Neutral Citation Number: [2023] EWHC 336 (Admin)

Case No: CO/2938/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 20/02/2023

Before :

MR JUSTICE LANE

- -

Between :

The King (On the application of Glass Eels Limited t/a UK Glass Eels)	**Claimant**
- and -	
Secretary of State for the Environment, Food and Rural Affairs	**Defendant**

- -
- -

Mr N Wells (instructed by **Harrison Clark Rickerbys**) for the **Claimant**
Mr T Jones (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 17 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

A. THE EUROPEAN EEL

1. The European eel (*Anguilla anguilla)* has experienced a rapid population decline, which led the International Union for Conservation of Nature to assess it as "critically endangered". This has resulted in the inclusion of the European eel in Appendix II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). In England and Wales, CITES obligations are implemented as a matter of domestic law by Council Regulation EC No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein. Subject to certain amendments, this Regulation is retained EU law in the United Kingdom, following this country's withdrawal from the EU.

2. The European eel is a highly migratory species. It is widely considered that the eels spawn in an area of the Sargasso Sea in the Atlantic Ocean. The eel larvae drift with ocean currents to the continental shelf of Europe, where they metamorphose into glass eels and enter continental waters. Glass eels are the stage of development between larvae and elvers. Thereafter, the eel grows to a stage that is called a yellow eel, before becoming a mature silver eel. Silver eels subsequently leave their rivers for the Sargasso Sea, where they spawn.

3. European eels will not breed anywhere else, including in captivity. Accordingly, European eels may be obtained for human consumption, either by catching them in the watercourses in which they are present as either yellow or silver eels; or by obtaining them from fish farming facilities, which have received glass eels. The main eel fishery in the United Kingdom is situated in Lough Neagh in Northern Ireland.

4. The Claimant has run a sustainable glass eel fishery since the early 1990s. Its Managing Director, Mr Wood MRCVS, is a veterinary surgeon with long experience in the conservation and sustainable harvesting of glass eels. Mr Wood is a founding member of the Sustainable Eels Group and has been actively involved over many years in combating the illegal trade in glass eels.

5. In England, glass eel fishing continues to employ artisanal fishing methods, with individual fisherman using hand-held dip nets to catch the glass eels. These fishermen require authorisations from the Environment Agency, which imposes detailed conditions and restrictions on fishing methods. This case is concerned with the catching of glass eels by authorised fishermen operating in the River Severn and the River Parrett.

6. The claimant buys glass eel catches from the authorised fishermen and sells them on. The purchase costs can be very substantial (around £150,000 - £200,000 per tonne). Glass eels have a "shelf life" of only 14 days and detailed arrangements are required for their transport, ideally by air. The season when glass eels may be caught in the Severn and Parrett lasts for less than three months. This year, the season is due to open on 15 February and close on 23 April 2023.

7. From 2010, EU member States have refused to permit the export of live glass eels to non-member States. The defendant suggests that this prohibition was not an absolute one, but the issue is, in any event, not material for the purpose of these proceedings.

8. What is, however, relevant is that, following the withdrawal of the United Kingdom from the EU, the claimant is, at present, no longer able to trade with EU member States, as the EU member States will not accept the import of glass eels from States outside the EU. The defendant is seeking to persuade the EU member States to reconsider its stance; so far, without success.

9. Following earlier uncertainties as to whether the claimant could continue to trade with Northern Ireland (specifically, the eel fishery in Lough Neagh) the defendant permitted the claimant to make such exports in 2021 (albeit, very late in the glass eel season) and in 2022. The claimant says, however, that this trade with Northern Ireland is insufficient to sustain the claimant's business. The claimant has historically provided glass eels at discounted rates to facilitate the stocking of the Lough Neagh fishery.

10. The claimant says that, unless it can establish new export markets, it stands to lose its entire business, built up over several decades. This will affect not only the claimant's own staff but also the individual fishermen who look to the claimant to purchase their catches of glass eels. Accordingly, the claimant applied to the defendant for a permit to export glass eels to Hong Kong. This judicial review is concerned with the defendant's refusal to grant such a permit.

B. LEGAL FRAMEWORK

11. I have already mentioned Council Regulation EC No 338/97. It is, however, necessary at this point to describe the legal position in more detail.

12. CITES regulates international trade between parties through a system of documents, including import and export permits. There are three CITES Appendices at Convention level, listing species requiring protection and affording the species different levels of protection.

13. As well as Council Regulation EC No 338/97 ("the Principal Regulation"), the Implementing Regulation (Commission Regulation EC No 865/2006) laid down detailed rules concerning the implementation of the Principal Regulation. The Permit Regulation (Commission Implementing Regulation No 792/2012) laid down rules for the design of permits, certificates and other documents provided for in the Principal Regulation. The Suspension Regulation (Commission Implementing Regulation No 2019/1587) prohibited the introduction into the EU of specimens of certain wild fauna and flora.

14. Following the United Kingdom's withdrawal from the EU and after the end of the Transition Period, this entire regulatory regime was retained as part of United Kingdom law, with appropriate amendments made by the Environment and Wildlife (Miscellaneous Amendments etc.) (EU Exit) Regulations 2020 (SI 2020/1395).

15. The Principal Regulation lists plant and animal species in Annexes A to D, which approximate to the CITES Appendices. The European eel has been listed in Annex B since 2009.

16. Article 5 of the Principal Regulation concerns export or re-export from Great Britain. Article 5(2) provides that an export permit may be issued only when certain specified conditions have been met. For present purposes, the relevant conditions are:-

> " (a) the competent scientific authority has advised in writing that the capture or collection of the specimens in the wild or their export will not have a harmful effect on the conservation status of the species or on the extent of the territory occupied by the relevant population of the species;
>
> ……
>
> (d) the management authority is satisfied, following consultation with the competent scientific authority, that there are no other factors relating to the conservation of the species which militate against issuance of the export permit".

C. RELEVANT BODIES

17. The responsibilities of the "management authority" for the purposes of Article 5 are carried out by the defendant and by the Animal and Plant Health Agency ("APHA"). APHA is an executive agency of the defendant.

18. Where the competent scientific authority gives the advice referred to in Article 5(2)(a), this is known as a "Non-Detriment Finding" ("NDF"). This provides confirmation from the competent scientific authority that trade in the relevant species will not compromise its survival.

19. The Scientific Review Group ("SRG") is an EU body, which meets to discuss scientific aspects of the implementation of CITES and the EU Wildlife Trade Regulations.

20. Since December 2010, taking into account negative opinions of the SRG, EU member States' scientific authorities have declined to make NDFs for trade in the European eel. This is the reason why EU member States have not issued permits to export or import glass eels to or from non-member States since that time.

21. Following the United Kingdom's withdrawal from the EU, the Joint Nature Conservation Committee continues to be the competent scientific authority in this country, with regard to animals. It has produced an NDF for the European eel. The NDF was issued in May 2020 and is reviewed every three years. The NDF concluded that glass eels can be caught only in the Rivers Severn and Parrett.

22. The claimant says that regulated glass eel fishing from the Rivers Severn and Parrett is not merely sustainable but actually beneficial to the conservation of the European eel. Essentially, the claimant's position is that, for so long as it is able to run an economically viable operation, the claimant and the fishermen from whom the claimant purchases glass eels can continue to play an important role in stocking the Lough Neagh eel fishery. The defendant's position is that whether the extraction of surplus glass eels is beneficial overall depends on what will happen to the glass eels following extraction. That includes considering the effect on the illegal trade in glass eels, which lies at the heart of this judicial review.

D. THE DECISIONS

23. On 11 January 2021, the claimant applied for an export permit in respect of the supply of 1,600 kg of live glass eels to an importer in Hong Kong. On 12 March 2021, APHA, on behalf of the defendant, refused the application. The decision stated that insufficient information had been provided by the claimant for a conclusion to be reached on non-detriment or legal acquisition. The claimant would have been approached for further information in that regard, had it not been for the fact that the defendant had decided to refuse the application on other grounds.

24. Those grounds were set out in the letter. The defendant noted that the European eel was a critically endangered species and that "there is a well-documented illegal trade in glass eels that is threatening the species (UN Office on Drugs and Crime – 2020 World Wildlife Crime report, Europol Operation LAKE 2020 press release)..." The decision letter went on to state that "The dominant trafficking route for this illegal trade appears to be from European source countries to China".

25. The letter continued as follows:-

> "There is a risk that, were we to permit the proposed export to China, it may be used to mask a bigger illegal trade. The concern is not that any export permit issued would be used to export more than is permitted, or that the permit may facilitate illegal activity in this country. Rather, the concern is that the permit may be used in China, to provide evidence of lawful acquisition for aquaculture which may in fact include a mixture of legally and illegally acquired eels (ie a mixture of the eels exported under the permit applied for and eels sourced illegally from elsewhere). The problem is particularly acute in the case of glass eels because of the combination of large illegal trade (especially in China), and the difficulties in estimating the likely total weight of the glass eels when they reach adult size. A glass eel may weigh 0.3g, whereas an adult eel will weigh several kilogrammes (the largest recorded is 6.6kg). There is also a substantial difference between the weight of adult males and females, which adds to the difficulties of estimating the likely total yield of adults exported as glass eels. All of these factors mean that there is considerable scope for legitimate export permits to be used in China to mask illegal trade and/or to provide a cover for illegally acquired eels to be sold on within China or re-exported.
>
> We are therefore concerned that if the UK issues export permits for trade with countries of illegal wildlife trade concern regarding eels, such as China, this will harm the significant international enforcement efforts and the UK's credible participation in these efforts. While eel stocks remain precarious and a significant illegal trade in eels persists, we will continue to consider the risk of UK exports enabling illegal wildlife trade ("IWT") as a relevant factor when making a

> decision on applications for CITES export permits for European eels. We take a precautionary approach."

26. The decision letter of 12 March 2021 went on to deal with a letter of 19 February 2021 from the claimant's solicitors. I shall return to that letter later. For present purposes it is, however, relevant to note that the letter made reference to statements on behalf of the defendant "suggesting that export permits would not be granted to Asia". The defendant's letter of 12 March said that "we do not consider that the statements which have been made do in fact express an official blanket APHA or Defra policy against exports to Asia. There is currently no such blanket policy, and your application has been decided on its own merits."

27. The letter addressed the offer to use 60% of the average UK glass eel catch of the claimant for restocking projects and other conservation efforts. The letter then said:-

> "More generally, however, applications for CITES export permits are assessed against the merits of the specific trade in question, and in the present case our concerns relate to the potential consequences of exports to China. Restocking in GB may be relevant to the non-detriment finding, but it would not be relevant to (and would not in any event be sufficient to offset) the risks which we have identified in relation to the proposed export."

28. Immediately after this, the letter said that, although there was no formal right of appeal, "APHA will consider future applications and would encourage applicants to provide further relevant information that addresses the rationale for the above decision".

29. On 23 April 2021, the claimant applied to the defendant for a permit to export 500kg of live glass eels during 2021 to the same importer in Hong Kong (Ms Yu), albeit that she was now said to be involved with a different company than that mentioned in the first application.

30. The claimant's application contended that the claimant "has been extremely careful in identifying its proposed importer in Hong Kong, to ensure that there can be no risk of an export permit being used to facilitate any illegal trade". The letter "acknowledged that there is an illegal trade in glass eels in China (as elsewhere), but China is a CITES contracting party". The claimant said that there were reputable and long-established importers based in Hong Kong who had no history of involvement in the illegal trade in glass eels. As for Ms Yu, Mr Wood had known her for over 30 years and traded with businesses managed by her. Mr Wood had always found Ms Yu to be honest and reliable. Ms Yu herself had been actively involved in the fight against the illegal glass eel trade, providing information about it which Mr Wood had been able to pass on to the relevant authorities.

31. The defendant's second decision, responding to the application of 23 April 2021, is dated 28 May 2021. It is this decision which is the subject of the judicial review. As with the first decision, the ground of refusal is under Article 5(2)(d) of the Principal Regulation. The decision letter of 28 May 2021 said:-

> "We note the additional information provided in your letter of 23 April, however we do not consider that these (sic) address our concerns with issuing a permit to allow export of UK glass eels to Hong Kong. European eels are a Critically Endangered species with a well-documented illegal trade, particularly in glass eels. The dominant trafficking route for this illegal trade appears to be from European source countries to China.
>
> There is a risk that, were we to permit the proposed export to China, it may be used to mask products derived from illegal trade and/or to provide a cover for illegally acquired eels to be sold on within China or re-exported. We note your comments about reputation and track record of the proposed importer, however, we do not consider that your assertions regarding the trustworthiness of the importer can offset our concerns over the lack of robust traceability systems in China that could provide assurance over the use and end destination of any glass eels exported from the UK.
>
> We are further concerned that if the UK issues export permits for trade with countries of illegal wildlife trade concern regarding eels, such as China, this will harm the significant international enforcement efforts and the UK's credible participation in these efforts. While eel stocks remain precarious and a significant illegal trade in eels persists, we will continue to consider the risk of UK exports enabling illegal wildlife trade ("IWT") as a relevant factor when making a decision on applications for CITES export permits for European eels. We take a precautionary approach."

32. Although it is not the subject of this judicial review, reference needs to be made to a third application and refusal. On 18 March 2022, the claimant applied for a permit to export 1500kg of live glass eels to Ms Yu's company, Koltai International Limited, in Hong Kong. The claimant's solicitors wrote to the defendant on 18 March 2022, enclosing a second witness statement from Ms Yu (Her first statement had dealt with the chain of supply to "two or three [fish] farms"). The second statement explained that, in order to receive a shipment of glass eels from the UK, her company would have to obtain its own import permit from the Hong Kong authorities. The original of the UK export permit would be given to those authorities and would be retained by them. No third party, whether a subsequent purchaser or otherwise, would need to be provided with a copy of the UK export permit. The solicitors' letter of 18 March 2022 said that there could be no misuse of the export permit because it was retained by the Hong Kong authorities and not passed on to third parties.

33. In its refusal letter of 27 April 2022 in respect of this third application, the defendant noted the additional information provided by the solicitors. However, the defendant did "not consider that this addresses our concerns with issuing a permit to allow export of UK glass eels to Hong Kong" and that there was a risk that, were the defendant "to permit the proposed export to China, it may be used to mask products derived from illegal trade and/or to provide a cover for illegally acquired eels to be sold on within China or re-exported". Again, the defendant did not consider that the

claimant's assertions regarding the trustworthiness of the importer could offset the defendant's concerns "over the lack of robust traceability systems in China", which could "provide assurance over the use and end destination of any glass eels exported from the UK". The letter ended with the expression of the further concern that issuing such a permit would harm the significant international enforcement efforts and the UK's credible participation in them.

E. THE GROUNDS OF CHALLENGE TO THE SECOND DECISION

34. There are three grounds of challenge to the decision of 28 May 2021. Ground 1 contends that the defendant has adopted an inflexible policy, which admits of no exceptions, against granting export permits to Asia in the case of glass eels. This is said to be evidenced by various public statements made by the defendant. The claimant also relies upon evidence in the form of written communications concerning the decision-making process, served by the defendant in the light of the judicial review.

35. Ground 2 alleges that the defendant failed to take account of relevant matters; namely, the identity, good faith and trustworthiness of Ms Yu. The issue is not, according to the claimant, a matter of apportioning weight to established facts. Rather, it is failure to establish the relevant facts in the first place.

36. Ground 3 argues that the defendant's decision to refuse the export permit was irrational. The claimant puts this on the basis that, as explained by Sedley J in *R v The Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1, the claimant does not have to demonstrate that the decision was "so bizarre that its author must be regarded as temporarily unhinged". Rather, the claimant needs to show "a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic" (paragraph 13). The claimant submits that, in the first decision letter, the defendant articulated a concern about the possible misuse of the UK export permit. By contrast, in the second decision letter, the defendant's position was that the defendant's concerns could not be met by evidence about the specific importer's trustworthiness etc. because of purported concerns about "a lack of robust traceability systems in China". It is at this point that the claimant says the defendant's reasoning "does not add up".

F. THE PROCEEDINGS

37. Permission to bring judicial review was refused on the papers and, subsequently, at a hearing before HHJ Jarman KC.

38. On 16 June 2022, permission to bring judicial review on the above-mentioned grounds was granted by Males LJ. He said that, whilst it may well be lawful to have a policy not to permit sales of glass eels at all to Asia/East Asia, it was "arguably unlawful to apply such a policy while denying that it exists". It was, in his view, hard to see any practical difference between the existence of such a policy and one which gives weight to a consideration based on systemic concerns, "while taking no account of the character or trustworthiness of the particular importer". It also appeared that "public statements on behalf of the Respondent have indicated the existence of a general policy". If there were "no general policy, it is difficult or impossible for the applicant to know what it must do in order to obtain a licence".

39. Males LJ accordingly granted permission "so that the facts as to the existence or otherwise of such a policy can be properly determined and the claim can be considered in the light of those facts".

40. I am indebted to Mr Wells and Mr Jones for the high quality of their respective written and oral submissions.

G. DECIDING THE CLAIM

Ground 1

41. As I have explained, the claimant places considerable emphasis on the public statements emanating from the defendant. The claimant says these show that, in reality, the defendant fettered its discretion. As stated at paragraph 9-002 of *De Smith's Judicial Review* (8th Edition), a "decision-making body exercising public functions which is entrusted with discretion must not disable itself from exercising its discretion in individual cases". However, as is stated at 9-004, this principle "does not prevent public authorities upon which a discretionary power has been conferred guiding the implementation of that discretion by means of a policy or a rule that is within the scope of its conferred powers". The decision-maker must, nevertheless, "allow interested individuals the opportunity to persuade him to amend or deviate from the rule or policy", albeit the principle against fettering is not concerned with any particular form of hearing or with any particular technique of making or receiving representations.

42. The claimant relies upon a number of public statements, which it says are couched in absolute terms, so far as concerns the export of glass eels to Asia. At 13.1 of the UK's NDF it is said that:-

> "**No trade** will be permitted in glass eels destined for aquaculture or direct human consumption to regions in which a high level of illegal trade in glass eels persists because of the risk of any legal trade from the UK being used as cover for future re-exports of products derived from illegal trade."

43. This statement was relied upon in the UK's response to comments from the 90th meeting of the SRG, adding that "We intend to ensure that no legitimate trade from the UK can be used to enable illegal trade". However, the defendant told the SRG that "as we also state in the same section of the NDF, we would consider permitting, subject to safeguards, some trade in live glass eels to other non-EU states within the natural range of the European eel".

44. In its response to comments from the 91st meeting of the SRG, the defendant said that "We have noted repeatedly that the UK will **not** permit any trade to those parts of the world (notably east Asia) where there is a risk that legal trade could enable laundering of specimens of illegal origin".

45. The claimant contends that these statements, made in the context of the UK's attempt to persuade the EU to accept imports of glass eels, were clearly intended to be accepted as absolute assurances, admitting of no exceptions.

46. In connection with these proceedings, Dr William Lockhart, Deputy Director in the Department for Environment, Food and Rural Affairs, and Head of International Biodiversity and Wildlife Division within the defendant's International Biodiversity and Climate Directorate filed a witness statement, with exhibits. At paragraph 26 of his statement, Dr Lockhart accepts that the purpose of the NDF was to attempt to persuade the SRG "to enable some continued trade with Great Britain".

47. The claimant also points to a presentation made in July 2019, prior to the UK's exit from the EU, in which, under the heading "Scenario Planning – glass eel trade after EU exit", the defendant produced a slide showing that, in respect of "rest of world (eg Asia)" trade would not [be] possible due to illegal wildlife trade concerns").

48. On 22 June 2020, the then Parliamentary Under Secretary of State at Defra, in a letter to an MP, said that "If we are able to meet our CITES obligations and trade our eels outside the EU, we will not permit the sale of glass eels to Asia despite their high market value". An almost identical statement appears in her letter of 19 October 2020 to another MP.

49. In her letter to Mr Wood of 13 January 2021, Ms Anne Freeman (Defra's Deputy Director for Domestic Fisheries and Reform) wrote that "Illegal trade in glass eels remains a serious concern globally and officials have been clear throughout this process that no trade would be permitted in glass eels to regions where there are credible and significant illegal trade concerns".

50. Her letter ended by saying to Mr Wood that Ms Freeman understood that "this is a difficult time for your businesses and that you will need to take some tough decisions. I know you are already in regular contact with officials and have asked for that dialogue to continue".

51. So far as the defendant's internal correspondence is concerned, in an update to Ministers of 18 December 2020, it was said that "DEFRA could open up new, non-EU, markets for some GB glass eels. However, the current policy position is not to permit trade in live glass eels to East Asia, as it could mask illegal wildlife trade".

52. In his email of 11 January 2021 to Border Force and NWCU, Mr Kris Blake (responsible for CITES implementation at Defra) wrote:-

> "I wanted to touch base with you on eels to make sure our policy thinking continues to reflect the latest enforcement/compliance risk. As such, I've set out a few questions below I've be (sic) grateful for advice on from your experience/feel for the problem. For context, we are being challenged by the industry on our position to not support trade of UK glass eels with Asian markets (so as to not mask illegal trade or allow illegally sourced eels to be laundered under legitimate UK CITES permits) and I want to make sure our position is mindful of the latest situation on the ground from an illegal trade of eels perspective".

53. Mr Blake then asked whether the global illegal trade in eels remained a problem, what role the UK played in this illegal trade; and whether NWCU or BF had concerns with the UK using CITES permits for shipments of UK glass eels for export to Asia.

54. On 14 January 2021, a detailed response was received which said, amongst other things, that "it is feared that any opening of a legal trade with Asia from the UK will hamper the continued enforcement of this illegal trade".

55. The JNCC's advice on the claimant's 2021 applications is set out in emails of 26 February and 12 May 2021. Each of these emails stated that "it is important to note that the NDF also refers specifically to the UK's intention not to enable trade in live glass eels for aquaculture to those parts of the world in which there is illegal trade because of the risk that legal trade from the UK could be used to mask products derived from illegal trade". It was, each time, stated that the claimant's application "seems to us to fall within that category…accordingly… we suggest" that it is prudent to consult Defra policy to consider whether this application should be refused under Article 5.2.d …".

56. In support of Ground 1, Mr Wells relied upon the judgment of Leggatt LJ in *R v London Borough of Bexley ex-parte Jones* [1995] ELR 42. That case involved a judicial review of a decision of the London Borough of Bexley to refuse to grant the applicant an award for financial assistance in order to attend university. She contended that the council had fettered its discretion when considering her case by not contemplating any exception to its policy.

57. Leggatt LJ said :-

> "It is, of course, legitimate for a statutory body such as the respondents to adopt a policy designed to ensure a rational and consistent approach to the exercise of a statutory discretion in particular types of case. But it can only do so provided that the policy fairly admits of exceptions to it. In my judgment, the respondents effectually disabled themselves from considering individual cases and there has been no convincing evidence that at any material time they had an exceptions procedure worth the name. There is no indication that there was a genuine willingness to consider individual cases. On the contrary, there is every indication of rigid adherence to their policy of refusing those eligible for discretionary awards on the grounds that the respondents would be obliged to make full awards and were not prepared to do so.
>
> The exceptions procedure was referred to by the respondents for the first time in answer to the applicant's application for judicial review. It looks as though when, for the purpose of drafting his affidavit, Mr Tyson was pressed to say how an exceptional case might have been dealt with, he gave an answer about the education secretary consulting the chairman of the relevant subcommittee. That, however, as I have already remarked, did not happen in this case. There is no indication that it ever has happened…

> I am not satisfied that the respondents had such a procedure in place at the time for the most obvious of all reasons that there was no prescribed method of eliciting exceptional circumstances from applicants without which the procedure could not operate. The result is that the respondents fettered their discretion by adopting a policy from which no departure was contemplated of invariably refusing awards to applicants….".

58. Mr Wells also relied on the judgment of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 where, at paragraph 38, Lord Dyson held that "what must… be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made".

59. Mr Wells referred to *R v North West Lancashire Health Authority ex-parte A* [2000] 1 WLR 977. In that case, the Court of Appeal, dismissing a challenge to the quashing of a local authority's decisions and policy in respect of treatment for gender dysphoria, held that, although the authority had acknowledged gender identity dysphoria as an illness, its written policies and the evidence of its Director of Public Health and Health Policy indicated that the authority did not really believe the condition to be an illness and was sceptical of the notion that it required any medical treatment beyond psychiatric reassurance. That defect was not cured by the ostensible provision for exceptions in cases of overriding clinical need or other exceptional circumstances.

60. In Re Herdman's application for judicial review [2003] NIQB 46, Kerr J was concerned with the process for obtaining a firearms certificate in Northern Ireland. Kerr J held that "there must be a readiness to recognise exceptions to that policy if warranted by the specific circumstances of a particular case". That requirement was "not satisfied by a routine examination of the particular facts that arise in an individual application. There must be a rigorous enquiry as to whether those circumstances justify an exception being made to the general policy". The decision-maker must "scrupulously consider whether those circumstances warrant a departure from the normal rule". This need was "more critical where the policy erects a high – albeit not uncceptably so – standard" (paragraph 21).

61. For the defendant, Mr Jones relied upon the judgment of the Court of Appeal (Lord Dyson MR, Laws, Treacy LJJ) in *R (West Berkshire District Council and another) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441. At paragraph 17, Laws and Treacy LJJ (relying on a passage in *De Smith's Judicial Review*) held that "a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions". At paragraph 21, they said:-

> "It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion…, a policy may include exceptions … But the law by no means demands that a public policy should incorporate exceptions as part of itself".

Ground 1 : discussion

62. Mr Wells advanced the claimant's case in respect of ground 1 under three headings: (1) the defendant's "acknowledgement of a blanket policy" in its external and internal statements; (2) the defendant's practice in assessing export permit applications; and (3) the alleged inability of an applicant to identify how an export permit might be obtained. I shall address each of these in turn.

63. As would already be apparent, in the present case, we are not dealing with a written, self-contained policy statement. Dr Lockhart says in his witness statement:-

> "49. I note that the word "policy" can mean several things. For some products, there are written policies which the APHA decision-maker will essentially read and apply when faced with a relevant application. There is no such policy in relation to glass eels (or indeed eels more generally), which means that the decision-maker will not simply read and apply the relevant policy.
>
> 50. On the other hand, it is certainly right to say that there were at the relevant time, and remain, significant concerns about issuing export permits to areas of high illegal wildlife trade, in particular in East Asia. Those concerns would always be given (and were given in this case) significant weight given the substantial illegal wildlife trade as has been summarised above."

64. At paragraph 21, Dr Lockhart cited recent reports which estimate that as many as 350,000,000 live glass eels are trafficked to Asia every year and that they command substantial values. The illegal glass eel trade is estimated to be the most significant illegal wildlife trade from Europe in monetary terms. The illegal trade often originates from European source countries, going predominantly to China, where the bulk of eel aquaculture is located.

65. I find that *West Berkshire* is binding authority. The defendant was, therefore, entitled to express its policy publicly, without reference to any exceptions. If the position were otherwise, much of the purpose of a policy would be lost, whether in normative or informative terms. Insofar as there may be a conflict between *ex parte Jones* and *West Berkshire*, I am bound to follow the latter. That said, I do not, in fact, consider there is any such conflict between the cases. It is clear from Leggatt LJ's judgment that he was concerned by the fact that the respondents did not, at the relevant time, have any procedure in place of eliciting exceptional circumstances from applicants. That is not the position here, as I shall go on to explain in dealing with the second heading under this ground.

66. Mr Wells submitted that, even though a policy might in certain circumstances be articulated in absolute terms without infringing the prohibition on fettering discretion, this was not such a case. Because of the nature of the audience for the public statements of the defendant, those statements had, he said, to be taken at face value. It

would, in particular, be a breach of the good faith which the defendant owes to the EU if, in seeking to persuade the EU to allow trade between the UK and the member States in glass eels, the defendant declined to point out that, in fact, exceptions to its stance on exports of glass eels to Asia, can, in fact, arise.

67. In similar vein, Mr Wells said that the communications to MPs, which can be expected to have been subsequently shared by the MPs with their constituents, would have mentioned the possibility of exceptions, had there been one, since this would have been of obvious importance to those whose livelihoods depend, wholly or partly, on the harvesting of glass eels. A similar point could be made about the July 2019 presentation.

68. I am not persuaded by these submissions. The policy under consideration in *West Berkshire* was part of National Planning Practice Guidance. It was addressed to an audience, in particular local planning authorities, that one might equally have expected to be specifically told that the policy was, in fact, subject to exceptions. As a general matter, it would be wrong for this court to qualify the *West Berkshire* principle, according to the court's own view of what any actual or likely recipient of the policy statement might have expected to be told; or what the court thinks they should have been told. This concern is particularly acute in the context of international relations, such as those between the UK and the EU.

69. Accordingly, I find that the external statements (including the NDF) do not fall to be interpreted as the claimant contends; and so do not call into question the defendant's express statement in the first decision letter about the claimant's application being "decided on its own merits".

70. I do not consider that the claimant can derive any material assistance from the internal communications, disclosed by the defendant pursuant to the duty of candour. Although it is evident that they refer to the stated policy, without specifically referring to exceptions, it is equally evident that the correspondence was not saying that, because the claimant's application involved a proposed trade in glass eels with China, the application must be refused. On the contrary, it was said to be "prudent to consult Defra policy to consider whether this application should be refused under Article 5.2.d" of the Principal Regulation.

71. I do not accept that, as a matter of ordinary language, the reference to "Defra policy" is to the various statements mentioned above. It is obvious that what is being referred to is a unit within Defra that deals with relevant policy matters. As the claimant's own skeleton argument points out, the "CITES management authorities are DEFRA for policy and the Animal and Plant Health Agency (APHA) for the issue of permits and certificates". In short, APHA was not, at this point, taking the decision.

72. In contending that the defendant's public or external statements do not demonstrate the defendant has fettered its discretion, Mr Jones drew attention to the letter of 19 February 2021 from the claimant's solicitors to the defendant. Having referred in detail to those statements, the letter says: "We accept, of course, that the UK Government has not confirmed that it is adopting a blanket policy of refusing any application to export glass eels to anywhere in Asia". The letter contended that if the government were to "adopt the blanket policy referred to, and if it were to refuse to consider our client's application on its individual merits, then we consider that there

would be the strongest grounds for challenging the adoption of such a policy by way of judicial review".

73. Mr Jones submitted that this was a clear indication that the statements in question have not been treated by the claimant's legal advisors as having the effect now claimed. Mr Wells responded that this letter was written before the initiation of the present judicial review and the disclosure that has ensued from it. That is, of course true. However, for the reasons I have given, the internal communications do not materially assist the claimant. The letter of 19 February 2021 accordingly serves to reinforce the defendant's case that the external statements are not capable of bearing the meaning which the claimant now seeks to ascribe to them.

74. My examination of the internal communications takes us into the second of Mr Well's headings under this ground; namely, how the applications were dealt with. I have already explained why I do not consider the express statement, in the decision of 12 March 2021, to the application being decided "on its own merits" falls to be questioned in the light of the defendant's external statements.

75. I have earlier set out the relevant passages from the decision letter of 12 March 2021. The defendant submits, and I agree, that this decision needs to be read along with the second decision dated 28 May 2021, given their closeness in time and subject matter. This also enables the claimant to advance its case in respect of the evidence concerning Ms Yu.

76. Mr Wells criticises the letter of 12 March 2021 for addressing the issue with what he says is a high level of generality. I find that criticism to be misplaced. As the quoted passages make plain, the matters of concern to the defendant were articulated in some detail.

77. One of the documents referenced in the letter is the 2021 World Wildlife Crime Report of the UN.

78. The report includes the following:-

> "Eel products are legally produced and consumed in countries around the world. This legal market is relevant to a discussion of eel trafficking, because it is largely fed by aquaculture producers who may receive some of their glass eels stock from illegal sources. Unlike contraband like street drugs, there is no back-alley black market for eel meat products. Rather, similar to some other wildlife products, legitimate products can be tainted by illegitimate sources of supply."

79. This fits precisely with the external statements that, as we have seen, refer to the problems of permitting "trade" in glass eels destined for aquaculture because of the risk of "legal trade" from the UK being used as a cover.

80. The point was made in the 12 March 2021 letter, quoted earlier: "There is a risk that, were we to permit the proposed export to China, it may be used to mask a bigger illegal trade". Notwithstanding this, the claimant chose to focus on the physical "permit" which would be issued by the defendant, if consent were to be given for the

export of the glass eels to Ms Yu's company. It is, however, quite evident that the defendant's concern is, and always has been, the wider one that I have just described.

81. The claimant's focus upon the issue of the permit led it to attempt to address the security of that document, in its second application of 2021, accompanied by the claimant's letter of 23 April 2021 and the information concerning the probity of Ms Yu. I will return to that matter when addressing ground 2. As far as the present ground is concerned, it is evident that the first and second decision letters disclose a genuine analysis of, and engagement with, the claimant's applications and the reasons advanced for them, rather than any closed mind. The focus of the defendant's concerns - and hence its policy – was about lack of traceability and the consequent risk of using legally-imported glass eels to mask the illegal trade. The fact that the claimant chose to focus upon the security of any export permit which the defendant would issue did not mean that the defendant exhibited a closed mind when it was explained to the claimant why that issue did not meet the defendant's concerns.

82. Viewed in this light, the claimant's complaint about the uniformity of language used in the decisions, including the third decision, misses the point. Insofar as the defendant's concerns remained the same, there was nothing wrong in those concerns being expressed in the same or similar language.

83. By the time of the third decision, Ms Yu had provided a second witness statement, enclosed with the letter of 18 March 2022 from the claimant's solicitors, explaining that the original export permit would be provided to the Hong Kong authorities and retained by them. However, as the defendant's third decision letter reiterated, the proposed export to China could be used to mask products derived from illegal trade and provide cover for illegally acquired eels. As should by now be plain, this problem concerns the aquaculture stage; that is to say, the fish farms in China into which both legally and illegally obtained eels may be placed.

84. Mr Wells criticised the contemporaneous statement in the first decision that the decision had been taken on its merits. He also questioned the weight to be afforded to paragraph 51 of Dr Lockhart's witness statement, in which it is said that both the first and second applications were "considered on their merits considering in turn the four requirements in Article 5 and giving weight as APHA saw fit to concerns about traceability and illegal trade". Dr Lockhart's statement has, however, been compiled in accordance with the duty of candour, as have its exhibits. I have already explained why the external or public statements did not call into question the express statement in the decision letter of 12 March 2021 that the application had been decided on its merits. Standing back at this point and looking at matters in the round, I find the claimant has failed to show why paragraph 51 should not be taken at face value.

85. I do not consider that the *North West Lancashire* case offers the claimant any material assistance. The essential problem in that case was not the existence of a process for considering exceptions but the policy itself, which did not reflect the authority's medical judgment. As for the judgment of Kerr J in *Re Herdman's application for judicial review*, one must be cautious about extrapolating from context-driven judicial statements about the need for "rigorous enquiry" and the like any general legal principle, capable of bearing upon a very different case, such as the present. The key question remains whether, on the facts of the particular case, the decision-maker has

failed to "keep its mind ajar" by "shutting its ears" to the application (*De Smith* paragraph 9-002).

86. Objectively read, the decisions, and the external and internal statements, do not disclose such a state of affairs.

87. I turn to the third aspect of the claimant's ground 1. This focusses on the statement of Males LJ, when granting permission, that "if there is indeed no general policy, it is difficult or impossible for the applicant to know what it must do in order to obtain a licence". It appears that the "general policy" he had in mind is a policy "not to permit sales of glass eels at all to Asia/East Asia, or at any rate China" (paragraph 1 of the Court of Appeal's reasons).

88. It is important to appreciate that the Court of Appeal envisaged that the Administrative Court would determine "the facts as to the existence or otherwise of such a policy", in considering the claim "in the light of those facts". This is the task I have undertaken.

89. Mr Wells relied in this regard on *Lumba;* in particular, paragraph 34, where Lord Dyson stated that the rule of law "calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised"; paragraph 35, where he held that the individual "has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt, provided that the adopted policy is a lawful exercise of the discretion conferred by statute"; and paragraph 38, where Lord Dyson held that "What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made".

90. Mr Wells also relied on *ex parte Jones* where, as we have already seen, Leggatt LJ made reference to the need for a procedure, whereby an applicant can meaningfully approach the decision-maker with a view to advancing why the applicant should be made the subject of an exception to the decision-maker's policy.

91. Mr Wells was particularly critical of paragraph 55 of Mr Jones' skeleton argument. In paragraph 55, Mr Jones submitted that the defendant did not conduct a detailed review of Hong Kong/Chinese law because it was not seeking to identify precisely why and how the Chinese system is failing in respect of the illegal trade in glass eels. Mr Jones said that doubtless this is a highly complex issue; but the simple fact, however, is that China lies at the centre of the illegal global trade in European glass eels and, as a result, the system is "evidently failing in some way".

92. Mr Wells categorised this as requiring the claimant to "chase at shadows". There was, he said, no evidence of any guidance or assistance being given to applicants to show how they might be able to obtain a permit, notwithstanding the policy.

93. I have already explained why I do not consider that *ex parte Jones* assists the claimant. In the present case, there is plainly a procedure that is designed to elicit from an applicant why they should be given permission to export glass eels to China, notwithstanding the defendant's policy and the serious and legitimate reasons underlying it. In this regard, it is noteworthy that, as I have already referenced, the

first decision says that the defendant "will consider future applications and would encourage applicants to provide further relevant information that addresses the rationale for the above decision". The second decision ends by saying that "I trust that the above is clear, but if you do have any queries, please do not hesitate to contact me". The same words occur at the end of the third decision letter.

94. The claimant complains that its own offers to discuss have not been taken up by the defendant. The present proceedings are not the forum to address the merits of any such concerns. The overarching point is that dialogue between applicant and defendant was specifically envisaged by the defendant.

95. *Lumba* was about the need for those in immigration detention to know about an unpublished policy operated by the Secretary of State for the Home Department, concerning the circumstances in which a person's detention might be ended (or not). *Lumba* is not authority for the proposition that where, as here, the policy in question is publicly known and (as I have held) lawfully expressed in absolute terms, the operator of that policy must publish guidance explaining in what circumstances a person may be able to establish a case why they should not be subject to that policy. Were the position to be otherwise, that part of the judgment in *West Berkshire,* which I have referenced above, would be *per incuriam.* The claimant has failed to show anything in *Lumba* which demands such a surprising conclusion.

96. At paragraph 52 of Dr Lockhart's witness statement, he gives a list of circumstances in which he can in principle conceive that export permits for European eels to Hong Kong and mainland China might be approved in the future, albeit that these would still need to be assessed on their own merits. These circumstances include:

    a) Cases where the movement was for scientific, research or other non-commercial purposes;

    b) Cases where the specimens would be held in separate aquaculture facilities within a demonstrably secure and reliable traceability system;

    c) Cases where more information on the supply or production chain was provided to address the concerns detailed above;

    d) Cases where the application was concerned with adult eels, rather than glass eels (and so the impacts of masking and traceability issues would be far lower); or

    e) Cases where the eels would be shipped dead for human consumption.

97. At paragraph 53, Dr Lockhart also expects that any wider, systemic improvements in the enforcement, handling and treatment of the illegal wildlife trade in Hong Kong and mainland China could lead to a different determination on an export application.

98. Examples b) and c) of Dr Lockhart's non-exhaustive list are, plainly, of relevance to the claimant, which seeks a commercial outlet for live glass eels. Mr Wells says that, nevertheless, the claimant does not know how it can in practice overcome the defendant's concerns. I accept the task of demonstrating that an applicant can, for example, satisfy paragraph b) or c) may well be difficult, even very difficult. That

does not, however, mean the defendant's willingness to consider such cases (or, indeed, others yet unarticulated) is anything other than genuine.

99. This brings me to an important point made in oral submissions by Mr Jones. The amount of flexibility in a particular policy, such as the one with which we are concerned, depends on what aspect of the policy is under scrutiny. In the present case, the defendant's policy does not comprise a worldwide ban on the export of glass eels. This is graphically demonstrated by the fact that the claimant has been given permission to export glass eels to Russia, although it has only been able to do so to a very limited extent because of difficulties arising from Russia's invasion of Ukraine.

100. There is also, as I have found, no absolute prohibition on the export of live eels to Asia, including China. In this regard, I refer particularly to paragraph 52 of Dr Lockhart's statement, regarding the possible export of live adult eels, in respect of which the impacts of masking and the traceability issues would be far lower than in the case of glass eels.

101. The claimant's focus is on that aspect of the policy which concerns the export of glass eels to Asia for commercial use in aquaculture. However, as Mr Jones points out, the narrower one frames the aspect, the more difficult it is likely to be for an applicant to show that an exemption should be made to that aspect of the policy. I have said that bringing oneself within one of the examples given by Dr Lockhart could well be very difficult. That difficulty, however, is not to be equated with the defendant's having a closed mind or an otherwise overly-rigid approach, amounting to a fettering on discretion. Were the position otherwise, then as Mr Jones says, the claimant's case becomes, in practice, nothing less than that the defendant must give the claimant a permit.

102. Ground 1 accordingly fails.

Ground 2

103. Ground 2 alleges that the defendant was required to make a judgment concerning the identity, good faith and trustworthiness of Ms Yu or Koltai International Limited and that the defendant's failure to do so renders the impugned decision unlawful by reason of a failure to take account of a relevant consideration.

104. The claimant submitted that, on the defendant's own reasoning, it was clear that the identity, trustworthiness and good character of the specific Asian importer were matters of fundamental importance, which had to be taken into account in considering the export permit application. In the first decision letter, the defendant confirmed that it did not have any concern that an export permit would be used to facilitate illegality in the United Kingdom. As I have already been at pains to state, what troubled the defendant was the risk that, were the proposed export to China to go ahead, it might be used to mask a bigger illegal trade.

105. The claimant points to the fact that the defendant accepts, for the purposes of these proceedings, that the identity, trustworthiness and good character of the specific importer constitute a relevant factor and that it did take the information into account. As a result, the only challenge which the defendant says can be made is one on *Wednesbury* grounds as to the weight which the defendant gave to that information.

106. The claimant says that this cannot be right. The claimant points to what it describes as the "bare statement" in the second decision letter that "We note the additional information provided in your letter of 23 April …". However, the claimant says that this information was not even referred to, let alone discussed or assessed within the contemporaneous internal documentation disclosed by the defendant.

107. The claimant also points to the defendant's protocol response letter of 23 July 2021. In that letter, the defendant said :-

> "…you go on to say that since APHA has not made any attempt to question the good faith and trustworthiness of Ms Yu or Koltai International Ltd it must follow that it has no credible doubts about them. APHA's concern is systemic, not linked to any particular individual. As your client is aware from its knowledge of the framework in this country, preventing illegal trade requires a robust traceability system so that eels can be tracked and monitored at every stage of the chain, which may involve many individuals and many different legal entities. Having confidence in one individual is not sufficient.
>
> Furthermore, and for the avoidance of doubt, APHA has not reached any judgment regarding Ms Yu or Koltai International Ltd. It does not need to, because its concern is more general but if the application *did* depend, as you suggest, on reaching a judgment about the trustworthiness of particular individuals in other jurisdictions, that would impose a remarkable burden on APHA, which would not rely simply on assertions made by an applicant".

108. The claimant argues that this means the defendant did not form any view about the trustworthiness and good faith of the proposed importer. The matter is not, as the defendant suggests, one of apportioning weight to established facts. The defendant has failed to establish the relevant facts in the first place. The defendant cannot say, at one and the same time, that it has formed no view on whether or not the importer is trustworthy, but that it has nevertheless taken their trustworthiness into account.

109. In his oral submissions, Mr Wells drew attention to the parties' agreed list of issues, submitted shortly before the hearing. Item 2 of this list says that the parties "agree that '*the position of the importer*' is a relevant factor in deciding whether or not an export permit should be granted". The agreed question is whether "the defendant's decision to refuse the grant of an export permit [was] vitiated by a failure to consider and take into account the identity, character and trustworthiness of the proposed individual importer".

Ground 2- discussion

110. Clearly, the decision letter of 28 May 2021 did have regard to what was being said by the claimant about Ms Yu and Koltai International Ltd. The letter states that "we note the additional information provided in your letter of 23 April…". The letter then went on to make plain that the defendant did not consider this addressed the defendant's "concerns with issuing a permit to allow export of UK glass eels to Hong Kong".

Having explained those concerns again, in terms of the proposed export being "used to mask products derived from illegal trade and/or to provide a cover for illegally acquired eels to be sold on within China or re-exported", the letter then said that "We note your comments about reputation and track record of the proposed importer", before explaining that this could not "offset our concerns over the lack of robust traceability systems in China that could provide assurance over the use and end destination of any glass eels exported from the UK".

111. The duty to have regard to a relevant consideration was, thus, fulfilled. The flaw in the claimant's case is to assume that that duty required the defendant to go further and reach its own view on the probity of Ms Yu and Koltai, even though the defendant had given an entirely rational reason why this was unnecessary.

112. Accordingly, the asserted illogicality in the defendant's stance simply does not exist. Although "the position of the importer" was a relevant factor, the defendant discharged its duty to have regard to it by *noting* what the claimant had to say on the subject. In the circumstances, the defendant did not need to do more.

113. Ground 2 accordingly fails.

Ground 3

114. The claimant relies upon *ex parte Balchin* where, as I have already observed, Sedley J described the challenge based on "irrationality" as one which involves demonstrating that the impugned decision "does not add up" because "there is an error of reasoning which robs the decision of logic" (paragraph 13). The claimant says that the failure in the defendant's reasoning is that, in the first decision, the alleged concern was about the possible misuse of the export permit, which the defendant would issue to the claimant and which would be provided to the importer in Hong Kong; whereas the defendant's second decision involved concerns over the lack of robust traceability systems in China. The claimant says that there is no causal relationship between the two, since the risk of an export permit being misused depends upon the honesty and trustworthiness of the individual importer. It does not, the claimant says, depend on general levels of traceability within the system.

115. The claimant submits that one can test the matter in the following way. If one posited an honest trader and accepted that the system in which the trader operates has a flaw which could be dishonestly exploited, the existence of that flaw does not mean that the honest trader will suddenly decide to act dishonestly and illegally. The claimant says that the defendant's reasoning says otherwise.

116. There is a further aspect to ground 3. In the decision letter 12 March 2021, the defendant expressly said that "We take a precautionary approach" in considering applications for export permits "for trade with countries of illegal wildlife trade concern regarding eels, such as China". In the second decision letter (28 May 2021), the defendant's concerns were, likewise, expressed in terms of "risk", together with the sentence: "We take a precautionary approach".

117. The claimant submits that the application by the defendant of what it categorises as the "precautionary principle" was wrong. The defendant's concerns have not, in fact, been clearly explained and have no proper evidential basis. The precautionary

principle does not enable a decision-maker to proceed on the basis of mere assumptions or hypotheses. It does not remove or restrict the obligation to make reasonable enquiries as to facts.

118. In this regard, the claimant relies upon the judgments of Lords Reed and Toulson in *R (Lumsdon) v Legal Services Board* [2016] AC 697 where, at paragraph 57, it was held that the precautionary principle enables a decision-maker to "take protective measures without having to wait until the existence and gravity of the risks became fully apparent"; but that it does not permit the assessment of risk to be "based on purely hypothetical considerations".

119. In the same vein, the CJEU found in *FMC Corporation v European Commission* (Case T-719/17) that "a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified" (paragraph 69). Mr Wells submitted that the precautionary principle does not remove or restrict the well-established common law duty on decision-makers to ask the right questions and take reasonable steps to acquaint themselves with the relevant information: *Secretary of State for Education v Tameside MBC* [1977] AC 1014, 1065.

120. The claimant's contention that the defendant relied on conjecture, as opposed to evidence, in reaching the impugned decision brings me to the issue of Ms Yu's third witness statement, dated 21 October 2022. Mr Jones objected to reliance being placed by the claimant on this third statement, as well as the second witness statement of Mr Wood, dated 21 October 2022. For his part, Mr Wells pointed to the consent order of 4 October 2022, in which the claimant was given "permission to file and serve evidence in reply to the defendant's detailed grounds and written evidence".

121. I find there is an aspect of both of these witness statements (particularly that of Ms Yu) which I consider to be properly responsive to a matter raised by the defendant in its decision-making. In Ms Yu's second witness statement of 30 September 2021, the defendant understood her to say that she could obtain a CITES re-export permit from the Hong Kong authorities without those authorities making any reference to the original UK export permit. Ms Yu explains in her third witness statement why that is not correct.

122. Ms Yu's third witness statement also describes the way in which CITES operates in Hong Kong and, more generally, China, exhibiting an application form that she says would have to be submitted to the Agriculture, Fisheries and Conservation Department in Hong Kong, together with an application form that would need to be obtained by an importer on mainland China. Amongst the information to be supplied in that application is the country/region of previous export, CITES permit number and issue date. Ms Yu also contends that the Chinese/Hong Kong authorities are "doing enough to identify and punish glass eel smugglers". She gives details of relevant convictions of illegal traders.

123. In the circumstances, I consider that I should have regard to Ms Yu's third witness statement, insofar as it deals with these issues. I say so because the issues are properly referable to the challenge in ground 3, which asserts the defendant acted irrationally by relying on conjecture, rather than evidence, about the position regarding glass eels in China.

124. Much of Mr Wood's second statement is, however, of a different order. It seeks to take issue with Dr Lockhart's views about the degree of endangerment of the European eel. Notwithstanding Mr Wood's experience and expertise, that is not a matter which is relevant to any of the grounds of challenge.

Ground 3 – discussion

125. I deal first with the "*Balchin*" issue. As I have already held in respect of ground 1, there is no gap in logic or other defect in reasoning in the first and second decisions. The defendant's concerns have always been, first and foremost, that permitting exports of glass eels to Hong Kong/China would provide opportunities for those engaged in fish farming to mask the product derived from illegal trade and/or provide cover for illegally acquired eels to be sold on. There is, accordingly, no question of the defendant's position depending upon the honest trader suddenly deciding to act dishonestly and illegally, as the claimant suggests.

126. I turn to the precautionary principle. Despite Mr Wells' valiant efforts, I find that this aspect of ground 3 also misses the mark. The precautionary *principle*, in the sense described in the cases upon which Mr Wells relies, is, in essence, about what a decision-maker may do, when faced with scientific uncertainty about a relevant matter. In the present case, there is no pleaded disagreement with the defendant's stance that the European eel is seriously threatened. Nor can there be, given the European eel's position under CITES.

127. The claimant's criticism is, in reality, that the defendant has adopted a precautionary *approach* to the risks faced by the European eel as a result of the illegal trade in glass eels to Asia, specifically China. There is no indication in the defendant's decision-making that the defendant has mistakenly applied the precautionary principle, in its proper sense, to this matter.

128. In *R (FACT Ltd) v The Environment Secretary* [2020] 1 WLR 3876, the Court of Appeal, in a case involving export restrictions on ivory, robustly rejected the criticisms of the first instance judge for applying what the judge described as the precautionary principle. One of the grounds of challenge was that the precautionary principle was said to be capable of being used only where the means employed to mitigate a risk could be established, by reference to strong contemporaneous scientific evidence, so as to have a proper causal relationship or nexus to the achievement of the mitigation of the risk in question, as to which there was no such evidence.

129. The Court of Appeal said:-

> "88. We disagree. We start with nomenclature. Criticising the Judge for using the expression 'the precautionary principle', when it had not been used by the parties, misses the point and elevates form over substance. The Judge did use the language of the precautionary principle in the context of the common ground fact that the elephant population in Africa was dramatically threatened by the demand for ivory and that CITES, and other international and national measures, had failed to prevent wide scale poaching. The need for stringent

> action was acknowledged at the international level, and the actions taken by Parliament were directed towards that risk.
>
> 89. It is wrong to overstate Defra's case. It has never been said that the Act can make more than a contribution to the mitigation of the risk; nor is it claimed that the UK acting alone can succeed in resolving the problem; and nor has it been claimed that there is a neat, clear and direct, causal connection between the trading bans in the Act and achievements of the goal of mitigation of the risk of extinction of the African elephant. What matters is and whether there is an identified risk and there is a connection between the action taken and the risk…."

130. So too here, albeit that (unlike in *FACT Ltd*) the defendant's decisions did not even use the expression "precautionary principle". The threat to the European eel posed by illegal exports to China has been recognised by the United Nations. It has been recognised by the European Union. The causal connection in permitting an export in circumstances where there may be mixing of legally and illegally obtained glass eels by those involved in aquaculture is, frankly, obvious. It has led to the Republic of Korea taking the drastic step of refusing to accept any legal importation of glass eels.

131. I have already indicated that I consider part of ground 3 to involve the assertion that the defendant acted on conjecture, rather than evidence; and that it is relevant in this regard that China is a signatory to CITES and has procedures in place that are supposed to give effect to CITES. It is for that reason that I take account of the evidence from Ms Yu on that matter, contained in her third witness statement.

132. Having done so, I do not find that the defendant acted irrationally or otherwise unlawfully in not engaging, as the claimant suggests it should have done, with the reasons why, notwithstanding the formal legal position in China, the problems identified by the United Nations and others nevertheless exist. The crucial point is that the problems *do* exist. The regulatory regime in China is not performing as it should. The reasons for this are immaterial. Contrary to what is asserted in Mr Wood's second witness statement, the defendant did not need to obtain "its own first-hand evidence of import/export practices in Hong Kong/China". Even if the defendant could identify ways in which the regulatory regime in China could be strengthened or improved, the power to effect change does not lie with the defendant.

133. Accordingly, the only thing the defendant can do at the present time is, as Dr Lockhart's evidence indicates, to maintain its policy, whilst remaining alive to the possibility of granting export permits where the defendant can be satisfied that the risks inherent in the current situation in China can be adequately addressed, such as in the examples given in paragraph 52 of Dr Lockhart's statement. In addition, as Dr Lockhart says, if and when there are systemic improvements in Hong Kong and mainland China, the defendant will respond appropriately.

134. I agree with Mr Jones that, as Ms Yu and others assert, the fact there may be problems with the EU's own systems, given that the illegal glass eel trade tends to start in the EU, is not an answer to any of the above. Two wrongs do not make a right.

135. Ground 3 accordingly fails.

H. DECISION AND CONCLUDING REMARKS

136. Each of the grounds has failed. This judicial review must, accordingly, be dismissed.

137. Like the defendant, I wish to acknowledge both Mr Wood's expertise and his concern for the sustainability of glass eels. I further acknowledge that fishing for glass eels in the River Severn and the River Parrett, as permitted by the defendant, does not, in itself, threaten the survival of the European eel; and that the provision of glass eels for re-stocking, such as in the fishery at Lough Neagh, is beneficial. Also like the defendant, I acknowledge the anxiety that has been caused to those who work for the claimant, and those who fish for the glass eels, since the withdrawal of the United Kingdom from the EU and the consequent loss of the market for glass eels in EU member States. The task of this court is, however, to determine whether the challenged decision was unlawful, applying public law principles. For the reasons I have given, it was not.

138. I invite the parties to agree, if possible, an order which reflects this judgment and any consequential matters. In that regard, I draw attention to the consent order sealed in the Court of Appeal on 18 January 2023 on the issue of costs.