these; they could smoke wild Atlantic salmon or farmed salmon.

[47] Overall, the 2019 compensation scheme was, Miss Crawford submitted, well within the Ministers' margin of appreciation.

Analysis and decision

[48] A1P1 provides:

“(1) 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.

(2) 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.”

[49] The general principles applying to the interpretation of A1P1 are well-known.

Lord Reed summarised these principles in *AXA General Insurance Limited v*

HM Advocate 2012 SC (UKSC) 122, paragraphs 107-108.

[50] A1P1 comprises three distinct rules: The first rule is of a general nature and expresses the principle of peaceful enjoyment of property; the second rule covers deprivation of possessions and makes it subject to certain conditions; the third rule concerns the State’s right to control the use of property in accordance with the general interest. The three rules are interconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and must, therefore, be interpreted in accordance with the general principle expressed in the first rule. Each of the two types of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means which are reasonably proportionate to the aim sought to be realised.

[51] In *Hutten-Czapska v Poland* (2007) 45 EHRR 4, paragraph 167, the Grand Chamber of the European Court of Human Rights provided an authoritative summary of the principles applying to A1P1 in the following terms:

“Not only must an interference with the right of property pursue, on the facts as well as in principle, a ‘legitimate aim’ in the ‘general interest’, but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual’s property. That requirement is expressed by the notion of a ‘fair balance’ that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the state’s interference the person concerned had to bear a disproportionate and excessive burden.”

[52] The categorisation of the interference as either expropriation or control is not critical.

The correct focus is on whether the interference imposes a disproportionate and excessive burden on the person affected. Thus, in *R(Mott) v Environment Agency* [2018] 1 WLR 1022 the Supreme Court held that the severity and disproportion (as compared to others) of the impact of a restriction of fishing rights on the claimant were such that there had been a breach of his rights under A1P1. In that case no compensation had been offered. At paragraph 32 Lord Carnwath explained that it was necessary to consider whether the effect on the particular claimant was excessive and disproportionate. His Lordship went on to observe, at paragraph 37, that the case was an exceptional one on the facts. He added that the Strasbourg cases showed that the national authorities enjoyed a wide margin of discretion in the imposition of necessary environmental controls, and that A1P1 gave no general expectation of compensation for adverse effects. Furthermore, where the authorities had given proper consideration to the issues of fair balance, the courts should give weight to their assessment.

[53] In *Alatulkkila v Finland* (2006) 43 EHRR 34, at paragraph 67, the European Court of Human Rights recalled that it had previously stated that the national authorities must enjoy a wide margin of appreciation in determining not only the necessity of the measure of

control concerned but also the types of loss resulting from the measure for which compensation will be made; the legislature's judgment in that connection would in principle be respected unless it was manifestly arbitrary or unreasonable.

[54] More recently, in *O'Sullivan McCarthy Mussel Development v Ireland* (2018) EU: 44460/16 the Strasbourg Court reiterated, at paragraph 109, that it had often stated that the protection of the environment was an increasingly important consideration in today's society, having become a cause whose defence aroused the constant and sustained interest of the public, and consequently the public authorities. The Court noted that in the instant case the impugned measures taken were adopted to ensure the respondent State's compliance with its obligations under EU law, which the Court had recognised as a legitimate general interest of considerable weight. At paragraph 124 the Court recalled that it had often stated in its case law that environmental protection policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake.

[55] In evaluating the petitioners' grounds of challenge in the light of these principles, the question to be addressed is, therefore, whether the interference with the petitioners' peaceful enjoyment of their possessions constituted by the prohibition contained in the 2016 Regulations strikes a fair balance between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights. The question is not, as the petitioners' submissions and the affidavit evidence tended to stress, whether the 2019 compensation scheme itself struck a fair balance. Nor is the question whether in some general sense the compensation scheme is a fair and reasonable one - again, that tended to be the petitioners' approach, as is clear from the affidavits.

[56] A further difficulty arises because the petitioners' approach to the effect of the prohibition on the title holders has been presented to the Court at a high level of generality without any real focus on the nature and extent of the burden that will be imposed on them individually. In the adjusted petition the petitioners encapsulate their approach in the following averments in statement 3.4:

“Explained and averred that the compensation offer made on 12th April 2019 applies equally (and in an equally arbitrary fashion) to all heritable title holders in terms of the applicable formula. Standing the nature of the compensation offer made by the Respondent (*sic*), the issue of whether the A1P1 rights of title holders have been breached is capable of being determined without the necessity of considering the individual circumstances of each title holder.”

[57] The petitioners attempt to justify this approach by averring that negotiations between the Ministers and the Association proceeded on a general basis and did not have regard to the circumstances of individual title holders. The petitioners then add that insofar as it may be of any assistance to the Court to consider the individual circumstances of title holders, reference is made to affidavits to be lodged by the petitioners (the terms of which are held as incorporated in the petition *brevitatis causa*).

[58] I have considered the terms of the affidavits. They rehearse a number of complaints about what is alleged to be the overall unfairness of the 2019 compensation scheme. They claim that the title holders will not be fully compensated for all their losses. The approach taken is that the compensation will not be sufficient to enable them to continue with their fishing businesses. This misunderstands the basis and purpose of the prohibition and of the 2019 compensation scheme. The scientific evidence shows that the prohibition will probably have to remain in force for the foreseeable future. Compensation is accordingly intended to allow the title holders to dispose of their interests and to diversify their operations over a number of years.

[59] The generality of the approach taken by the title holders can be seen, for example, in Mr Mackay's affidavit where he states that the 2019 compensation scheme is flawed because he will not be compensated at a level or in a manner "to ensure my business survives" (paragraph 31). Later in his affidavit Mr Mackay criticises the 2019 compensation scheme on the ground that it does not allow him to "dispose of significant assets, key to my business, which may be needed in future" (paragraph 34).

[60] Mr Hutchison states in his affidavit that the owners of the fishery in which he has an interest estimate that to recommission operational status in the future would cost approximately £50,000 for replacement and renewal of necessary plant, materials and equipment (paragraph 14). He then provides a series of round figures as a "first level estimate" of such costs. In paragraph 23 Mr Hutchison refers to "the significant economic growth potential" of the fishery; he contends that this should be recognised and compensated for.

[61] In his affidavit Mr Paterson complains that "the Scottish government want to stop us fishing with no reassurance that the fishing will ever start again" (paragraph 14). His evidence is presented at a high level of generality. For example, in paragraph 22 he says that the value of a heritable title was not based on recent catch figures (which may be currently low) but on its potential as evidenced by the much larger catch figures of the past.

[62] Messrs David Thomson Pullar and George Stewart Pullar provide a list of assets used in their business; "their conservative replacement cost/values" are then set out in a series of round figures, including the amount of £1,000,000 for an operating base with outbuildings and land (paragraph 32). It seems obvious that many of the fixed costs to which they refer would not have to be incurred if the business was wound up, for example accountancy fees and mortgage payments. In paragraph 40 of the affidavit the assumption

is made that the assets of the business will have to be retained “to support any future restart”.

[63] Mr Gary Stephen Fraser explains in his affidavit that his fishings have been dormant since 2009/10 due to oil pollution. Compensation has been paid by those responsible for causing this.

[64] Mr Joseph Buchan Yule claims that the true cost of decommissioning is in the value of the heritable titles; he claims that the three fisheries with which he is concerned would have a value of £250,000 (paragraph 7).

[65] I accept that the affidavit evidence shows that the title holders consider that they will not be fully and fairly compensated. It seems to me, however, that the evidence fails sufficiently to acknowledge that the prohibition is necessary for sound reasons of environmental protection and conservation. In such circumstances, A1P1 does not give rise to any entitlement to receive full compensation for all the financial losses that may possibly flow from the relevant measure. In the affidavits there is no real attempt to explain what the impact on the individual title holders will be in the event that they elect to accept compensation under the 2019 scheme and proceed to dispose of their business interests and diversify their operations over time. No convincing attempt is made to explain in concrete terms why, in those circumstances, the burden imposed on them should be regarded as excessive.

[66] In my opinion, the petitioners are mistaken to describe the 2019 compensation scheme as one which does not take account of individual circumstances. In fact, the scheme is tailored to the circumstances of individual netsmen by reference to their catch volumes and profit margins.

[67] Stepping back and trying to take a fair and, I hope, realistic view of matters, it appears to me that a compensation scheme based on loss of net profits for a period of 10 years cannot be said to impose an excessive burden. This is especially so where the prohibition has been put in place for sound reasons of conservation and environmental protection and to ensure that EU law is complied with. Both the Supreme Court and the Strasbourg Court have emphasised the importance of these considerations. The period for which compensation is to be paid is a substantial one. The compensation is to be calculated by the net profits generated over a representative period. It is important to recall also that the netmen will retain their heritable titles and will be able to exploit them in the event that the prohibition is lifted in the future. This points towards the interference being more in the nature of a control of use than an expropriation. The case law makes clear that a wide margin of deference should be extended to the national authorities in circumstances such as the present, particularly where, as here, they have consulted those affected and given careful consideration to the measures complained of.

[68] I take account also of the fact that the Ministers were willing to consider compensation based on recovery of the full capital value of assets, but for reasons that were not explained the Association has chosen not to explore this option.

[69] In my view, the 5-year period (2011 to 2015) adopted for catch figures reflected a reasonable and balanced approach. There is no reason to think that catch figures would have increased had the prohibition been removed after it was first introduced in 2016. In the case of title holders who did not fish during that 5-year period, any interference with the peaceful enjoyment of their possessions appears to me to be negligible. It was, in my judgment, reasonable for the Ministers to conclude that no compensation was required for such dormant fisheries.

[70] The comparison with the 2016 compensation scheme is irrelevant in my view. It was put in place for a different purpose.

[71] I consider that it was reasonable for the Ministers to take the view that no specific element of compensation was necessary to reflect the fact that the businesses run by some title holders extended to the smoking of fish. They may be able to continue with these or similar activities in the future notwithstanding the prohibition.

[72] In conclusion, I find myself in agreement with Miss Crawford's submission that none of the exceptional circumstances identified in Mr Mott's case exists in the present case (*Mott v Environment Agency supra*). The Ministers have offered a rationally based compensation scheme that is, I consider, well within their margin of appreciation. I am satisfied that it strikes a fair balance. It is not manifestly arbitrary or unreasonable. I shall for these reasons sustain the respondent's pleas-in-law, repel the petitioners' pleas, and refuse the petition. I shall reserve all questions as to expenses.