THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2020/232
High Court Record No. 2019/316 JR
Neutral Citation No. [2022] IECA 165

APPROVED
NO REDACTION NEEDED

Murray J.
Donnelly J.
Ní Raifeartaigh J.

BETWEEN

TOM KENNEDY AND NEIL MINIHANE

APPLICANTS/RESPONDENTS

– AND –

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 19th of July 2022

Contents

***The issues*……………………………………………………………………..1**

The background

***(a) The applicants*……………………………………………………………6**

***(b) The consultation process*………………………………………………..10**

***(c) The decision*…………………………………………………………...22**

Issue One: The Common Fisheries Policy

***(a) The argument*…………………………………………………………...28**

***(b) The trial judge's assessment*……………………………………………40**

***(c) Articles 19 and 20*……………………………………………………….46**

***(i) Application of Article 19*………………………………………………..52**

***(ii) Effect of notification obligation in Article 19*………………………72**

***(iii) Application of Article 20*……………………………………………..76**

***(iv) Northern Irish vessels*…………………………………………………..78**

***(v) Effect of non-compliance with Article 20*……………………………90**

Issue Two: Section 3(3)

***(a) The argument*…………………………………………………………….96**

(b) *The trial judge's assessment*……………………………………………....**102**

(c) *Analysis*…………………………………………………………………**107**

Issue Three: Reasons

(a) *The argument*……………………………………………………………..**121**

(b) *The trial judge's assessment*……………………………………………....**123**

(c) *Analysis*…………………………………………………………………**126**

Issue Four: Disproportionate interference with the applicants' rights

(a) *The argument*……………………………………………………………....**135**

(b) *The trial judge's conclusions*……………………………………………..**142**

(c) *Analysis*…………………………………………………………………**145**

Issue Five: Consultation rights

(a) *The findings of the trial judge*…………………………………………….**158**

(b) *Analysis*…………………………………………………………………**168**

Conclusion………………………………………………………………………..**186**

The issues

1. Section 222B of the Fisheries (Consolidation) Act 1959 applies to certain '*sea-fishing boats'*. It prohibits the use of such a vessel for sea-fishing – whether within the exclusive fishery limits of the State or otherwise – save in accordance with a licence granted in relation to the boat in question. A person who uses a sea-fishing boat in contravention of this prohibition is guilty of an offence. The licencing authority is the Registrar General of Fishing Boats (or, acting under his or her superintendence, their Deputy). Licences may be granted for such period as he or she deems appropriate. In practice, they are generally granted for a period of one year and must be renewed annually.

2. Section 3(3) of the Fisheries (Amendment) Act 2003 ('*the 2003 Act*')[1] enables the respondent Minister ('*the Minister'*) to issue Policy Directives requiring certain prohibitions or conditions to be imposed on sea-fishing boat licences. That power may be exercised *inter alia* for the purpose of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species or the rational management of fisheries

3. On 5 March 2019 the Minister issued such a Policy Directive. It was styled Policy Directive 1 of 2019 ('*the Policy Directive'*). This provided that from 1 January 2020, sea-fishing boat licences issued to vessels over 18 metres length overall ('*LOA*') were precluded from operating trawl or seine nets inside the 6-mile nautical zone[2], including

[1] As amended by s. 99(3) of the Sea-Fisheries and Maritime Jurisdiction Act 2006.

[2] Six nautical miles equates to a distance of approximately 11 km.

inside what are described as '*the baselines*'. The applicants – through companies in which they are interested – engage in trawl fishing within this area using vessels that are in excess of this length. In these proceedings they challenge the validity of the Policy Directive, seeking orders of *certiorari* quashing the Policy Directive, and various ancillary declaratory reliefs.

4. Insofar as relevant to this appeal, they argued as follows:

(i) That the Policy Directive is inconsistent with the Common Fisheries Regulation 1380/2013 ('*the Regulation*').

(ii) That the Policy Directive was outside the scope of the powers conferred by s. 3(3) of the 2003 Act because it was directed at the redistribution of fishing resources amongst fishermen this being (the applicants said) a purpose that was not permitted by s. 3(3).

(iii) That the Minister did not provide adequate reasons for his decision to issue the Policy Directive.

(iv) That the Policy Directive was irrational and/or amounted to a disproportionate interference with the applicant's property rights and their right to carry on a business.

(v) That the Policy Directive was made in breach of fair procedures.[3]

[3] Throughout, I refer to these as, respectively, issues one, two, three, four and five.

5. For reasons explained in a detailed judgment ([2020] IEHC 497), MacGrath J. granted a declaration that the Policy Directive was void and of no effect for the fifth of these reasons. The Minister has appealed that decision. MacGrath J. rejected the other four arguments. The applicants have cross-appealed that decision. In this judgment I explain why I have concluded that the trial judge was correct in his resolution of the second, third and fourth issues, and why he erred in his determination of the first and fifth.

The background

(a) The applicants

6. Each of the applicants has been involved in the fishing industry for over thirty years. Mr. Kennedy fishes from Dingle and Mr. Minihane from Castletownbere. A company (Dingle Fishing Ltd.) of which both are shareholders and directors owns '*The Celtic Quest'* while a second vessel, '*The Fiona K III',* is owned by Tom Kennedy Fishing. This is an unlimited company of which Mr. Kennedy is a director and in which he is a shareholder. Ocean Venture II Fishing – of which Mr. Minihane is a director – is the owner of '*The Ocean Venture II'* a third vessel which is said to be affected by the Policy Directive.[4] Each of these vessels is in excess of 18 metres in length,[5] and would – if the Policy Directive is lawful and its terms are adopted in the sea-fishing licences issued

[4] A standing based objection arising from the fact that the vessels are owned and the relevant licences held by limited companies was not pursued in the High Court and, therefore, was not in issue before this court. In *Fitzpatrick v. Minister for Agriculture* [2018] IEHC 772 Ní Raifeartaigh J. rejected a similar objection in the context of challenges to decisions affecting sea-fishing licences issued to bodies corporate in which the applicants in those proceedings were interested. This court expresses no view on that issue in this appeal.
[5] *The Fiona K III* is 24.46 m, while *The Celtic Quest* is 18.2 m.

in respect of them – be precluded from operating trawl or seine nets inside the 6 nautical mile (nm) zone and/or '*the baseline'*.

7. The area captured by this exclusion is extensive. The baseline is the low water line along the coast as marked on officially recognised large scale charts, [6] with the State's territorial seas extending out to 12 nm therefrom. Where there are deep indents in the coastline (as there are in the areas on the west coast of the country from which the applicants' vessels fish), baselines are drawn in straight lines from headland to headland. As a result, from some ports in that part of the country a sea-fishing boat may – if not permitted to fish within that zone – be required to travel up to 50 km to exit the 6 nm zone. [7]

8. The imposition of such a condition, the applicants say, would seriously damage their business. For nine months of the year they trawl for fish outside the 6 nm zone. For the last three months of the year '*The Celtic Quest'* and '*The Fiona K III'* trawl in tandem within that zone for herring, bull mackerel and sprat (the first two of which, but not the third, are subject to fishing quotas). The applicants say that they conduct their business in this way because during these months there are no other substantial fishing opportunities – in particular for sprat – available to them.[8] 95% of sprat is caught within the 6 nm zone, where this species shoals.

---

[6] They are set out in the Maritime Jurisdiction (Straight Baselines) Order 2016, S.I. No. 22 of 2016.

[7] The consultation paper explains that it focussed upon the 6 nm zone because the seas between 6 and 12 nm are subject to certain access rights for other Member States based on historic fishing patterns.

[8] The reason for this goes back to the quota system. Mr. Minihane explains in his second affidavit that quotas are issued on 1 January each year for mackerel and horse mackerel. These are substantially used by 17 March. From there the vessels target demersal fish such as sole, plaice, monk fish and hake. These are monthly managed by quota, the quota diminishing by the month. A substantial part of the quota is used by 31 July. Tuna are fished over three months from August. So, by the time the applicants have reached the last three months of the year, there is little quota available to them. Sprat, as I have noted, are not subject to quota.

9. On the basis of this business model, the applicants say, they have invested heavily in their vessels. They say that they have incurred bank borrowings secured on the boats and on personal guarantees they have given for those borrowings. In that context, they aver, fishing within the 6 nm zone represents around 25% of their overall catch, the most important part of which is sprat. They say that they will not be able to replace this 25% catch if the Policy Directive is lawful and is implemented. They claim that they relied upon their continued ability to fish in this way when they acquired their vessels and incurred the financial liabilities associated with them: for example, Mr. Kennedy says that the *Fiona K III* was designed at 24.43 m on an assumption that at that length it would be able to trawl within the 6 nm zone.

(b) The consultation process

10. Prior to the promulgation of the Policy Directive, there were some limited restrictions on fishing by certain vessel sizes within 3, 6 and 12 nm of the baselines. In some cases, restrictions were applied in localised areas as to the type of fish being targeted or the type of fishing gears that could be used. These restrictions, by and large, were directed to vessels in excess of 27.43 m in length, and in some cases, 36.58 m.

11. In 2017 the Minister requested Bord Iascaigh Mhara ('*BIM*')[9] and the Marine Institute ('*MI*') [10] to prepare reports to inform his consideration of access within the 6 nm zone. He sought from these bodies an analysis, from existing data sources, of the extent and

[9] Bord Iascaigh Mhara is established pursuant to the Sea Fisheries Act 1952, and is responsible for the development of the State's seafood industry.
[10] The Marine Institute (Foras na Mara) is established pursuant to the Marine Institute Act 1991 as the State agency responsible for marine research, technology development and innovation.

impact (biological and economic) of trawling activity by vessels inside that zone. The resulting document from BIM was entitled '*Economic analysis of trawl and seine fisheries within the Irish 6 nautical mile zone'*. The MI delivered two reports (a '*Fishing Patterns'* report and a '*Trawl Fishing Study'*).

12. The BIM report concluded that if vessels exceeding 18 metres in length were precluded from fishing in the 6 nm zone there would be little, if any, effect on herring fishing, while in the case of sprat, harvesting would be reduced by 98%. The report also concluded that such an exclusion would have an insignificant effect on vessels of that class: the class of vessels over 18 m in length was dependant on the 6 nm zone for only one species: sprat, and the negative impact from the exclusion of this class would be €1M, which is half of one per cent of the length class's total value. The MI Report on Fishing Patterns for vessels greater than 15 m in length noted that two vessels over 18 m in length targeting pelagic fish had been identified as deriving more than 15% of the value of their landings from inside 6 nm. The applicants said (and the trial judge agreed) that this was a reference to their boats. When the reports were received, the Minister wrote directly to the Fish Producers' Organisation, the Irish Fish Processors and Exports Association and the National Inshore Fisheries Forum, inviting feedback.

13. Then, on 29 April 2018, the Minister published a consultation document entitled '*Public Consultation on a Review of Trawling Activity inside the 6 Nautical Mile Zone'*. The three reports were appended to that document. At the time the document was launched, the Minister made a public statement. He said the following:

> '*The Government has committed to the development of the inshore sector in the current Programme for a Partnership Government. The programme identifies*

a number of methods for supporting the sector, such as ensuring smaller inshore boats are given new opportunities for commercial fishing'

14. He continued:

'*I want to support new initiatives that will strengthen the economic and social underpinning of our valuable coastal and island communities. This consultation process provides an opportunity to examine the case for giving priority access to our inshore vessels within the 6 mile coastal zone and in addition better support the eco-system in inshore waters.'*

15. The stated purpose of the consultation was in the light, amongst other things, of the three reports and the requested feedback the Minister had received, to '*undertake a comprehensive and formal examination and review of access to waters inside Ireland's 6 nautical mile zone, including inside the baselines'*. The document explained that the MI and BIM reports indicated that vessels under 12 m have a very high reliance on fishing inside the 6 nm zone and baselines. It said that the MI report also set out that in the case of vessels between 12 and 15 m, the value of landings is 52%, which would indicate a majority reliance on these waters. On the basis of this data, it was explained, the Minister was focussing on the activities of vessels over 15 m trawling within the 6 nm zone and baselines.

16. The information provided in the BIM and MI reports was further elaborated upon in the consultation paper. It was explained that if the value of the catch foregone by the over 18 m sector inside the 6 nm was taken up directly by vessels under 18 m, it would represent an increase of €5.5M to vessels under 18 m. This, it was said, amounted to a

reduction of 2.6% in value to vessels over 18 m. As the value of the then current landings by vessels under 18 m was €8.96M, adding an additional €5.5M represented a gain of 62% for vessels under 18 m. It noted, however that a number of factors would influence this, such as a difference between fishing activity for pelagic and demersal species for smaller vessels, whether the species is controlled by quota or not, and the capacity of the over 18 m to catch landings of the same value, especially of quota species, outside 6 nm.

17. The consultation document canvassed issues comprising improved security and economic opportunities for smaller vessels, the risk of environmental impact from trawling, the re-establishment of links between local fish resources, local fleets and local economies, conflicts between mobile and static fishing gears where trawl fishing was permitted, improving the availability of fish in inshore waters, the protection of fish recruitment and stock components, and the improved management of inshore waters. It explained that the Minister had decided that there was a case for review of policy and trawling activity inside the 6 nm zone including inside the baselines. It identified three options. These were:

(a) No change to the status quo;

(b) Exclusion of all vessels using trawls over 18 m in length from inside 6 nm and the baselines;

(c) Exclusion of all vessels using trawls over 15 m length from inside 6 nm and baselines.

18. The paper recorded that '*[a]ny proposed changes in access arrangements for larger vessels inside 6nm could potentially lead to improved protection of coastal environments, ecology and essential fish habitat. There is also a potential net increase to smaller vessels with respect to the number of fishing vessels, jobs and added value of the catch that could be derived from such new arrangements.'*

19. Over 900 submissions were received by the Minister in response to the consultation paper. The evidence is that these were '*significantly in favour of the proposed change'*.[11] Mr. Kennedy and his son and Mr. Minihane (through the agency of the Irish South and West Fish Producers Organisation) were amongst those who made representations as part of the process. Between them, they criticised the BIM and MI reports. They said that if the exclusion suggested in these documents became policy, this would mean that vessels along the coast may in some cases have to travel 40 to 50 kilometres from their home ports to fish. They argued that this would result in economic collapse for some vessels and indeed a potential loss of life due to the economic pressures arising for some from such a change. They said that persons had traditional fishing rights and that to exclude one citizen over another based on vessel length without providing any reason for so doing was seriously flawed. The absence of any analysis of fishing activity within the 6 nm zone by reference to different methods of fishing was criticised, as was the asserted absence of and/or flaws in, data and scientific evidence supporting any change. The reports referred to in the consultation paper were described as '*flawed'* and '*very biased'* and the consultation document was said to reflect an '*agenda'*.

[11] Marine Institute Rebuttal Report at p. 4.

20. The submission of the South and West Fish Producer Organisation – upon which Mr. Minihane relies – contended that the consultation process had been embarked upon in the absence of reliable scientific data, without identification of any clear objectives that are or may be in accordance with the social and economic objectives of the Common Fisheries Policy (‘*the CFP*’), was in error in relating solely to fishing activities within the 6 nm zone, and that the consultation process was using flawed data and scientific information, mixing up waters and fish stocks that were and were not subject to the CFP.

21. The text of the consultation paper explained at various different points the purpose of the exercise. The applicants claim that the terms in which this was done generated an obligation on the part of the Minister to follow the consultation process initiated by him with a further and second consultation when he settled upon a provisional policy. I will address the terms in which it is said that these representations were made, later in this judgment.

(c) The decision

22. On 4 December 2018 a briefing note was submitted to the Minister by officials in his department. That note expressed the view that environmental, economic and gear conflict issues pointed towards some restrictions. It said that excluding vessels of over 18 m from using trawls inside the 6 nm zone would present a significant economic opportunity to smaller inshore vessels and that increasing availability of sprat and possibly herring to such vessels would represent a substantial diversification

opportunity for them. The note observed that there were just 7 vessels out of 163 in the Irish fleet that were over 18 m in length and which obtained more than 15% of the value of their landings from inside the 6 nm zone. It described two of these as polyvalent vessels[12] targeting sprat and herring (these in fact being the applicants' boats). The briefing note recommended that trawling by vessels over 18 m in length inside the 6 nm zone and baselines be phased out in such a way as to allow the owners of those boats to prepare for the changes. The rationale for this conclusion was expressed as follows:

> *'excluding vessels over 18 m using trawls from inside the 6nm zone and inside baselines has significant potential to lead to improved protection for coastal environments, ecology and essential fish habitat. There is also potential for smaller vessels to yield a greater economic return, including jobs and added value from the catch opportunities that could be derived if larger vessels are no longer active in this zone.'*

23. On 6 December the Minister approved this suggested policy, and on 21 December the policy was announced. The announcement took the form of a document entitled '*Ministerial Decision Regarding Trawling Activity Inside 6 Nautical Miles'*. The announcement was in the following terms:

---

[12] '*Polyvalent*' vessels are boats that may fish for multi-species, and the '*polyvalent segment'* is that part of the fishing fleet targeting white fish, pelagic fish and bivalve molluscs. The other four segments of the fleet (two of which are broken into further subsegments) are Aqualculture (fish farming), Specific (bivalve), Beam trawl and Pelagic (fish inhabiting the water of coasts, open sea and lakes such as mackerel, herring and sardines).

'1. Following a full public consultation and careful consideration of the issues raised, my decision regarding the review of trawling activity inside 6 nautical miles is as follows:

1.1 From 1 January 2020 vessels over 18 LOA (Length Overall) will be excluded from trawling inside 6 nautical miles and the baselines, with the exception of trawling for sprat only, which will be phased out by 31 December 2021.

1.2 A total allowable catch of up to 2000 tonnes of sprat will be permitted for over 18 m LOA vessels inside 6 nautical miles and the baselines during 2020 reducing to 1000 tonnes in 2021, with all trawling activity by over 18m LOA vessels inside 6 nautical miles and inside the baselines being entirely curtailed from 2022 onwards.'

24. The following reasons were given for this decision:

'2.1 There is a compelling case for excluding trawling activity by large vessels in coastal waters inside 6 nautical miles. There are sufficient fishing opportunities for these vessels outside of 6 nautical miles. These actions will provide ecosystem benefits, including for nursery areas and juvenile fish stocks. These changes will also benefit small scale and island fishermen who exclusively rely on inshore waters.

> 2.2 *As the sprat fishery is concentrated inside the 6 nautical mile zone the transition period will allow those vessels involved in the sprat fishery time to transition to other fishing activities.'*

25. After the publication of the decision, a solicitor representing the applicants requested a meeting with the Minister. That request was refused, it being explained that the Minister had already decided on the matter following a public consultation open to all. On 5 March 2019, the Policy Directive was issued. It was in these terms:

> '*1. The Sea-Fishing boat licences of vessels over 18 metres LOA (length overall) shall include a condition to the effect that such vessels are precluded from operating trawl or seine nets inside the six nautical mile zone, including inside the baselines, from 1 January 2020.*
>
> *2. As a derogation from the above and without prejudice to an existing licence condition restricting access to this zone, the Sea-Fishing boat licence for Polyvalent segment and RSW Pelagic segment vessels over 18 metres LOA shall include a condition to the effect that such vessels are permitted to operate trawl or seine nets inside the six nautical mile zone, including inside the baselines, for the targeting of sprat only, up to and including 31 December 2021, subject to any catch limits as may be determined by the Minister from time to time.*
>
> *3. This Policy Directive shall enter into force on 1 January 2020.'*

26. The Policy Directive was accompanied by this explanation:

> *'It is intended that as the sprat fishery is concentrated inside the six nautical mile zone, including the baselines, the transition period will allow those vessels involved in the sprat fishery time to transition to other fishing activities.*
>
> *These measures aim to provide ecosystem benefits, including for nursery areas and juvenile fish stocks. They are also intended to facilitate the further sustainable development of the small scale inshore and the sea angling sectors which strongly rely on inshore waters.'*

27. Those licences issued in respect of the applicants' vessels following the promulgation of the Policy Directive contained conditions precluding trawling activity by the boats in question from 1 January 2020 in any part of the exclusive fishery of the State within a distance of 6 nm from the baselines *other* than for the targeting of sprat subject to catch limits that may be determined by the Minister from time to time. They included a similar condition operative from 1 January 2022 without this proviso.

Issue One: The Common Fisheries Policy

(a) The argument

28. The regulation of fisheries in the State is subject to the law of the European Union and, more specifically, those measures required to implement the CFP. The scope of the CFP is described in the Regulation as including '*the conservation of marine biological*

resources and the management of fisheries and fleets exploiting such resources' (Article 1.1(a)). It extends to fresh water biological resources and aquaculture activities, as well as the processing and marketing of fishery and aquaculture products '*in relation to measures on markets and financial measures in support of the implementation of the CFP'* (Article 1.1(b)). It is intended to ensure that fishing and aquaculture activities '*contribute to long-term environmental, economic, and social sustainability'* (Recital 4) and that *inter alia* fishing and aquaculture activities are carried out in a way that is consistent with the objectives of achieving economic, social and employment benefits (Article 2(1)).

29. Article 3(1)(d) of the Treaty on the Functioning of the European Union ('*TFEU*') provides that the Union shall have exclusive competence in the conservation of marine biological resources under the CFP. Other aspects of the CFP and environment (including matters of fishery '*management*') fall, pursuant to Article 4(2)(d) and (e) TFEU, within the area of shared competence of the Union.

30. Today, the legal structure for the CFP is to be found in the Regulation, Article 5(1) of which posits the general principle that union fishing vessels shall have equal access to waters and resources in all Union waters. Union waters comprise (with certain exceptions that are not relevant to this case) '*waters under the sovereignty or jurisdiction of the Member States'* (Article 4(1) of the Regulation).

31. One exception to the principle stated in Article 5(1) is provided for in Article 5(2). This states that in the waters up to 12 nm from baselines under their sovereignty or jurisdiction, Member States shall be authorised, until December 2022, to restrict fishing

to fishing vessels that traditionally fish in those waters from ports on the adjacent coast. Article 5(2) further provides that the restrictions which Member States may impose on vessels of other Member States in the 12 nm zone are '*without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States'*. This has been interpreted as meaning that Member States may extend fishing rights in the 12 nm zone to the vessels of other Member States pursuant to bilateral arrangements entered into with those states.

32. While Article 6 of the Regulation provides that the Union – for the purposes of achieving the objectives of the CFP – shall adopt measures in respect of the conservation and sustainable exploitation of marine biological resources as set out in Article 7, limited powers have been delegated back to Member States to adopt certain measures both inside and outside the 12 nm zone. Thus, Article 19 of the Regulation confers and conditions the power of Member States to adopt measures for the '*conservation'* of fish stocks within Union waters, while Article 20 makes similar provision for the adoption of measures for the '*conservation and management'* of fish stocks, as well as the maintenance and improvement of the conservation status of marine ecosystems, within the 12 nm zone. Because – at least insofar as '*conservation measures'* are concerned – these are exceptions to the general rule according to which competence to adopt such measures is for the EU, the provisions must be interpreted strictly (*Deutscher Naturschutzring v. Bundesrepublik Deutschland* Case C-683/16 ECLI:EU:C:2018:433 at para. 60).

33. Article 19 is concerned with measures applicable to fishing vessels flying the flag of the Member State in question or to persons established within their territory. It is as follows:

> *1. 'A Member State may adopt* ***measures for the conservation of fish stocks*** *in Union waters provided that those measures fulfil all of the following requirements:*
>
> *(a) they apply solely to fishing vessels flying the flag of that Member State or, in the case of fishing activities which are not conducted by a fishing vessel, to persons established in that part of its territory to which the Treaty applies;*
>
> *(b) they are compatible with the objectives set out in Article 2;*
>
> *(c) they are at least as stringent as measures under Union law.*
>
> ***2. A Member State shall, for control purposes, inform the other Member States concerned of provisions adopted pursuant to paragraph 1.***
>
> *3. Member States shall make publicly available appropriate information concerning the measures adopted in accordance with this Article.'*

(Emphasis added).

34. The applicants say that this provision was not complied with by the Minister. They contend that the Policy Directive was, on the basis of the Minister's case, a measure '*for the conservation of fish stocks'* within the meaning of the Article. While not accepting this, they contend that if that is correct, the Minister was required by Article 19(2) to inform other Member States of the measure. This was not done and (the applicants say) on the Minister's own case the Policy Directive was accordingly invalid. They also stress that if the Minister is correct in his contention that the measure applied to Northern Irish vessels from the point at which it came into force (1 January 2020), it was not authorised by Article 19. Finally, they pleaded that the measure was not consistent with a number of provisions of the Regulation, in particular the objectives identified at Article 2(5)(c), (e), (f), (g), (h) and/or (i) thereof.

35. From there, the applicants' argument focusses upon Article 20. This provision addresses the situation where certain measures are liable to affect fishing vessels of other Member States. It states:

> *1. 'A Member State may take* ***non-discriminatory measures*** *for* ***the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems*** *within 12 nautical miles of its baselines provided that the Union has not adopted measures addressing conservation and management specifically for that area or specifically addressing the problem identified by the Member State concerned.*[13] *The Member State measures shall be compatible with the*

[13] The court was informed that no such measures had been adopted by the Union in relation to the area in issue in these proceedings.

objectives set out in Article 2 and shall be at least as stringent as measures under Union law.

2. ***Where conservation and management measures to be adopted by a Member State are liable to affect fishing vessels of other Member States, such measures shall be adopted only after consulting the Commission, the relevant Member States and the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, inter alia, that those measures are non-discriminatory. For the purpose of such consultation, the consulting Member State may set a reasonable deadline, which shall, however, not be shorter than two months.***

3. *Member States shall make publicly available appropriate information concerning the measures adopted in accordance with this Article.*

4. *Where the Commission considers that a measure adopted under this Article does not comply with the conditions set out in paragraph 1, it may, subject to providing relevant reasons, request that the Member State concerned amends or repeals the relevant measure.'*

(Emphasis added)

36. Here, the applicants similarly say that if the Minister is correct in his characterisation of the Policy Directive, it was a '*conservation and management*' measure within the meaning of this Article. Because the effect of s. 1 of the Sea-Fisheries (Amendment)

Act 2019 (‘*the 2019 Act*’) (which came into force on 23 April 2019) is that the owners of vessels registered in Northern Ireland can fish in Irish waters, the applicants say that the Policy Directive was liable to affect fishing vessels of another Member State (as the United Kingdom was at the relevant time).

37. Given – as is admitted – that the Minister did not comply with the procedural requirements imposed by this provision, the applicants contend that the decision was unlawful. But they also say that the Policy Directive cannot apply to Northern Irish vessels as the Minister has no power to impose conditions on the licences issued to those boats and, therefore, no means of enforcing the Policy Directive. Therefore, they say, the measure is discriminatory, and thus in breach of Article 20.

38. It is to be noted that the Minister (a) suggested in the course of his oral submissions to this court that the Policy Directive was lawfully promulgated under s. 3(3) of the 2003 Act because it was in part a conservation measure as contemplated by that section, (b) argued that it was at the same time *not* a conservation measure for the purposes of Article 19 of the Regulation and thus did not have to be notified under that provision, but (c) contended in his post hearing written submissions that it *was* a ‘*management’* matter within the meaning of Article 20(1) and thus authorised by the Regulation while at the same time arguing (d) it was *not* a ‘*conservation and management’* measure for the purposes of Article 20(2), so it did not have to be the subject of consultation under that provision.

39. Conversely, the applicants say that the provision was *not* authorised as a conservation measure under s. 3(3) its actual purpose was to confer a benefit on those owning smaller fishing vessels, but was captured by Articles 19 and/or 20. It is possible for the

applicants to argue these in the alternative (as they have done – *ultra vires* the statute but, if not, adopted in violation of Articles 19 and/or 20).

(b) The trial judge's assessment

40. In addressing the operation of these two articles, the trial judge made three points. First, it was his view that the Policy Directive was neither a measure for '*the conservation of fish stocks'* as that term is used in Article 19, nor a measure for '*the conservation and management'* of fish stocks within the meaning of Article 20. In this regard he noted that the Policy Directive imposed conditions on the fish that could be caught using vessels to which they applied and areas in which they could fish, rather than the type or amount of fish which they were entitled to catch, with the exception of the derogation provision in respect of sprat. The purpose of that transition period, as stated and acknowledged in the Ministerial decision, was to afford time to those vessels involved in sprat fishing to transition to other fishing activities.

41. Therefore, in the view of MacGrath J., it could not be said that in so far as the expressly stated policy of the Policy Directive was concerned, it was a measure designed for the conservation of fish stocks. While it may have a conservation effect, he said, he felt that he must accept the distinction drawn by counsel for the respondent between a conservation measure and a measure which may have conservation effects. He said (at para. 111):

> '*That it is not an overt conservation measure is best exemplified by the fact that no legal limit is placed on the amount of sprat that can be caught within the six*

nautical mile zone, albeit by smaller vessels. That there may be practical limitations on those vessels being able to catch a similar amount of sprat to the larger vessels does not, it seems to me, amount to a legal limitation or render the Policy Directive a measure for the conservation of fish stocks.'

42. The judge was of the view that this interpretation was supported by the consultation document. The key points to the review were stated to concern restrictions on vessel size and the options set out were directed at vessel length. When viewed in its entirety, including the content of the consultation document, the reasons advanced in the decision and the wording of the Policy Directive, he felt that the Policy Directive by determining where vessels of particular lengths may fish, did not place a limitation on the amount of fish which might be caught and which are otherwise subject to quotas separately implemented (at para. 112).

43. The trial judge's second point related to Article 20. He did not believe that the Policy Directive was a discriminatory measure having regard to the manner in which the 2019 Act treated Northern Irish vessels and, in particular, the fact that s. 10(4) of the Sea-Fisheries and Maritime Jurisdiction Act 2006 (as amended by the 2019 Act via the insertion of s. 10) provided that a person who contravened ss. 1 of that section committed a criminal offence (at para. 114).

44. Section 10(1), (2) and (3) are as follows:

'(1) Subject to section 9 and subsection (2), a person on board a foreign sea-fishing boat shall not fish or attempt to fish while the boat is within the exclusive fishery limits unless he or she is authorised by law to do so.

(2) A person who is on board a sea-fishing boat owned and operated in Northern Ireland may fish or attempt to fish while the boat is within the area between 0 and 6 nautical miles as measured from the baseline ***… if, at that time, both the person and the boat comply with any obligation specified in subsection (3) which would apply in the same circumstances if the boat were an Irish sea-fishing boat.***

(3) The obligations referred to in subsection (2) are the following:

… ***an obligation specified in a policy directive given by the Minister under section 3(2)(b) of the Act of 2003'***

(Emphasis added).

45. Third, MacGrath J. noted that at the time the Policy Directive was issued, it was not possible for Northern Irish vessels to fish in Irish territorial waters. This only became lawful when the 2019 Act was promulgated and took effect, both of which occurred *after* the Policy Directive issued, albeit before the prohibition it imposed came into force. Referring to ss. 16(3) and 16(4) of the Interpretation Act 2005 he concluded that the Policy Directive had come into operation at the end of the day before the day on which it was made. Because Article 20 is addressed to steps to be taken before a measure is *adopted* and because (essentially) the Policy Directive was in operation *before* it was applied to Northern Irish vessels, he concluded that the Policy Directive did not, in this regard, give rise for complaint.

(c) Articles 19 and 20

46. Before examining these arguments and findings in detail, it is convenient to compare generally the provisions of Articles 19 and 20. The scope of the power conferred by the former is obviously narrower than that in the latter in a number of different ways. For a start, Article 19 refers only to measures that are '*for the conservation of fish stocks'*, while Article 20 is concerned with measures '*for the conservation* ***and management*** *of fish stocks'* (emphasis added). For reasons I explain this variation in the language used in the two provisions is not significant here, but the difference of terminology at least suggests that Article 19 is intended in this respect to have a narrower focus than Article 20.[14]

47. Moreover, while Article 19 is concerned solely with measures directed to '*fish stocks',* Article 20 extends further and also applies to measures concerned with *'the maintenance or improvement of the conservation status of* ***marine ecosystems'***. The trial judge explained his interpretation of the provision thus (at para. 108):

[14] There are, it should be said, two ways of looking at this. The fact that throughout the Regulation, and indeed various international agreements referred to in it, the terms are invariably used together might suggest that they cover the same territory. The fact that Recital 40 to the Regulation (which is clearly addressed to Article 19) uses the term '*conservation and management measures for stocks'* while Article 19 itself does not indicates that '*management'* adds nothing to '*conservation'* (and indeed most, if not all, conservation measures can be said to involve management of fish stocks of some kind). However, the provision in the legislative predecessor to the Regulation now reflected in the Article 19 used the phrase '*conservation and management'* in reference to fish stocks, and it might follow that Article 19 must be taken to have deliberately eschewed that language. At the same time, the fact that two consecutive provisions in the Regulation addressing the same general subject matter use different phrases points to the conclusion that '*management'* in Article 20 was intended to add something to '*conservation'* in Article 19.

'Article 20 applies to non-discriminatory measures for the conservation and management of fish stocks ***and*** *the maintenance or improvement of the conservation status of marine ecosystems* ***within the 12 nm zone****. It seems to me to be correct, as submitted by Mr. McCann S.C., that the notification requirements under article 20(2) apply only to measures which are directed at the conservation and management of fish stocks and that the measure captured by article 20 is one for the conservation and management of fish stocks* ***and*** *the maintenance or improvement of the conservation status of marine ecosystems within the relevant zone. Therefore, I am satisfied that it is correct to state that if the measure is not one which is directed towards the conservation and management of fish stocks, the provisions of the Regulation do not apply to it.*

(Trial judge's emphasis).

48. Having regard to the view I reach as to the nature of the measure in issue here, it is not strictly relevant to the outcome of this case whether this conclusion is correct. However, it is not obvious to me that Article 20(2) is restricted in the manner suggested by the trial judge. It seems to me that the removal of any reference to '*fish stocks'* strongly suggests that *any* conservation and management measure of the kind referred to in Article 20(1) is captured by the obligation provided for in Article 20(2) provided they affect fishing vessels of other Member States. I cannot see why the legislator would have wished to limit the notification obligation in the manner suggested by the trial judge where that condition is met.

49. Three other differences between the provisions can be more shortly noticed, if only to contextualise the purpose of the two Articles. First, while Article 19 enables the adoption of measures '*in Union waters',* Article 20 authorises only measures affecting the area within 12 nm of the baselines. Second, the provisions of Article 19 are applicable in respect of measures that apply only to vessels flying the flag of the Member State in question or persons established in that state, while Article 20 may be engaged where a measure is liable to affect the vessels of another Member State and is thus subject to an express requirement that it be '*non-discriminatory'*. Third, and presumably for that very reason, the procedural obligations imposed by the provisions are different. Those identified in Article 19 are less constrained – other Member States must be merely informed of the measures – while Article 20 requires a more elaborate process of consultation framed, it is to be noted, in more prescriptive terms ('*such measures shall be adopted only after consulting …'*).

50. It follows that Articles 19 and 20 confer and qualify two distinct and, in many respects, quite different authorisations. Article 19 is applicable only if the measure is for the conservation of fish stocks (and therefore does not extend to species that are not fish) *and* only applies to vessels flying the flag of the Member State in question. Article 20 by contrast enables non-discriminatory measures within the 12 nm zone for '*conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems'* but also requires that where a provision is properly described as '*conservation and management measures'* (a phrase which as I have noted appears to capture all or any of the foregoing) and where it is liable to affect fishing vessels of other Member States, that it be the subject of consultation.

51. As is obvious from my earlier summary of the trial judge's decision, the interaction between these provisions raises, in this case, a curiosity: at the time the Policy Directive was promulgated it only applied to Irish registered vessels (and was thus potentially within the grasp of Article 19), but by the time it took effect it applied also to Northern Irish vessels (thereby possibly engaging Article 20(2)).

(i) Application of Article 19

52. The approach thus adopted by the trial judge to the question of whether the Policy Directive is a '*measure for the conservation of fish stocks',* and therefore within the ambit of Article 19, discloses a net issue of construction: whether a measure which has conservation *effects,* but is not designed for conservation purposes, falls for that reason alone outside of this definition.

53. Here, it must be observed that no part of the Policy Directive or the justifications proffered for it referred expressly and in those terms to it as a measure for the conservation of fish stocks. No assessment was carried out to determine whether in fact precluding vessels over 18 m in length from fishing in the 6 nm zone would actually operate to conserve any fishing stock. No detailed analysis was conducted of how many fishermen using smaller vessels could or would fish for the sprat that otherwise would have been caught by the longer vessels. No work appears to have been done on the effect on stock of those longer vessels fishing outside the 6 nm zone in the latter three months of the year (as the Minster clearly believed they could or would do). The measure imposed no limitation on the amount of stock that could be fished in the area; it merely identified those vessels that were prohibited from doing so.

54. Whether or not Articles 19 and 20 are to be taken as distinguishing between regulations that are '*for the conservation of fish stocks'* and provisions which are '*for the conservation **and management** of fish stocks'* (emphasis added), it must be the case that merely regulating the activity of fishing is not sufficient in itself to render a rule a '*measure[...] for the conservation of fish stocks'* as that term is used in Article 19. Nor – as must follow from the reference thereto in Article 20(1) – would measures directed to the maintenance and improvement of the conservation status of the marine ecosystem fall automatically within that description even if they *might* have a beneficial effect on fish stocks. Indeed, the very inclusion of the latter category in Article 20 strongly suggests that it is not sufficient in determining whether a measure is for the *conservation of fish stocks* to see if it has a potential conservation *effect* on those stocks: the purpose of the measure must be relevant. The relevance of that purpose is specifically acknowledged in the manner in which the Article ties the requirement that the Union have not adopted measures that pre-empt Member State action – this is referenced to whether the Union has adopted measures '*specifically addressing the problem identified by the Member State.'* And, it might be said, if *'purpose'* is a centrally important factor in this case the Minister's objective – as evident from the uncontradicted evidence he has tendered – cannot be said to have been directed to conservation of fish stocks.

55. There is no doubt but that one factor which will distinguish a '*conservation'* measure from one concerned solely with '*management'* of the resource is the object of the provision: a regulation which has as its stated purpose the attainment of a conservation objective will, at least if rationally capable of achieving that aim, be properly viewed as a '*conservation'* measure and thus captured by Article 19. Conversely, if obviously,

a provision which is intended to reach a different objective altogether and which when introduced is not understood as attaining and is not connected in any way with a conservation purpose is not a '*conservation'* measure.

56. Many of the cases dealing with the meaning of *conservation measures* have arisen in the context of issues around competence and/or the legal basis for specific measures, often at a time when the applicable legislative context was different. Nonetheless they are of some general assistance, if only by way of analogy. In *Pesca Valentia Limited v. The Minister for Fisheries and Forestry, Ireland, and the Attorney General* Case 223/86 [1988] ECR 83 ECLI:EU:C:1988:14, for example, the issue was whether a legislative requirement that a proportion of the crew of an Irish sea-fishing vessel be of Irish nationality was lawful. A question arose as to whether Ireland was prohibited from introducing the measure having regard to Article 102 of the Act of Accession 1972, which invested the Council, acting on a proposal from the Commission, with exclusive competence to determine conditions for the purposes of protecting fishing grounds and conservation of the biological resources of the sea. In answering that question in the negative, the court referred not merely to the purpose, but the subject matter of the measure: these were not '*either by virtue of their subject-matter or by virtue of their purpose, measures relating to the conservation of fishery resources, since the application of such a measure cannot in itself have any effect on those resources'* (at para. 11).

57. This must be correct and suggests to me that the issue is not simply one of design or dominant object. Instead, whether a measure is a conservation measure or not will depend upon a combination of purpose, intention, effect and the actual nature of the measure. Assessing the relationship between these variables and whether they combine

to render a '*management'* provision also a '*conservation'* measure will, inevitably, be a matter of degree. A measure which is capable of achieving and is on the facts obviously implemented – at least in part – with a view to having a conservation effect may be properly described as a '*conservation measure'* irrespective of whether this was the stated reason it was introduced.

58. The limitation of fishing to small vessels with a capacity to catch less fish is liable to preserve the fishing resource in the area to which the limitation applies for a reason that is as simple as it is obvious. Whether or not this is the stated purpose of such a measure, irrespective of whether the measure is actually also animated by another object, and regardless of whether the provision will as a matter of scientifically proven probability achieve that objective, this will as a matter of practical likelihood be its effect. Given that that likely effect is self-evident, it must be taken that it was intended to bring it about.

59. Indeed, the Minister's statement of opposition makes this clear: '*[i]t is anticipated that some small vessels will fish those stocks formerly taken by the larger vessels but it is not expected that those smaller vessels will cumulatively fish the same volumes as the large vessels has been fishing'* (at para. 42); '*[t]he Minister's Decision is intended to support fish stocks in the ecological system'* (at para. 43). Moreover, it is clear that the Policy Directive was specifically concerned with sprat fishing, and the Minister's evidence stressed the fact that sprat is a vital species to the ocean food chain and, although not itself subject to quota, is viewed by the International Council of the Exploration of the Seas, as a '*data limited stock',* with the effect that more detail is required in order to form a full understanding of the state of that stock. That this was a highly relevant factor in the decision making is evident from the Marine Institute

Rebuttal report: the ideas, it said, in the consultation paper '*are for much smaller volume of larger sprat to be landed. The bulk of smaller fish would not be fished and remain as forage for other species'* (at p. 6).

60. It is unsurprising that Article 7(1)(e) of the Regulation states that measures for the conservation and sustainable exploitation of marine biological resources may include '*measures on the fixing and allocation of fishing opportunities'* while Article 7(2)(c) envisages that amongst these conservation measures that may be adopted by the Union are '*limitations ... on fishing activities'*. The Policy Directive clearly falls within both provisions. Indeed, Recital 19 of the Regulation appears to me to assume that measures of the kind in issue here, where introduced in part with a view to assisting small-scale fishermen, may objectively be (and are viewed by the Regulation as being) directly related to conservation objectives of some kind:

> *'Existing rules restricting access to resources within the 12 nautical mile zones of Member States have operated satisfactorily,* ***benefiting conservation by restricting fishing effort in the most sensitive part of Union waters****. Those rules have also preserved the traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent. Those rules should therefore continue to apply.* ***Member States should endeavour to give preferential access for small-scale artisanal or coastal fishermen.'***
>
> (Emphasis added).

61. This reflects a concern acknowledged in certain aspects of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Article 5(i) of which requires account to be taken of '*the interests of artisanal and subsistence fishers'*: the Regulation requires Member States when taking '*conservation and management measures, for which they have been empowered within the framework of the CFP'* to act in a manner that is consistent with these obligations (Recital 6 to the Regulation).

62. It also reflects a principle evident (again, by analogy) from the decision in *Mondiet* Case C-405/92 ECLI:EU:C:1993:906. There it was found that a measure – including a limitation on the use of driftnets – adopted for primarily for the conservation of marine resources in maritime waters that are not under the sovereignty of Member States, did not require an additional legal basis for its adoption where it also served an environmental purpose, that environmental purposeitself being a component of the Community's other policies. In *Deutscher Naturschutzring v. Bundesrepublik Deutschland* the court applied a similar logic to Article 11 of the Regulation. That provision empowers Member States to adopt conservation measures not affecting fishing vessels of other Member States applicable to waters under their jurisdiction where necessary to comply with obligations under the Habitats Directive 92/43/EEC. The applicant conservation association requested the relevant German authorities to prohibit under national law fishing methods which touched the seabed and the use of gillnets in several Natura 2000 sites within the German exclusive economic zone. The authorities took the view that they had no power to adopt these measures because they

were liable to affect sea-fishing by vessels of other Member States. One of the issues referred to the CJEU by the court to which an appeal against that decision was brought, was whether the measures in question were '*conservation measures'* as that term was used in Article 11. The applicant in particular argued that because the measures had an environmental objective, they fell outside Article 11 (and could therefore be unilaterally adopted by the Member States).

63. The fact that Article 11 specifically joins conservation measures with the Habitats Directive made this an ambitious argument on any view. However, in rejecting the claim the CJEU expressed itself in somewhat broader terms, explaining that because the measures were of a kind that fell within Article 7, they were for that reason *capable* of being conservation measures for the purposes of Article 11 (at para. 39). It accepted the submission that a conservation measure had to '*pursue an objective relating to the Common Fisheries Policy'* (at para. 43), but emphasised that the fact that a measure also affected species that were not subject to fishing is not enough to exclude those measures from the scope of the policy (at para. 44). Then, it noted that Article 7(1)(d) and (2)(c) expressly envisaged the adoption of conservation measures aiming to encourage fishing methods with a low impact on the marine ecosystem (at para. 45).

64. Perhaps more relevantly, and in language readily applicable to this case, the Advocate General explained that the measures by their very nature concerned the CFP as they '*would prohibit the use of certain fishing techniques and equipment, thereby regulating the manner in which fishing activities may be carried out in certain areas, and consequently affect the quantities of marine biological resources fished in those areas'* (at para. 22). He continued (at para. 23):

> *'It is true that those measures would also affect species other than those subject to fishing and, more generally, the whole ecosystem of the sites. However, that is not enough to bring those measures outside the scope of the CFP. In that regard, it suffices to point out that all animal species — including the marine species subject to fishing — can live, reproduce and thrive only when their ecosystem is sufficiently preserved. Any significant alteration of the living and/or non-living components of a marine ecosystem is liable to have an impact on the fishing stocks in those sites. That is why Regulation No 1380/2013 is intended to implement an ecosystem-based approach to fisheries management, so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised and avoid, as far as possible, the degradation of the marine environment.'*

65. The same principle should apply here: if the Policy Directive is properly characterised having regard to its nature and intended effect as a '*conservation measure'*, the fact that it also serves another proper purpose (either environmental or directed to the protection of coastal communities) should not cause that characterisation to be changed.

66. On the facts of this case, it is clear that it was not only understood by the Minister that one of the consequences of the measure could be to reduce fishing within the 6 nm area, but that he viewed this as one of the benefits of the provision: '*the Directive',* the Minister's deponent averred in an affidavit sworn for the purposes of seeking a stay on the High Court order, '*will ensure the continued improvement of stocks within the 6nm zone'.* Whether or not described in the affidavit evidence adduced in the defence of these proceedings in the jargon of '*conservation of fish stocks'*, the fact is that the

reasons given for the measure included benefits '*for nursery areas and juvenile fish stocks'*. This repeated what was stated in the announcement of December 21. In both documents these '*ecosystems benefits'* were stated to be the first reason for the measure, the benefits for small scale fishermen being second and, as presented, secondary ('*also*'). The question of when an *ecosystem* benefit is a *conservation* measure has proven historically controversial in the context of the CFP, a difficulty that was perhaps more acute in earlier iterations of the governing regulations than it is now. But here, the overall tenor of the consultation paper and supporting documents leaves no doubt but that '*conservation'* of fish stocks was a consequence presented as justifying the Policy Directive.

67. So, and perhaps inevitably having regard to the nature of the measure, justifications were proffered for it throughout this material that can be categorised as conservational in character – the protection of fish habitat,[15] the discouragement of over-fishing, the protection of the stock complex,[16] the belief that the measure would reduce unintended by-catches of herring[17], the view that discarding rates are higher inshore than offshore and that a reduction of fishing effort in such areas may '*benefit fish stocks in general'*[18], the restoration of habitat structure, the protection of spawning stock diversity, and the management of trawling effort and fish outtake so as to restore the prevalence of large fish.[19] The consultation paper, in particular, explained that fishing vessels under 12 m in length have become increasingly specialised targeting fewer species and becoming increasingly reliant on a limited number of fish stocks. This, it explained, had a domino

[15] Consultation paper at p. 14.
[16] Consultation paper at p. 44.
[17] Affidavit of Josephine Kelly of 24 February 2021 at para. 12.
[18] Consultation paper at p. 50
[19] Consultation paper at p. 47

effect on stocks as the number of stocks available to the sector has declined so that pressure on the remaining stocks increases.[20]

68. These themes are repeated throughout the Minister's pleadings and supporting affidavits. These include references to '*improving availability to fish in inshore waters, protection of fish recruitment and stock components'*, to the fact that the marine conservation objectives were related to *inter alia* the status of commercial fish and shellfish stocks, to the fact that mixed species trawl fisheries captured in coastal waters higher proportions of smaller fish compared to further offshore, to improving the availability of fish stocks and to the claim that continued large scale trawling in inshore waters was posing a particular risk to turbot, rays and skates.[21] Sprat, the evidence emphasises, is ecologically important as a forage fish for predatory fish, and thus reducing the catch of sprat entails knock on benefits for other fish stocks.[22]

69. That being so, it is unsurprising that counsel for the Minister in the course of his submissions to the High Court referred to the evidence as disclosing '*a clear desire to protect fish stocks'*, and to the fact that because smaller vessels have less capacity to catch herring than vessels of greater length, the Policy Directive should '*help to reduce the exploitation of scarce herring stocks within the 6 nm zone'*. All of these, it seems to me, point not merely to the belief that the measure had a conservation effect, but to the Minister wholly intending and wishing to bring about that effect when introducing it.

[20] Consultation paper at p. 50.
[21] Affidavit of Josephine Kelly of 24 February 2021 at para. 11.
[22] MI response to the affidavit of Mr. Kennedy dated 11/03/2021

70. It follows, having regard to (a) the fact that the measure is one that is both intended and likely to reduce fishing in the '*most sensitive part'* of Union waters, (b) to the designation of provisions of this kind as capable of amounting to conservation measures for the purposes of Article 7 of the Regulation, (c) to the intent of Recital 19 of the Regulation, (d) to the fact that one of the stated reasons for the measure was the '*ecosystem benefits'* for '*for nursery areas and juvenile fish stocks'* and (e) to the contents of the pleadings, consultation paper and supporting documents to which I have referred, that the Policy Directive was a '*measure[...] for the conservation of fish stocks'* as that term is used in Article 19. It is the Minister's own case, supported by the affidavit evidence he has chosen to adduce that one of the benefits of the Policy Directive fall directly within the concept of fish stock conservation as it is used in the Regulation. He cannot at the same time disavow that intended effect so as to avoid the obligations attached by the Regulation to it.

71. Finally in this regard I should observe that one of the contentions advanced in oral argument before this court is that the reference to '*conservation of fish stocks'* in Article 19 is limited to what was described as '*the quota system'*. I can find no warrant in the Regulation for that conclusion, and no authority was identified or, for that matter, textual or purposive analysis of the Regulation was conducted, suggesting such a limitation. The Article is concerned with conservation of '*fish stocks'* and nothing in it or Article 7 suggests that this means only the stock of fish that are subject to quota.

(ii) Effect of notification obligation in Article 19

72. While this conclusion becomes important when one moves to Article 20, I do not believe the fact that the Policy Directive is properly construed as a '*measure[...] for the*

conservation of fish stocks' within the meaning of Article 19 of the Regulation has any effect on its legality. If one assumes that the provision is engaged on the basis that the Policy Directive was, at the time of its promulgation, concerned solely with Irish sea-fishing vessels, the argument advanced by the applicants that a failure to notify in accordance with its provisions invalidated the decision finds no support in the provisions of the Regulation. Article 19 merely requires that a Member State shall '*for control purposes'* inform the other Member States concerned of provisions adopted pursuant to Article 1. Upon being so advised, the Member States in question have no power to prevent the adoption of the measure, the obligation is not stated to arise prior to the coming into effect of the measure, and the very fact that the purpose of notification is that of '*control'* strongly militates against a failure of notification invalidating it.

73. To that extent the decision in *Wood and Cowie* Cases C-251/90 and 252/90 [1992] ECR I-02873, relied upon by the Minister, is apt. There, the CJEU was concerned with questions referred by a Scottish court as to the effect of a failure to notify Member States and the Commission of sea-fishing licence conditions, that notification being required by the provisions of Article 3 of Council Regulation 101/76. This provision imposed a general requirement that Member States should advise other Member States and the Commission of any alterations they intend to make to their fishery licences. The respondents in the proceedings before the referring court were fishermen who were prosecuted consequent upon a failure to comply with a condition introduced by the United Kingdom authorities requiring notification to the authorities where certain fishing vessels crossed from one designated zone to another. The introduction of the requirement was not advised to other Member States or the Commission as required by Article 3; the accused contended that that failure invalidated the condition.

74. The CJEU explained as follows (at para. 28):

> *'in view of the fact that the adoption of such a national measure is not made conditional on its prior notification to the Commission, the notification requirement in question must be regarded as having been laid down for the purposes of information only. Consequently, the absence of such notification does not affect the validity of a measure which satisfies the criteria mentioned in the first paragraph of Article 15.'*

75. The same rationale must apply here: if anything, the position insofar as Article 19 is concerned is stronger, in that the measure is expressly stated to be for control purposes and the Commission itself does not have to be notified at all. Even if within the terms of the Article, accordingly, a failure to notify does not invalidate the measure. The Policy Directive was, as was the measure under consideration in *Wood and Cowie*, a provision which had to be notified only for information purposes, and that notification did not function as a precondition to the adoption of the measure.

(iii) Application of Article 20

76. As I have earlier noted, Article 20 does not refer only to '*conservation'* measures but applies also to '*management'* measures. Because I have concluded that the Policy Directive was a '*conservation'* measure, Article 20 clearly applies to it. It is not necessary to determine whether (as the Minister contended in his post-hearing submissions) it was a '*management'* measure for the purposes of Article 20 and thus (as he appears to suggest) whether '*management'* measures (over which the EU does not have exclusive competence but joint competence with the Member States) are

captured independently of a '*conservation'* purpose by some or all of this Article. Nor is it necessary to decide whether the ecosystem benefits identified as a reason for the measure render it as being for *'the maintenance or improvement of the conservation status of marine ecosystems within 12 nautical miles of [the] baselines'*, as provided for in Article 20(1).

77. Here, I emphasise my earlier view as to the scope of Article 20(2). Article 20(1) – having referred to measures for the conservation and management of fish stocks and the maintenance and improvement of the conservation status of marine ecosystems – then gathers these together under the general umbrella of '*conservation and management'* ('*provided that the Union has not adopted measures addressing conservation and management specifically for that area'*). This is the phrase carried into Article 20(2) – '*conservation and management measures'*. So, it is not merely measures for the conservation of fish stocks that are the subject of the notification requirement: it is *any* of the measures identified in Article 20(1) – provided of course that they '*are liable to affect fishing vessels of other Member States.'*[23]

(iv) Northern Irish vessels

78. The Minister raises an initial objection to the applicants agitating any issue around the impact of Article 20 of the Regulation on the Policy Directive. He says at one point that this is not a matter for the courts in this jurisdiction, that it is implicit in Article 20 that the measure retains validity until such time as the Commission takes action, and

[23] This is certainly the assumption throughout the academic literature, see Appelby and Harrison '*Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive and Brexit'* (2019) 31 Jnl. of Env. Law 443, at p. 451.

that it is not a matter for the national court to declare a Policy Directive invalid because there was no consultation at European level. I cannot accept that contention. The Regulation is directly effective, and insofar as it imposes a requirement relating to certain provisions of domestic law, the courts in this jurisdiction are fully entitled to assess whether the requirement applied, was complied with and, if not, what the consequence of this is. Certainly, the Minister cited no authority that suggests otherwise.

79. He also raises an objection based on *jus tertii.* It was stressed that the measure was being challenged by Irish licensed trawler owners, not by Northern Irish fishermen or by the Commission. This argument also appears to me to be misplaced. The applicants are affected by the measure, and are entitled to litigate any asserted precondition as to its validity. They are also directly impacted by any discrimination insofar as they contend that Northern Irish vessels over 18 m are in fact free to fish in an area in which the applicants are prevented from so doing. The case sought to be made by the applicants here is not analogous to *Cahill v. Sutton* [1980] IR 269, relied upon by the Minister, where the plaintiff sought to have a statute struck down because it did not cater for a hypothesis which did not arise in his specific circumstances. Here the position is far simpler: the applicants are affected by the measure, they contend that it was not validly introduced and the ground of invalidity is one that accordingly impacts directly upon them.

80. The context to the substantive issue that thus presents itself is this. A *voisinage* arrangement enabled vessels from Northern Ireland and from Ireland to fish within the 6 nm zone of each. However, in *Barlow v. Minister for Agriculture* [2016] IESC 62,

[2017] 2 IR 440 the Supreme Court determined that fishing by Northern Irish vessels in the State's territorial seas was not permitted by law. On 23 April 2019 the Oireachtas responded to that decision via the Sea-Fisheries (Amendment) Act 2019, which substituted the new s. 10 of the Sea-Fisheries and Maritime Jurisdiction Act 2006, quoted earlier. From that point, Northern Irish Vessels could fish in the State's 6 nm zone. Therefore, the applicants say, the Policy Directive was liable to apply to Northern Irish vessels and, thus, the notification obligation imposed by Article 20(2) had to be complied with.

81. Of course at the time the 2019 Act took effect the Policy Directive had been both announced and issued. However (a) the Policy Directive did not come into force until January 2020 and (b) at the time it was announced, the Bill that ultimately led to the enactment of s. 10 was making its way through the Oireachtas, having been initiated in 2017. Nonetheless, the Minister argues (and as I have said the High Court judge agreed) that the Policy Directive did not permit Northern Irish vessels to use the State's 6 nm zone in such a way as to engage Article 20 because the 2019 Act was not in force at the time it was promulgated.

82. I agree with the applicants when they suggest that it is not permissible for the State, consistently with its duty of loyalty and, for that matter, its obligations under the Regulation, to avoid an obligation of compliance with Article 20 by pointing to the fact that the Policy Directive and any application it may have had to Northern Irish vessels were split between two different legal measures. The fact is that – on the Minister's case – the conditions set forth in the Policy Directive apply to Northern Irish vessels. This is as a result of the enactment of the 2019 Act.

83. When that legislation did take effect, the consequence was that the Policy Directive did and/or would upon its coming into force apply to the vessels of another Member State. This was the clear effect of s. 10(3)(b), which specifically applies such Directives to Northern Irish vessels. I cannot see how the fact that the relevant legal events – the promulgation of the Policy Directive and the extension of rights to Northern Irish vessels – occurred at different times and by virtue of distinct legal instruments, can have the consequence that the obligation that would arise if the measures were adopted as a single instrument, can be avoided. Ensuring that the substance of the EU obligation has been complied with requires that where a measure is adopted and thereafter is applied by a second measure to the vessels of other Member States, the notification obligation is triggered.

84. It is not difficult to rationalise that conclusion within the language of Article 20(2). In substance, the consequence of the 2019 Act was to extend the prohibition imposed by the Policy Directive to Northern Irish vessels. That was the effect of the final clause of s. 10(2) in combination with s. 10(3)(b). Once that section was '*adopted',* the Policy Directive as issued was applicable to those vessels and it was the '*adoption'* of the Policy Directive as so extended that ought to have been notified.

85. It strikes me as somewhat academic whether that notification should have been effected prior to the enactment of s. 10, or prior to the Policy Directive taking legal effect (it will be recalled that it provided '*[t]his Policy Directive shall enter into force on 1 January 2020'*). Nonetheless, a measure can be '*adopted'* before it '*enters into force'*, and it would seem to me to be logical that the obligation was triggered prior to the event that placed the measure on the statutebook (here, the enactment of these provisions of

the 2019 Act), rather than the technical enforceability of the extended Policy Directive. It is, as I have said, academic. Either was possible and, obviously, neither was done.

86. Finally, in this regard I should say that I do not see the provisions of the Interpretation Act 2005 to which the trial judge referred as relevant. These are addressed not to '*adoption*' of a legislative measure, but to its '*coming into operation*'. The Interpretation Act is not set in stone and the rules it introduces apply only presumptively. They are displaced when a measure expressly or implicitly provides otherwise (s. 4 Interpretation Act 2005). Section 16(3) provides that every provision of a statutory instrument comes into operation at the end of the day before the day on which the statutory instrument is made but is subject to s. 16(4). Section 16(4) specifically provides that where a statutory instrument is expressed '*to come into operation*' on a particular day, it will '*come into operation*' at the end of the day before that day. The declaration on the face of a Policy Directive that it is '*in force*' from a particular point necessarily displaces the general rule in s. 16(3).

87. I cannot, however, agree with the applicants when they say that the provision was discriminatory because the purpose of the Policy Directive is to impose a licensing condition on Irish registered boats with which the Registrar General of Fishing Boats was bound to comply, yet the Minister did not have the power to impose conditions on the licences of Northern Irish vessels. That argument, also, ignores the reality of what occurred.

88. The effect of s. 10 of the 2019 Act was three-fold. First, a person on board a foreign sea-fishing boat shall not fish while the boat is within the exclusive fishery limits unless he or she is authorised by law to do so. Second, Northern Irish vessels are granted

permission to fish – *provided* they comply with any obligation specified in ss. (3) which would apply in the same circumstances if the boat were an Irish sea-fishing boat. Third, one of those obligations is the requirements arising from a policy directive issued under the 2003 Act. Fishing by a Northern Irish vessel in breach of these conditions is fishing contrary to s. 10(1), and this is an offence.

89. The overall effect of these provisions is clear: Northern Ireland fishing vessels must comply with the obligation contained in the Policy Directive, and if they do not, they commit an offence under s. 10(4). The fact, accordingly, that a condition is imposed on the licence of an Irish vessel but not of a Northern Irish vessel is neither here nor there: the licence condition is a mechanism by which the obligation is imposed and can be enforced in respect of Irish vessels. The 2019 Act achieves the same objective in respect of Northern Irish vessels.

(v) Effect of non-compliance with Article 20

90. However, it remains the fact that the Policy Directive ought to have been notified. The question is what consequence should attach to the failure of the State to do this. The Minister contends that the failure of the State to notify the measure does not affect its legality, relying again in this regard upon the decision in *Wood and Cowie*. Here, it must be immediately noticed that the obligation imposed by Article 20 is quite different from that considered in that case, and indeed the obligation imposed by Article 19. First, Article 20 expressly provides that measures to which it applies shall be adopted only after the process of consultation has been exhausted. Article 19 contains no such direction. Second, while Article 19 described the obligation to inform other Member

States of the measures to which that provision applied, it expressly states that this was for the purposes of '*control'*. The purpose of the process provided for under Article 20 is different and is most definitely not one undertaken solely for control or information purposes. The Member State is required to explain why the provision is not discriminatory, and the periods of time for responses from the Member States and the Commission is regulated. It seems reasonable to assume that the Article proceeds on the basis that the Member State in question will consider and take into account the representations and observations of other Member States before proceeding with the measure in issue. It follows that there is a direct connection between the obligation, and the ultimate adoption of the measure: that consultation process *may* alter either the decision to adopt the measure, or its content if adopted.

91. I say this because the central issue in resolving a question of this kind is the purpose of the notification measure in issue. *Wood and Cowie* was decided as it was because the court characterised the measure as one directed only to the provision of information. Other cases make clear that where this is the case, a failure to comply with such an obligation before introducing a measure will not be a basis for invalidating the measure (see for example the opinion of the Advocate General in *Roland Teulie v. Cave Co-opérative 'Les Vignerons de Puissalicon'* Case C-251/91 ECLI:EU:C1992:319 at para. 23). So, because notification could not affect the enactment or content of the measure it follows that breach of the obligation to notify could not affect its legality.

92. But, as I have said, the obligation specified in Article 20 is imposed for more than merely informative purposes. It is clear that it was imposed with a view to other Member States making representations and on the assumption that account would be taken of them. This is why – unlike the provision in issue in *Wood and Cowie* – the

Article expressly prohibits the adoption of the measure before the Commission, the Member States and the relevant advisory council have been consulted (‘*shall be adopted only after*’). Recital 41, it will be noted, describes the consultation as ‘*prior*’. This is why the measure on which there is to be consultation is framed as a ‘*draft*’ of the measures, and it is why the Member State is required to submit an explanatory memorandum regarding the measures. All of this is done in order so that the consultation process may have an impact on the measure itself and it must accordingly follow that a provision that is introduced in breach of these requirements has not been lawfully adopted.

93. Counsel for the Minister relied in his submissions on the provisions of Article 20(4), which enable the Commission to request that the Member State concerned ‘*amends or repeals*’ a measure to which the Article applies. This, it was suggested, implied that a provision could be lawfully introduced in breach of the Article. In my view, this does not at all follow. It is entirely possible that after the consultation process the measure is adopted notwithstanding the objection of the Commission. There is nothing preventing this from happening *provided* there has been consultation in the first place. Article 20(4) empowers the Commission to continue to agitate its objection in that situation.

94. In those circumstances, and in particular given the emphatic statement in Article 20(2) that measures to which that provision applied must be subject to the process of consultation described there, and the emphasis within the Regulation on ‘*prior*’ consultation (Recital 41), I believe that the Minister breached the CFR by failing to notify the Policy Directive prior to its coming into effect and that in normal circumstances this would render the Policy Directive unlawful.

95. However, this begs two additional questions that were not canvassed in the course of submissions in this appeal. The first is whether that part of the Policy Directive that is liable to affect another Member State may be severed from the remainder of the provision. If severance is not possible, the second question is what remedy is now appropriate in circumstances in which the United Kingdom is no longer a member of the European Union and in which the measure, if struck down, could be immediately reintroduced without any obvious legal difficulty. Further argument will be required from the parties on these issues.

Issue Two: Section 3(3)

(a) The argument

96. Section 3(2) of the Act of 2003 – referring to the Registrar General of Fishing Boats – provides as follows:

> *(2) The licensing authority shall be independent in the exercise of his or her functions under this Part subject to –*
>
> *(a) the law for the time being in force in relation to sea-fishing boat licensing, including, in particular, the legal obligations of the State arising under any law of an institution of the European Communities or other international agreement which is binding on the State, and*

(b) such policy directives in relation to sea-fishing boat licensing as the Minister may give in writing from time to time'

97. Section 3(3) of the Act of 2003 now provides:

'A policy directive given under subsection (2)(b) may provide for measures to control and regulate the capacity, structure, equipment, use and operation of sea-fishing boats ***for the purpose of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species or the rational management of fisheries,*** *in furtherance of national policy objectives and to comply with requirements of the common fisheries policy of the European Communities or other international obligations which are binding on the State.'*

(Emphasis added).

98. Section 3(4) then provides that the Policy Directive, including reasons for it, must be laid before the Houses of the Oireachtas.

99. The applicants make a number of points based upon the text of this section. The provision, it says, is concerned with what they describe as '*husbandry matters'* involving the conservation of fisheries resources and the rational management of fisheries. The Policy Directive, it is argued, is directed not at the conservation of fisheries but at the redistribution of fishing resources. The achievement of what the applicants describe as '*socio-economic goals'* lies outside the scope of the Minister's powers.

100. Allied to this, they advance two other contentions. Compliance with the CFP, they say, is a jurisdictional pre-requisite to the legality of a Policy Directive issued under s. 3(3). A licensing condition which is adopted and in contravention of EU law is not binding on an economic operator under s. 3(2) of the 2003 Act. They refer in this regard to the powers of the Registrar General of Fishing Boats to issue licences containing conditions such as those encompassed in the Policy Directive and that they are expressly subject to '*the legal obligations of the State'* arising under EU law (s. 3(2) of the 2003 Act). For the reasons I have already examined, the applicants say that the measure was not compliant with the CFP.

101. Moreover, the applicants say, a Policy Directive must further '*a national policy objective*'. The Minister, they contend, failed to establish the existence of such a policy objective.

(b) The trial judge's assessment

102. The trial judge concluded that the provisions of s. 3 should be construed disjunctively, so that a measure made under s. 3(2) could have the purpose of either the rational management of fisheries *or* that of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species. To construe the provision so that the objective of rational management of fisheries could be pursued only in the context of the protection, conservation or enabling the sustainable exploitation of species would, he said, render the language used by the Oireachtas and, in particular the disjunctive, meaningless. Having so concluded, the judge continued (at para. 91):

> '*it is difficult to see that the Policy Directive is not one which has at least the aim, if not the effect, of rationally managing fisheries by causing the imposition of conditions to sea boat fishing licences which constitute measures to control and regulate the use and operation of the applicants' sea fishing boats, in this case, by the exclusion of the larger vessels from within the 6nm zone.*'

103. MacGrath J. proceeded from there to consider the consequence were he wrong in concluding that the provision required to be construed conjunctively. He decided that the Policy Directive was aimed at providing for measures to control and regulate the capacity, structure, equipment, use and operation of sea-fishing boats, not only for the rational management of fisheries but also for the protection, conservation or permitting the sustainable exploitation of living marine aquatic species. He noted in this regard the potential effects of the exclusion of large trawlers from inside the 6 nm zone as recorded in the consultation document, and that part of the reasons given by the Minister for the introduction of the Policy Directive which referred to the exclusion as providing '*ecosystem benefits, including for nursery areas and juvenile fish stocks*'. Insofar as the applicants had contended that the measure would not in fact achieve this objective, MacGrath J. said (at para. 93):

> '*whether the Policy Directive is capable of achieving the aims addressed in the consultation document in the long term is not to be conflated or confused with whether the adoption of such a measure with such aims comes within the statutory power of the respondent in the first instance.*'

104. The latter, he said, fell to be addressed within the rubric of the argument based upon rationality and proportionality.

105. The judge then addressed the two other issues. Arising from the reference in s. 3(3) to '*national policy objectives'* and to compliance with the requirements *'of the common fisheries policy of the European Communities or other international obligations which are binding on the State',* he concluded that the Policy Directive comported with each of these. The expressed view of the Minister that the Policy Directive would benefit small scale and inshore/inland fishermen was consistent with what was stated in the Programme for Government, of which the court took notice (although it was not exhibited in the proceedings).

106. Insofar as the requirements of the CFP and other international obligations were concerned, MacGrath J. concluded that the Policy Directive also complied with these. He referred to Recital 19 of the Regulation, which I have earlier quoted. MacGrath J. concluded that the Policy Directive was consistent with the objective recorded in this Recital as it '*pursues preferential access to the 6nm zone for small-scale, artisanal or coastal fishermen'* (at para. 98).

(c) Analysis

107. I have referred earlier to the justifications for the Policy Directive as explained in the Minister's evidence. They were six-fold:

(i) The Minister considered that the Policy Directive would '*provide wider ecosystem benefits including for nursing areas and juvenile fish stocks'*.

(ii) There was a high proportion of the areas inside the baselines and 6 nm zone designated as SACs and SPAs under the Habitats and Birds Directives. These presented '*a compelling environmental argument'* for restrictions in the zone because trawling by large vessels could have a more detrimental effect on the environment than smaller vessels. Included within these were fish conservation concerns – the obligation to obtain Good Environmental Status included '*the status of commercial fish and shellfish stocks'*.

(iii) Excluding vessels over 18 m using trawls from inside the 6 nm zone would present a significant economic opportunity to smaller inshore vessels.

(iv) The increase in the availability of sprat and possibly of herring to smaller vessels would represent a significant diversification opportunity for those smaller vessels.

(v) There were potential knock-on benefits for other economic sectors if restrictions were introduced.

(vi) The restrictions ultimately reflected in the Policy Directive would go some measure to addressing the issue of gear conflict, that is the loss of the static fishing gear used by smaller vessels as a consequence of net trawling by larger boats.

108. The Minister's deponent was not cross-examined on her affidavit evidence, and the court must accordingly proceed on the basis that the Minister did, indeed, take into consideration these six factors. Nor can it be disputed that the first and second of these purposes – those based on conservation of fish stocks and the '*compelling environmental argument'* – fell within the language of s. 3(3): the measure was '*for the purpose of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species or the rational management of fisheries'*. Even without relying upon the fact that there was no cross-examination, the material before the Minister makes clear that this was in every sense a real factor driving the decision: throughout the MI report, the consultation paper and the Minister's briefing note, the obvious environmental (and, as I have already found, conservation) benefits of restricting fishing to smaller vessels were stressed. Therefore, the starting point must be that *prima facie*, the Policy Directive fell within the provisions of s. 3(3).

109. But it cannot be in doubt either that *one* of the reasons the Policy Directive was introduced was to improve the position of those fishing using smaller vessels and the relevant coastal communities. This was, at the very least, as important to the Minister in issuing the Policy Directive as the environmental objective. Three of the six factors identified in the Minister's affidavit evidence – diversification opportunity, economic opportunity, and coastal economies – come back to the prospect that local fishermen fishing from smaller vessels will have greater fishing opportunities if the prohibition on trawling by longer vessels in the 6 nm zone was introduced. It was, it will be recalled, these factors that the Minister identified as driving the consultation process when he

announced it, and indeed the Marine Institute in its rebuttal to Dr. Shotton's report made clear its understanding that this was a critical factor underlying the decision:

> *'The number of vessels in the 12-18m fleet in Ireland is very low and continues to decline reflecting the very difficult environment in which it operates. The consultation document identifies this problem and the resultant Policy Directive can be seen as an attempt to correct it by reducing competition with larger vessels.'*

110. It cannot be seriously questioned that this was a significant factor animating the introduction of the measure.

111. The analysis conducted by Carswell L.C.J. (as he then was) in *Re Kelly's Application* [2000] NI 103 shows that several – sometimes only subtly different – tests have been formulated in the case law for describing when an improper purpose will vitiate a decision that is made in part because of, a proper purpose. The evolution of the law is reflected in the authorities in this jurisdiction. In *Cassidy v. Minister for Industry and Commerce* [1978] IR 297 the Supreme Court suggested a traditional test based upon the identification of the '*primary and dominant*' purpose of a decision (at p. 308-309 per Henchy J.). By the time the court came to determine *Kennedy v. The Law Society (No. 3)* [2001] IESC 35, [2002] 2 IR 458 (at p. 488) it was suggesting that where there are a plurality of purposes, some of which are permissible and some which are not, the prohibited purpose will operate to vitiate the decision if the impermissible purpose was '*as important ... as the permissible one'.* This might be interpreted as, effectively, imposing a causation based test: but for the impermissible purpose would the decision have been made at all? (see *Thompson v. Randwick Municipal Council* (1950) 81 CLR 87, at p. 106). The practical difficulties attending the actual application of such a test

and of ascertaining in any given case whether a decision would or would not have been made but for a particular purpose suggests to me that *Kennedy v. Law Society (No.3)* might be more satisfactorily understood as just asking whether the impermissible purpose viewing the facts and circumstances objectively '*demonstrably exerted a substantial influence on the relevant decision'* (*R. v. Lewisham Borough Council, ex parte Shell UK Ltd* [1988] 1 All ER 938, at p. 951 per Neill L.J.). Here, and however one looks at the matter, I have no doubt but that the test is met. If the conferring of a benefit on small fishermen and coastal communities was not a permissible purpose having regard to the terms of s. 3(3), the Policy Directive must fall.

112. A case can be made – in the abstract – that the Oireachtas did not intend the power to issue Policy Directives to be used for the purposes of conferring an essentially commercial advantage on one class of fisherman at the expense of another. The applicants' contention that a choice of a socio-economic nature which, had it been intended to enable a Minister to make it, would have been expressly said and, perhaps, conditioned or regulated in some way does not on its face lack substance. The decision of McKechnie J. in *Nurendale Ltd. v. Dublin City Council* [2009] IEHC 588, [2013] 3 IR 417 affords a good example. There, the court found improper the use of a statutory power conferred for environmental purposes (the Waste Management Act 1996) to implement an economic policy (the creation of a monopoly in the provision of refuse collection services). Although there were environmental benefits from the policy, these were minor and remote from the real (and, it was found, impermissible) objective. To that might be added the consideration that as originally enacted, s. 3(3) was limited to the preservation, conservation and sustainable exploitation of living marine aquatic species. The expansion of the provision by the Sea-Fisheries and Maritime Jurisdiction

Act 2006 to include '*the rational management of fisheries'* should, it can be plausibly said, be read as an elaboration upon, not an expansion of, that power: *noscitur a sociis.*

113. The difficulty with this argument – and the reason I believe it must fail – is that it assumes a differentiation between those factors relevant to the management of fisheries, and the interests of those fishing using smaller vessels and those dependent upon the coastal economies that are affected by fishing activities, that is not reflected in the governing legislative regime. In particular, as the applicants themselves contended, the provisions of s. 3 should be viewed in the light of the CFP. Section 3(3) expressly relates Policy Directives to the CFP. That policy includes within its objectives – as described in Article 2 of the Regulation – measures to adjust the fishing capacity of the fleets to levels of fishing opportunities with a view to having economically viable fleets without overexploiting marine biological resources (Objective 2(d)). Objective 2(f) refers to contributing to a fair standard of living bearing in mind coastal fishing and socio-economic aspects. Objective 2(i) refers to the promotion of coastal fishing activities taking into account socio-economic aspects. The Regulation makes it clear that the Member States should grant access to fisheries based on criteria of *inter alia* '*an environmental, social and economic nature'* (Recital 33), providing incentives to those operators who '*fish in the least environmentally damaging way and who provide the greatest benefits for society'* (*id.*).

114. It is therefore to be expected that s. 222B (3(d)) of the 1959 Act (as inserted by s. 4 of the 2003 Act) expressly enables the licensing authority to have regard to broadly framed social and economic considerations in deciding whether or not to grant a sea-fishing boat licence. It states:

> '*In deciding on the grant or refusal of a sea-fishing boat licence or the attachment of conditions to licences the licensing authority may take account of economic and social benefits which the operation of a boat would be likely to contribute to the coastal communities and regions which the quotas within the meaning of* [the Regulation] *are designed to benefit'*

115. The relationship between the power to issue Policy Directives under s. 3 and the power to issue and attach conditions to sea-fishing boat licences under s. 222B is symbiotic. Policy Directives are intended to be implemented via the licensing power, and the licensing power must be exercised in the light of Policy Directives. Therefore, the type of factors that can be taken into account in conditioning licences are indisputably relevant to the identification of the lawful purposes for which a Policy Directive may be introduced, which in turn, is to be adopted in licences for those vessels to which it is intended to apply. If the licensing authority is entitled to take into account the social and economic benefits to a coastal community of licensing a vessel, it is difficult to see how the Minister is acting unlawfully in pursuing that same purpose when issuing a Policy Directive *provided*, of course, that the Policy Directive comes in its terms within the language of s. 3(3).

116. For these same reasons, the specific objectives sought to be achieved by the Minister were not improper. They are, it must be remembered, not merely specifically validated by, but directly encouraged in, the provisions of the Regulation. I have referred to Recital 19 earlier. It exhorts Member States to *'endeavour to give preferential access for small-scale, artisanal or coastal fishermen.'* This theme is taken up in other parts of the Regulation, which speak of fostering '*direct and indirect job creation and economic development in coastal areas'* (Recital 12).

117. Therefore, the purposes identified by the Minister as amongst those animating the Policy Directive – the affording of diversification opportunities, economic opportunities, and fostering coastal economies – were permissible. The factors I have outlined above point to a wide construction of the term '*rational management of fisheries'*, or at least one that captures the objectives underpinning the CFP and, therefore, the Policy Directive.

118. And if they do not, the fact that s. 3(3) itself refers as it does to the '*requirements of the common fisheries policy'* in itself provides a legal basis for the measure. Here, I disagree with the applicants' interpretation of this reference. They seek to deduce from it a restriction on the power to issue Policy Directives and argue that if any part of the Regulation is breached by or in the course of the promulgation of a Policy Directive, the Policy Directive is invalid. In that regard they emphasise the conjunctive preceding this phrase ('*and the requirements of …*'). This is not how I read the section.

119. Obviously, if the Minister through a Policy Directive acts contrary to a directly effective provision of the Regulation, a person with standing to challenge the measure is entitled to rely upon the Regulation to impugn it. I have explained why that is so earlier in this judgment. This is not, however, because of s. 3(3). The reference to the CFP in s. 3(3) is a facility that broadens, not limits, the Policy Directive issuing power: it means that the Minister can issue directives that '*may provide for measures … to comply with requirements of the common fisheries policy …'*, not that the sub-section operates to vitiate the Policy Directive whenever there is non-compliance with the provisions of the Regulation. It is very hard to my mind to see why the Oireachtas would impose a limitation which exists independently and in any event. Therefore, the non-compliance with Articles 19 and 20 I have earlier identified do not ground a challenge under s. 3(3)

– although insofar as Article 20 is concerned, it may enable relief on the distinct legal basis I have earlier discussed.

120. The same logic may, or may not, apply to the reference to '*national policy objectives'*. If it does not, and if this is a constraint on the exercise of the power, it does not affect the legality of the measure. The Minister did establish the relevant policy here. The fact that the publicly available document he relied upon (the Programme for Government) was not exhibited on affidavit is an omission which the trial judge was in his discretion fully entitled to overlook.

Issue Three: Reasons

(a) The argument

121. I have recited earlier the reasons for the promulgation of the Policy Directive as recorded when it was issued. They were as follows:

> *"There is a compelling case for excluding trawling activity by large vessels in coastal waters inside 6 nautical miles. There are sufficient fishing opportunities for these vessels outside of 6 nautical miles. These actions will provide ecosystem benefits, including for nursery areas and juvenile fish stocks. These changes will also benefit small scale and island fishermen who exclusively rely on in shore waters.*

As the sprat fishery is concentrated inside the 6 nautical mile zone the transition period will allow those vessels involved in the sprat fishery time to transition to other fishing activities."

122. The applicants say that after a lengthy and detailed consultation process, one would expect that there would be what they describe as '*an extensive document*' setting out in detail the reasons for such a significant policy change. They contend that the reasons thus given by the Minister were vague and unintelligible. They say that the reasons did not enlighten them as to why this (as they describe it) '*highly significant*' decision was made, and classify it as a '*box ticking*' exercise. They identify a series of issues arising from the reasons, questioning in particular what ecosystem benefits were being referred to therein.

(b) The trial judge's assessment

123. The trial judge's conclusions in relation to the adequacy of the reasons given by the Minister depended upon his view of the interests of the applicants impacted by the measure. In this regard MacGrath J. attached importance to the fact that fishing boat licences were not themselves a tradeable commodity, to the fact that quotas are not privately owned, to various legal measures directed to keeping the size of the State's fishing fleet commensurate with available fishing opportunities and to the consideration that the terms of fishing licences may lawfully be changed from time to time. He also concluded that the applicants had not established a significant financial impact for them of the measures.

124. On that basis he addressed the argument advanced in relation to the alleged inadequacy of reasons as follows:

> *'In the light of the failure of the applicants to establish the significant impact on the substantive rights advanced by them, I am satisfied that the duty to give reasons does not lie at the higher end of the scale as discussed in Mallak v. Minister for Justice [2012] 3 I.R. 297. The reasons advanced by the respondent were sufficient to explain the rationale for the Policy Directive and to enable a person who might seek to challenge, to have such necessary information as he/she may require for this purpose.'*

125. Moreover, the judge felt that all interested parties had access to the consultation document and the underlying reports of BIM and the MI and he was satisfied that the decision must be understood and read in that context (at para. 153).

(c) Analysis

126. The applicants base their legal argument on the decision in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 IR 752. There, the court found the reasons provided by the respondent for a decision granting permission for a development comprising a wind farm to be adequate, insofar as they explained why that permission had been granted. However, they were found to be inadequate in failing to explain why there was no reasonable scientific doubt as to the absence of any identified potential detrimental effects on a protected site having regard to conservation objectives, for the purposes of the appropriate assessment required by the Habitats Directive.

127. The value of the judgment of Clarke C.J. lies in his examination of the nature, source and extent of the obligation to give reasons. The essential points he made can be simply summarised: the nature of the obligation to give reasons will depend upon the type of decision being made and the legal requirements which must be met in order for a sustainable decision of that type to be met (at para. 5.2). Where the decision maker is required to determine whether very precise criteria are met before a decision is made, the reasons will have to address why those criteria were met. Where the decision is of a policy kind involving a degree of judgement or margin of appreciation and is directed to general concepts the obligation is, by definition, less exacting. The character of the decision must then be matched against the function reasons perform – (a) ensuring that a person affected by the decision knows in general terms why the decision was made and (b) providing that person with enough information to consider whether they can or should avail of any appeal or to bring judicial review (at para. 6.15). Combining the nature of the decision, and the level of detail required to ensure these objectives are met should guide the court in determining in an individual case whether reasons given for the decision meet the applicable legal requirements. In that case, to take an example, the criteria required for the purposes of AA were very specific and it logically followed that the reason the Board reached a conclusion in relation to them had to reflect those criteria.

128. Sometimes the dividing line between decisions of a legislative and policy kind and those properly described as '*administrative'* may be thin. In *Christian v. Dublin City Council* [2012] IEHC 163, [2012] 2 IR 506 the High Court (Clarke J., as he then was) quashed parts of the Dublin City Development Plan because proper reasons were not given for it. The challenge was to the designation of the applicant's property in a zoning

category in which development for residential use was expressly excluded. In determining a reasons based challenge to the validity of the plan, Clarke J. drew an important distinction within the development plan between provisions which implemented policies (for which no reasons had to be given) and those parts of the plan that implemented those policies in a precise way (for which reasons did have to be given). The distinction was explained in the judgment as follows. As to the first, Clarke J. said (at para. 80):

> *'In those circumstances it does not seem to me that the policy end of a development plan being the overall strategy and the principal means designed to implement that strategy are elements of a development plan in respect of which there could be any obligation to give reasons save such as might be necessary to demonstrate (if it were not obvious from the plan itself) that the policies underlying the plan were within the statute or were compliant with broader policies which the statute requires to be respected. The broad strategy and its broad means of implementation involve the making of policy choices which are precisely the kind of matters which the current legislation gives to elected members. In this context it is none of my function to assess whether the conferring of those broad powers on elected members is the best means of implementing an appropriate planning strategy. The Oireachtas, in the exercise of its law making power under the Constitution, has, for the time being, decided that it is the elected members who are to make those decisions.'*

129. However, implementation of that policy so as to impact on the rights or interests of a landowner was a different matter (at para. 81):

> *'when a development plan gets down to the nuts and bolts in a way which has the potential to specifically affect the rights of individuals, both those who may wish to develop their own lands or those who may have their own interests interfered with by the development of neighbouring lands, then it seems to me that it is necessary to give at least some reasons for the precise means of implementing the overall strategy or policy adopted. The extent of the reasons required to be given will depend on the nature of the specific provisions of the development plan under consideration.'*

130. In this case much of the debate is reduced by the fact not only that the Minister has given reasons, but that s. 3(4) clearly envisages an obligation on his part so to do. It states:

> *'Where the Minister gives a policy directive under subsection 2(b), a notice of such directive and details of it* ***(including reasons for giving the directive)*** *shall, as soon as practicable after the directive is given, be laid before each House of the Oireachtas and published in Iris Oifigiúil'.*
>
> (Emphasis added).

131. Nonetheless, *Christian* affords a useful analogy in applying this obligation in this case. Insofar as the reasons for the Policy Directive are rooted in policy choices (that local fishermen or coastal communities should be fostered, or that the marine ecosystem should be protected) it is sufficient for the Minister to identify that policy in such a way

as makes clear that the Policy Directive is within the permitted terms of s.3(3). However, when he moves to impose particular prohibitions that seek to advance those policies in a manner that will directly impact on the interests of a defined category of fishermen, they are entitled to understand why he has reached that decision.

132. The Policy Directive and the reasons delivered when it was issued and indeed announced make quite clear the broad policy decisions underlying the Minister's decision. The restriction was being imposed because the Minister believed that they would provide ecosystem benefits, including for nursery areas and juvenile fish stocks and would benefit small scale and island fishermen who exclusively rely on in shore waters. The implication was fairly obvious: trawling by larger vessels captured a greater proportion of the available stock, was inimical to the marine environment and precluding that activity would provide opportunities for fishermen with smaller vessels who, plainly, the Minister wished to foster.

133. Were this not sufficient, it is clear that in adjudicating on the adequacy of reasons the court is entitled to have regard to documents '*prepared in the context of the adoption process'* (*Christian* at para. 86; *Connelly* at para. 7.3). Clearly, this can only be done where it can be said with certainty that the documents actually recorded the reasons for the decision. Here, I do not think that there can be any doubt but that the consultation paper, the BIM and MI reports met this requirement. They were the documents identified as informing the need for changes to policy in the first place and the documents to which those participating in the consultation process might be expected to direct their attention. From these the justifications identified above are clear.

134. Armed with these reasons, the applicants could have been under neither any illusion as to why the Minister had decided to issue the Policy Directive, nor any doubt as to whether (and if so on what basis) they could challenge that decision. That is obvious from the fact that they were fully equipped to, and did, mount a challenge to the rationality of the measure, to which I will now turn.

Issue Four: Disproportionate interference with the applicants' rights

(a) The argument

135. While the applicants' pleadings asserted that the Policy Directive was '*arbitrary, unreasonable and constitutes a disproportionate interference with the Applicants' rights to earn a livelihood and/or constitutes an unjust attack on their property rights',* the focus of the written argument before this court was upon the constitutional claim. That aspect of their case was referenced to the decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 which, it was said, '*endorsed the use of proportionality in administrative law cases where a fundamental right is in issue.'* The Policy Directive (it was said) failed this test: it did not serve '*any rational conservation objective'* yet encroached on the applicants' property rights for the purported benefit of fishermen with smaller boats without providing any compensation to the applicants. Referring to the decision in *Re The Health (Amendment) (No.2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105, the applicants contended that the Policy Directive entailed a substantial encroachment on their property rights which, without compensation, could only rarely be justified.

136. The claim that the Policy Directive was unreasonable and/or disproportionate was based on the combined effect of the following:

(i) The measure encroaches substantially on the applicants' property rights without the payment of compensation;

(ii) The ban was a blanket one the objectives of which could have been achieved by alternative means;

(iii) The applicants say that 25% of their turnover is derived from fishing in the 6 nm zone in the last three months of the year. The loss in respect of *The Fiona K III* arising from the ban is approximately €500,000 per annum, while that in respect of *the Celtic Quest* is €150,000 per year. This income cannot, they say, be replaced and the ban will further operate to diminish the value of the fishing licences attached to the boats, but in particular the *Fiona K III*, for which the diminution will be in the region of €25,000;

(iv) There is no evidence that any small-scale fishermen target sprat in the areas in which the applicants fish;

(v) A constant criticism is made by the applicants of the information generated, in particular, in the course of the consultation process as it arises from the absence of evidence to support suggested benefits of restrictions on numbers, and the claim that many of the objectives which were suggested as potentially flowing from changes were aspirational and not based upon survey or specific data.

137. In this connection, the applicants say that their livelihoods will be significantly impacted by the Policy Directive. Mr. Kennedy says that the *Fiona K III* contributes approximately €1.6M to €1.7M to his turnover. He explains that out of that turnover, overheads have to be met, and his boats have to be paid for. He says that the lack of turnover from fish within the 6 nm zone will significantly affect his profitability and the viability of his vessels, and will affect the ability to meet his commitments to service the loans incurred when he acquired the vessels (which he says are in the region of €3M). He says that this will also substantially jeopardise the ten employees associated with the vessels. Moreover, he says that he estimates that the value of the fishing licence attached to the *Fiona K III* will be diminished by at least 25% and that the value of the vessels will also be significantly diminished by the Policy Directive. Mr. Minihane's evidence is to similar effect. There are, he says, borrowings of €4M secured on the *Ocean Venture II* and the income from the catch within the 6 nm zone is vital to the turnover of the vessel, its profitability and its ability to service its bank facilities. He also says that his business and the organisation thereof was at all times based on an assumption and understanding that a vessel less than 90 feet would be permitted to trawl within the 6 nm zone.

138. Following from these propositions the applicants say that the effect of the decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* is that when an administrative body makes a decision which '*affects rights'* then the means must be rationally connected to the objective of the legislation and not be arbitrary, unfair or based on irrational considerations, the rights of the person must be impaired as little as possible and the effect on rights should be proportionate to the objective. In

that connection, the applicants rely upon a report tendered by them in evidence from Dr. Shotton.

139. Dr. Shotton was critical of the BIM and MI reports, particularly insofar as he claims some of the assumptions made in each were not substantiated by supporting evidence. The principal points made by him, were as follows[24]:

(i) The consultation document does not specifically identify the Minister's policy management objectives. It claims that a number of potentially beneficial outcomes may arise from withdrawing fishing privileges for trawlers greater than 18 m, but the outcomes are general to most fisheries within and beyond Irish seas. The absence of an expressly articulated policy objective renders it difficult, if not impossible, to evaluate the effectiveness of the other alternative options proposed.

(ii) There will be no additional benefit to the less than 12 m class and he describes as untenable the assumption that an additional 60 vessels in the less than 18m length class will be available to participate in the fishery for sprat no longer caught during the three-month late autumn/early winter season.

(iii) The BIM report restricted its analysis to consideration of catch and the expected revenue of the vessel classes of concern, but its conclusions assume that if less

[24] My summary, it should be said, is adopted from the trial judge's analysis of the report (at para. 122 of his judgment).

than half of the vessels' catch caught within the zone, and if that vessel be excluded from fishing within the zone, then an equivalent catch can be taken from outside the zone, suggesting no loss of revenue but a relocation of fishing effort. This is an untested and untestable assumption, in his view. He suggests that the report does not address the possibility that fish left uncaught would move beyond the 6 nm limit before capture and thus be unavailable to vessels operating within the 6 nm zone.

(iv) The underlying reports illustrate that in general the over 18 m length vessels target low value fish in the 6 nm zone whereas higher value fish are targeted by the smaller vessel. The BIM report fails to provide information on such matters as the catch of nephrops by polyvalent pair trawlers in the over 18 m class and its conclusion that there will be negligible impact on over 18 m vessels is disingenuous in its comparison of the possible revenue reduction compared to the total revenues from this class for all Irish waters with no account for impact on catch per unit effort beyond 6 nm.

(v) The BIM report failed to identify the individual fishing vessel revenues and given the limited numbers, this would have been a straightforward exercise. The failure to conduct this analysis is described by him as baffling, given the impact on the affected vessels. Further, this report assumes that all landings by the 10 - 12 m class are from within the 6 nm zone which may not be the case. Depending on the weather, these vessels are capable of working outside the 6 nm zone and conclusions based on incorrect assumptions would overestimate

the importance of the area within the 6 nm zone. This assumption was capable of easy verification, which was not done.

(vi) Sprat is mainly caught within the 6 nm zone and comparisons with revenue from other fisheries beyond the 6 nm zone are specious in terms of the vessels' earning potential.

(vii) The MI reports fail to identify the areas where smaller vessels target species. This information would inform the actual competition for resources between the two classes, or whether their activities are complementary.

(viii) It does not follow that exclusion of vessels capable of fishing in exposed areas within the 6 nm zone will result in smaller vessels being able to do so and no specific information is provided on the activities within the specific areas where the excluded vessels now fish. Further, no specific information is provided on the seasonal fishing operation of the over 18 m class or seasonal distribution effort by the different vessel classes.

(ix) Pelagic trawling by the applicants' two vessels is concentrated in the south west of Ireland at a time of little other activity by other fishing boats and a reasonable conclusion is that given the cessation of fishing for sprat by these two vessels, there would be no additional benefit to the less than 12 m class, i.e. that 18.2% of the gains that are envisaged for the less than 18 m class from cessation of

fishing by the over 18m class would not happen, notwithstanding the assumption that an additional 60 vessels in the less than 18 m class would be available to participate in a fishery for sprat no longer caught during the three month late autumn/early winter season, off the south west of Ireland.

(x) No claim is made in the text of the policy document that Ireland's obligations in respect of marine environmental protection is inadequate and no recognition is given that all forms of food production affect the environment, but that fishing is increasingly being recognised as a more environmentally benign form of food production. No evidence is presented of the claimed improvement in protection of fish recruitment and stock components or as to why this would happen, and appropriate analysis was not conducted, nor was data available, in respect of the claim that nursery grounds would be protected. Similar criticisms are made of how issues such as gear conflict and improved management of inshore waters are considered in the consultation document.

(xi) Dr Shotton is similarly critical of the suggested benefits of conservation and environmental impact and socio economic impacts which might occur on the exclusion of the over 18m trawlers. He criticises the lack of explanation, information and evidence to support these conclusions.

(xii) He says that the only way in which to prevent impacts on local ecologies is to ban fishing by all classes of fishing vessels and not just particular classes, an option which was not considered.

140. In his opposition papers, the Minister explained that the BIM report identified the value of landings by vessels over 18 m inside the 6 nm zone. If the value of landings by the over 18 m sector inside the 6 nm zone was taken up directly by vessels under 18 m, it would represent an increase of €5.5M to vessels under 18 m (for pelagic and demersal species). This would amount to a reduction of 2.6% in value to vessels over 18 m. As the value of the landings by vessels under 18 m is €8.96M, adding an additional €5.5M represents a gain of 62% for vessels under 18 m. Other influential factors included the differences in the fishing activities of smaller vessels, whether the species was controlled by quota and the capacity of the over 18 m vessels to catch landings of the same value, especially quota species, outside the 6 nm zone. Just over half of the estimated reduction of €5.5M to the over 18 m vessels, if excluded from waters inside the 6 nm zone, relates to pelagic trawling.

141. The Minister stressed that a consideration that informed the respondent's decision was that the increase in the availability of sprat and possibly herring (subject to stock recovery) to smaller vessels would represent a significant diversification opportunity for these vessels. As these species are found in bays and coastal areas during the winter, the capacity of small vessels to increase the catches was feasible and the catch opportunity comes at a time of the year when limited other options are available. With better control on the size of sprat that is caught and landed and shorter fishing periods nearer to port, there may be an opportunity for higher value from the landings of smaller vessels. The Minister contends that the correct legal analysis demands a measure must be (as stated in his submissions) '*so disproportionate as to be unreasonable or*

irrational'. That test, having regard to the evidence before the Minister when he made his decision, had not been met.

(b) The trial judge's conclusions

142. Insofar as the applicants' claim was based on the asserted irrationality of the Policy Directive, MacGrath J. dealt with this by identifying the applicable test as being whether the Minister had before him material on which he could make the decision which he did (citing *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39). Answering that question in the affirmative, MacGrath J. noted the reports that were before the Minister when he made the decision. In the course of that analysis, the trial judge rejected the claim that the information was out of date, and the judge felt that the Minister had, in fact, operated on the basis of the most up to date information available to him. The Minister, the court held, had material before him that indicated the impacts of the measure ultimately adopted (including the impact on the applicants themselves).

143. As to the applicants' claim that the measure constituted a disproportionate impact on their property rights and their right to carry on a business, the trial judge conducted a detailed analysis of the evidence before the court as to the financial and commercial impacts of the Policy Directive on the applicants. Referring to the decision of Costello J. in *Hempenstall v. Minister for the Environment* [1994] 2 IR 20, the trial judge expressed the view that while changes in the terms and conditions of a licence may as a matter of fact have financial implications for the holder of the licence, it does not necessarily follow that such a consequence renders that measure unlawful, nor does it

necessarily constitute an attack on property rights. From there, he reasoned as follows (at para. 150):

> *'I am satisfied that while there may be some financial and organisational impact experienced by the applicants, such evidence, taken at its height, does not go so far as to corroborate the extent of the applicants' claim that the measure will have an effect to the extent claimed. While suggested figures for losses have been advanced, they have not been the subject of necessary detailed analysis based on past and projected financial profit models that might corroborate the applicants' contentions. I am not satisfied, therefore, that it has been established that there has or will be any significant interference with any fundamental right of the applicants. Although the change in licensing conditions may have some financial implication for the licence holders, nevertheless, in my view it is not established that this amounts to an unjust attack on any rights which they may have.'*

144. He continued (at para. 151):

> *'The Policy Directive is a national measure adopted in pursuance of national policy designed, inter alia, to further the interests of inshore fishermen and to advance the protection of the ecosystems and the environment. The measure affects only a limited class and while it may have some impact on the applicants' business and be disruptive, I am not satisfied that it has been established that the nature of such impact is or will be disproportionate to the impact or upheaval contended for.'*

(c) Analysis

145. Since the oral argument in this case, the Supreme Court has had further occasion to consider the role of the principle of proportionality in challenges to the validity of administrative measures. In *Burke v. Minister for Education and Skills* [2022] IESC 1, [2022] 1 ILRM 73, the court was faced with a challenge to the legality of decisions taken by the respondent Minister in an attempt to facilitate the assessment of Leaving Certificate students during the COVID-19 pandemic. Those measures, which included the giving of calculated grades by teachers, impacted adversely on persons such as the applicant, who had been home-schooled by one of their parents. The parents were precluded from participating in the grading process, and therefore the applicants could not avail of it. Under the relevant scheme, the applicants remained free to sit the Leaving Certificate exam, but the timing of that exam meant that they would not be in a position to attend university that Autumn. That adverse impact occurred in a context in which the freedom to provide and avail of such home-schooling was guaranteed by Article 42.4 of the Constitution.

146. O'Donnell J. (as he then was) explained the correct approach in determining a challenge to the validity of the measures in question in this situation, and the reason for that approach, as follows (at paras. 93 and 94):

> *'The basic question where it is alleged that an administrative decision breached constitutional rights is the same as that which applies when it is argued that a legislative provision breaches those rights. While this question might be resolved by using the language of reasonableness, it is not facilitated by the*

merging of different approaches, particularly when they come encrusted with layers of case law decided in a different context.

Faced with these difficulties, the majority decision in Meadows is undoubtedly clear in relation to what it did not decide: rejection of the contention that, when it is alleged that an administrative decision breaches a constitutionally protected right, the Court should assess that on the standard of rationality set out in State (Keegan & Lysaght) v. Stardust Victims Compensation Tribunal [1986] I.R. 642. When it is alleged that an enactment of the Oireachtas breaches a constitutional right, it is not sufficient to establish that the provision could be considered rational or reasonable at some level, still less that it does not fly in the face of fundamental reason. The Constitution protects rights against invasions whatever the motive or reasoning. There is, in principle, no reason why a different test should be applied to the decision or action when it is taken as an administrative decision pursuant to the executive power, rather than pursuant to legislation. The majority judgments were also clear in concluding that the principle of proportionality could be employed in the analysis and resolution of cases raising issues as to the impact of decisions on fundamental rights.'

147. In *Burke,* the interference with the constitutional freedom was '*significant and substantial',* while the specific justification proffered for the measure (that an individualised assessment of their work by another assessor or by special examination would give rise to challenge by other students denied that opportunity) was found not to be compelling. Elsewhere in the judgment it is suggested that the proportionality assessment will be required not merely where there is a breach of rights, but also where

an administrative measure will '*affect'* constitutional rights (at para. 95), reference being made later again to '*interference with the right'* (at para. 99).

148. What matters, however, for present purposes is that to succeed in the claim advanced under this rubric, the applicants must establish one of two things. Either first, they must prove that the Policy Directive is irrational in the sense described in *State (Keegan and Lysaght) v. Stardust Victims Compensation Tribunal* [1986] IR 642, or they must prove that they enjoy a constitutional right that is (at the very least) adversely affected by the measure in question in such a way as to trigger the proportionality test considered in *Burke v. Minister for Education and Skills*.

149. The first of these can be ruled out, in my view. The trial judge's consideration of this issue was clear and cogent, and no credible basis has been suggested on which it could be concluded that it was not. This aspect of the High Court judge's findings was not engaged with at all in the course of this appeal, either in written or oral submissions and in those circumstances, I find no reason to disagree with them.

150. As to the question of proportionality having regard to the '*engagement*' of constitutional rights, it seems to me that this must be viewed within the confines of two clear propositions of law. The first – hardly contestable – is that '*[a]ny right to fish ... may be subject to requirements as to licensing, quantity, size and season, conservation and more'* (*Barlow v. Minister for Agriculture* per O'Donnell J. at para. 31). Indeed, it seems likely that the comments in that case in respect of mussel fishing capture many other similar activities (at para. 67):

> '*On the plain meaning of Article 10 of the 1937 Constitution, the regulation of fishing for mussel seeds at least, when carried out in the territorial waters of*

the State, is the regulation and management of a natural resource, and therefore property belonging to the State …'

151. The second is that where property rights are said to arise from an activity conducted under an admittedly permissible system of statutory regulation, the changing of the conditions of a licence to be granted in the future for, and necessary to, that activity is not an unjust attack on those rights simply because it renders the activity less profitable than it might otherwise have been. This was the point made by Costello J. in *Hempenstall v. Minister for the Environment* when he said:

'*Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions. Changes brought about by law may enhance the value of those property rights... or they may diminish them... But an amendment of the law which by changing the conditions under which a licence is held reduces the commercial value of the licence cannot be regarded as an attack on the property right in the licence - it is the consequence of the implied condition which is an inherent part of the property rights in the licence.'*

152. The applicants never contended that this statement of principle – which heavily influenced the trial judge's conclusions – was wrong. In my view Costello J. captured with characteristic precision the correct constitutional analysis, and that thesis has been applied consistently since (see *Gorman v. Minister for Environment* [2001] IEHC 47, [2001] 2 IR 414). Moreover, while this explanation of the constitutional position is referenced to *property* rights, it cannot be the case that the invocation of rights to earn a livelihood or to carry on a business yields a different outcome. The applicants'

constitutional complaint derives from their asserted right to engage in a commercial activity, the activity is one that may be lawfully (and constitutionally) regulated, and their complaint is that the changes to licence conditions have the effect of rendering the activity less profitable than it would otherwise have been and their licence thus less valuable. The law is clear that that complaint alone does not constitute an unjust attack on their constitutional rights.

153. It is not evident to me that (or indeed why) the courts must in this situation move this analysis a step further and conduct any more detailed proportionality assessment: it must be repeated that this is not a situation in which the applicants' licences are being forfeit. Cases such as *Hygeia Chemicals Ltd. v. Irish Medicines Board* [2010] IESC 4 show that the constitutional property rights of the licence holders may (depending on the nature of the licence and applicable statutory scheme) be in play as they enjoy an asset in the form of the licence, the value of which is adversely affected by its withdrawal or in at least some circumstances by the imposition of certain new conditions on it. Where a licence is granted for a fixed period, the property right is no greater than the licence, unless the holder can ground a claim that he has some entitlement to its renewal on particular terms. The prospect that the licence will not be renewed or indeed that when it *is* renewed there may be new conditions attached to it is an inherent part of what the licence owner has obtained, and this is what both defines and circumscribes his property right. As Carroll J. said in *State (Pheasantry) v. Donnelly* [1982] ILRM 512, at p. 516 of a licence (in that case, to sell liquor) there are only such rights as are given by statute subject to the limitations and conditions prescribed by statute. The imposition of new conditions may devalue the licence holder's business, but it does not impair any constitutional right. That analysis has been

applied since across a variety of legal regimes governing different forms of commercial activity in which State regulation has granted, and thereafter modified or removed, economically valuable opportunities (see *PMPS v. Attorney General* [1983] IR 339, *J&J Haire & Company Ltd. v. Minister for Health* [2009] IEHC 562).

154. The language of, and decision in, *Hempenstall* make it clear that when viewing the validity of measures altering the conditions of a licence required for an activity which is lawfully and justifiably the subject of licensing in the first place, the mere fact that the new conditions make the activity less profitable than it might otherwise be does not itself involve a breach of any constitutional entitlement. If that is so, the issue of conducting a proportionality assessment that goes beyond an analysis of those facts alone should not usually arise. There are, I would add, substantial reasons of both theory and practicality showing why this should be so: vague and general appeals to '*proportionality'* in the context of property rights triggered solely because a legislative measure imposes a cost or tax on, or reduces the profitability of, a commercial activity are by definition more often than not standardless, and will inevitably engage the latitude afforded to the legislature in the assessment of social and economic matters (see my comments in *Used Car Importers of Ireland v. Minister for Finance* [2020] IECA 298 at paras. 259-260). Where such a challenge is to an administrative decision, the argument adds little to the common law principles of unreasonableness.

155. If, for whatever reason, that conclusion is wrong, I do not believe that the application of a proportionality test would alter the conclusion I have suggested. The consideration in *Burke* shows that where a challenge to an administrative measure is predicated on an alleged violation of the applicants' constitutional rights, the validity of decisions

limiting those rights should be approached using a methodology similar to that applied to a challenge to the validity of an enactment on the same grounds. Inevitably, therefore, the constitutional part of the challenge should take account of the deference towards decisions made in the allocation of resources and implementation of measures of a socio-economic kind. It must weigh in the balance the importance of the objective sought to be achieved.

156. When these factors are brought into account here, the multiple objectives underpinning the Policy Directive were on any objective view of overwhelming importance – environmental, conservational, and (following the exhortation in the Regulation) the protection and fostering of coastal economies. The impact on the applicants may not have been slight – I think they are correct in observing that there was no dispute that 25% of their income was derived from fishing as they did in the affected waters – but they continued to enjoy the entitlement to fish outside the areas in question, and whether he was right or wrong, I do not believe it can be seriously disputed that the Minister had *a* basis for believing that the applicants had available to them good fishing opportunities outside the 6 nm zone.[25] And more importantly, in placing that impact in the balance it must be remembered that the applicants' constitutional interest is qualified because it is not a right to engage in the activity in question that is involved, only a right to carry out an activity on permitted terms, under which conditions may change.

[25] The basis for this view is detailed in the second affidavit of the Minister's deponent. Between October and December 2019, she explains, there were good fishing opportunities available for white fish and prawns. These included opportunities to fish for monkfish, hake and megrim, for each of which there were what she describes as '*generous monthly catch opportunities*'. There were also fishing opportunities for prawns, haddock, whiting and pollack. These are all described by her as high value stocks. It is, she says, a '*business decision*' for the applicants to target sprat during this time.

157. Ultimately, the end point of the applicants' argument was that the extent of the dependence of two or three operators during three months of the year operated to preclude the adoption of a measure affecting a regulated activity and deemed by the Minister to be for the benefit of the environment and economy as a whole, unless they were compensated for consequent financial loss. No remotely apposite authority was cited in support of that proposition. In my view, in particular having regard to the justifications for the measure and the deference the court should afford it, this is simply not tenable.

Issue Five: Consultation rights

(a) The findings of the trial judge

158. A party concerned by an administrative decision may pray in aid rights of consultation in a variety of different circumstances and on distinct legal bases. Sometimes it may be that the statutory provision pursuant to which the decision is made expressly confers such rights. Where they do not, the effect of common law and/or constitutional mandates of natural justice and fair procedures may demand that persons affected in a particular way by a decision be permitted to make representations in connection with it, and decision-making powers in legislation will have implied into them an obligation on the part of the decision maker to receive and consider such submissions. And even if a person is not affected by a decision in such a way as to generate a right to make representations, they may have an entitlement to do so because the agency making the decision has promised that there will be a consultation process and that either the public

generally, or particular categories of persons affected by the decision, will have a right to make submissions in connection with it.

159. With the exception of that situation in which legislation provides an express right of representation (in which case the extent of that right, and the identification of those who enjoy it will depend on the terms of the relevant provision), the nature and extent of rights of representation and submission are fact sensitive, being dependent upon the nature of the interest enjoyed by the party concerned, the type of decision making involved and the potential impact of the decision upon that interest and (in the case of a right based upon promises made by the deciding agency) what the decision maker has said. These rights may also depend upon the legal characterisation of the process underway: some of the legal authorities suggest a reluctance on the part of the courts to extend rights of representation in relation to legislative decisions (see *Gorman v. Minister for the Environment*), although more recent authority looks more to the substance of the decision than its legal form (*Garda Representative Association and anor. v. Minister for Public Expenditure and Reform* [2018] IESC 4 (at para. 8.7)).

160. The varying nature of these rights was well expressed and explained by the trial judge when he said (at para. 158 to 159):

> *'The authorities suggest that while there is not a one size fits all formula and the more individual or closed category the measure, and the more direct and individual nature of the potential impact, the more stringent the application of the principles of natural justice and in particular the right to be heard, will be viewed.*

Depending on the circumstances, the fulfilment of the requirements of natural justice may be achieved through a spectrum of measures such as simple and straightforward notification or consultation at one end, to a more complete hearing at the other.'

161. In this case, it is clear that the 2003 Act does not entail an express obligation on the Minister to consult with those who may be affected by a Policy Directive made under s. 3(3). That being so, the trial judge explained his approach to the question of whether there ought to be implied a right of consultation on the part of the applicants, and if so the extent of that right, by reference to factors which, he said, included (a) the nature and quality of the decision under review, (b) the nature and extent of the rights or interests advanced by those alleged to be affected by the decision and (c) the nature and extent of the impact, actual or potential, which the decision has or may have on those rights or interests. He continued (at para. 174):

'*These are factors which, as has been discussed, tend to pervade a consideration of many issues. At one end of the scale, and always bearing in mind that in considering the nature of the measure, the focus ought to be on substance rather than form, where fundamental constitutional rights are in issue with little doubt about the potential impact of a decision which is overtly administrative in nature, the obligation to comply with fair procedures and natural justice will be at the higher end, most likely requiring those affected to be afforded a full hearing. At the other end of the scale, it seems to me, is where an overtly quasi-legislative measure impacts on individual interests rather than constitutionally protected rights. In those circumstances, the obligation on the*

decision maker, if any, is much reduced and depending on the circumstances, may be fulfilled simply through consultation, advance notification and/or the invitation to make submissions. In between there are a myriad of situations where the extent of the rights and obligations will vary. The task of this court is to determine where on this scale the applicants [sic.] case lies, if it has made its way on to the scales, and whether the measures taken leading to the making of the Policy Directive have appropriately balanced matters.'

162. This analysis – which is in my view as clear as it is correct – led the judge to direct attention to the fact that the Minister knew that the interests of the applicants were liable to be adversely affected by the proposal. This was evidenced by references in the briefing note to the fact that for just over 1% of over 18 m vessels, sprat constitutes a high proportion of the value of their landings, and to the fact that the lead in period provided for in the Policy Directive was intended to enable these vessels to transition to other fishing strategies. However, and at the same time, the measure was taken in pursuance of a national policy objective, and was not targeted at any particular individual. The judge, from there, concluded as follows:

'Taking all things into consideration, I am satisfied that although a legislative or quasi-legislative measure in nature, it was one which, in my view had the potential to, and on the facts, impacted on the interests of a defined and narrow class and number of fishermen. I am also satisfied, on a consideration and application of the authorities, that the circumstances of this case are more at the end of the scale necessitating consultation, rather than anything more. The issue therefore, it seems to me, thus boils down to whether the respondent has discharged that obligation in the particular circumstances.'

163. MacGrath J. then noted the comments of Lord Woolf MR in *R. v. North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at para. 108:

> *'It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account...'*

164. Applying this principle, and referring to a number of authorities applying it, the trial judge found the procedures adopted by the Minister to be unfair. It was his view that while the obligation on the respondent was '*at the lower end of the scale*' it had to be viewed against the process that was expressly outlined in the consultation document. Central to his conclusion in that regard were the following statements in the consultation document itself. Thus, the introduction to the consultation paper contained this statement:

> '*All relevant issues put forward will be carefully evaluated and subjected to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of the waters inside the 6 nm zone.'*

165. This statement was repeated as a '*Reminder'* in the introduction to that section of the consultation paper addressing possible impacts and outcomes

166. Based upon this, the trial judge's reasoning can, I think, be summarised as follows:

(i) It was not unreasonable for the applicants to have formed the impression that before the taking of any final decision, all stakeholders '*would be fully consulted'*.

(ii) Because the applicants were stakeholders (perhaps the only persons who would be adversely affected) and because their position was recognised in the briefing note and in the phasing out provision, they had an interest in the process and its outcome, enjoying rights – however limited – in that process.

(iii) The applicants were aware that a number of options were being considered but were unaware of the particular option as recommended to the Minister and subsequently decided upon.

(iv) A proper construction of the consultation document could only lead to the conclusion that at a minimum the preferred option was to be outlined to the affected stakeholders before a final decision was taken.

(v) The judge made it clear that in so holding, that it was not the ruling of the court that a second consultation process would or should be

undertaken, simply that the process which was adopted by the Minister should be adhered to as a matter of fairness, justice and law.

167. The trial judge's conclusion in respect of fair procedures was thus rooted firmly in the representation contained in the consultation document itself: his finding was that the interests of the applicants in the Policy Directive was such that they had an entitlement to *some* form of consultation, but that in affording a consultation process the Minister came under a legal obligation to deliver what he had promised. What he had promised, the court found, was a further opportunity – at least for the applicants – to make representations on the final proposal ultimately settled upon by the Minister.

(b) Analysis

168. While there were references throughout the submissions to the applicants having such an interest in the Policy Directive as to afford them a legal entitlement to make representations to the Minister regarding the proposed Directive that stood independently of the alleged promises in the consultation paper, the focus of the applicants' argument in written and oral submissions to this court was upon the language of the consultation paper itself. This, in my view, was correct. Putting to one side the issue of when a party will enjoy rights of fair procedures in connection with the promulgation of what is essentially a legislative measure affecting the interests of a very large number of persons, there can be little doubt in my mind that whatever the contents of that right at common law or as required by the dictates of constitutional justice, it was honoured in the consultation process that actually took place. That process fairly and clearly advised the applicants of the range of proposals under

consideration, of the material relied upon by the Minister in presenting those options, and of the factors he saw as relevant to the issues thus arising. Everything depends on whether, as the judge found, the terms of the consultation document itself were such as to generate an obligation to afford a further and second round of consultation. This, clearly, depends in the first instance on the meaning of the document, properly construed.

169. Here, the relevant principles of construction should not be controversial. The consultation paper shares in common many of the features of the planning documents considered in *Re XJS Investments Ltd.* [1986] IR 750 and *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 IR 527 and should, in my view, be construed according to the same principles (see [1986] IR 750 at p. 756). It was not intended to be understood as a legal instrument, is not to be treated as if it were the product of skilled draftsmanship by those with legal training and should not therefore be construed according to the principles that would be applied to such a measure. Instead, it should be read according to the ordinary meaning as it would be understood by members of the public without legal training. This means that the critical question is whether a reasonable person reviewing the document would understand that the Minister was promising not one, but two, consultation processes to be availed of by some, or maybe all, of those entitled to participate in the first (but at the very least including the applicants).

170. Bearing this in mind, and having regard in particular to five features of this argument when placed in context, it is my view that the trial judge erred in concluding that the consultation paper should be construed as promising a further and second round of

consultation before the Minister decided whether to issue a new Policy Directive and, if so, in what terms.

171. The first relevant, if obvious, feature of the document is that nowhere does it actually and clearly say that there will be a second round of consultation. This seems to me to be a sensible starting point. The Minister had initiated a process addressing a policy initiative he obviously believed to be of some import, by way of a consultation that was of some scale. A very detailed and comprehensive paper was prepared identifying the issues. It was accompanied by the BIM and IM reports. Any member of the public was free to participate. Given the inevitable time and effort involved in the conduct of a process of this kind (and the consequent delay in the finalisation of a policy position) it is not unreasonable to think that if the Minister was actually proposing that process as the starting phase of a two step procedure he would have said that in clear terms. On no version of the document could it be said that he did this. At the very best from the applicants' point of view, the document was ambiguous.

172. The second factor is that at a number of points the consultation paper is clear in stating that what was envisaged by the Minister was a single consultation process, and not either two consultation processes or a consultation process with two entirely different component parts. This is how the process is announced ('*Public Consultation*'):

> '*The Minister ... has launched **a consultation process** on a Review of Trawling Activity inside the 6 Nautical Mile Zone.*'

173. The comments in the introduction upon which the applicants rely were prefaced with a statement which made it clear that the consultation to which he was referring was that which he was then undertaking:

> '***To inform the Minister's consideration further, he is <u>now undertaking</u> a full public consultation. It is important to note that the Minister has not made any decision to change the current arrangements at this time.*** *All relevant issues put forward will be carefully evaluated and subjected to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of the waters inside the 6 nautical mile zone.'*

(All emphasis mine).

174. Similarly, when these terms were repeated in the conclusion to the consultation paper, this was on the basis that the reference was to the consultation that was being set in train by the document. It said:

> '***This consultation is taking place*** *without prejudice. It is important to note that at this time the Minister has not made any decision to change the current arrangements. All relevant issues will be carefully evaluated and subject to a full consultation with stakeholders before the Minister decides if any amendment to the policy is justified for the proper and effective management of waters inside the 6 nautical mile zone and the baselines.*
>
> *The purpose of* ***this consultation*** *is to invite stakeholders and interested parties to advise the Minister of their views on any changes to policy within the scope of this review as set out above.*

A Sea-Fishing Boat license holder should not carry out any activities or make any plans on an assumption that a change in policy may happen.

***The consultation process is set out below.*'**

(Underlined emphasis in the original: the remainder are mine).

175. What was '*set out below'* was an invitation to '*interested parties'* to submit comments to an identified address. It concluded:

> '*In accordance with procedures, the Department will not engage in consultations with individual operators or groups of operators and any additional information or clarification made will be published on the website.*
>
> *This document is for consultation purposes only.'*

176. This specific statement which made it clear that all persons interested in the proposals would be treated alike, was accompanied by a number of assertions that other possible options identified in the consultation process might also be considered, and that '*[o]ther suggestions put forward in the public consultation that may involve adjustments to these options will also be carefully considered'*.

177. I do not think that these statements, read as a whole, can have any reasonable meaning other than that during the consultation process ('*this consultation'*), which on any version was '*full',* the Minister would evaluate all submissions that were made and that accordingly the exercise of his power to make a Policy Directive was '*subject to a full consultation with stakeholders before the Minister decides'*.

178. The third point of importance, it seems to me, is this. It is self-evident that this document must be read as a whole. Had the Minister intended to initiate a second consultation it would be expected not merely that the Minister would say so, but that he would specify this, or it would otherwise be clear from the text which '*stakeholders'* would enjoy the benefit of that process. Without so specifying at the start, then no-one would actually know whether this was for them the only consultation to take place, or whether there was going to be another stage. There were, it must be recalled and repeated, 1392 vessels on the register. Persons interested in the environment, or food supply, or all or perhaps only some specific coastal communities, were all potentially '*stakeholders'.*

179. The applicants themselves seemed uncertain what they claimed was being promised: the High Court judge felt that the '*stakeholders'* who might enjoy a second round of consultation were just the applicants. This reflected the applicants' written submissions to that court, in which it was emphasised that the applicants were *not* asserting that there should have been a repetition of the public consultation procedure. In oral submissions to this court it was said that the '*stakeholders'* comprised *all* of the licensed trawler owners. That, as I have just noted, was a large constituency. More importantly, it was never satisfactorily explained why the licensed trawler owners were '*stakeholders'* for the purposes of this second round of consultation, but those interested in the protection of the environment, or economy of coastal communities, were not.

180. In their submissions the applicants were inclined to dismiss the relevance of this factor, suggesting that it was not pertinent who precisely the Minister involved in the second round, provided of course that it included them. This, I think, misses the point. In

construing the document the absence of any definition of who the stakeholders for the second consultation were to be was relevant to whether the document could be reasonably interpreted to have communicated that a second consultation was envisaged. The fact the Minister was unlikely to run a second round in which *everyone* was entitled to participate – it is unclear how a process of that kind could ever end – and the consideration that if he was only going to allow *some* persons to participate, it was less likely again that he would leave entirely open the question of who those persons were, with the consequent, inevitable and justified claim by those excluded that their removal from the process was unfair, are all relevant factors to the credibility of the claim that the applicants reading of the consultation paper corresponds to that of a reasonable participant at the time.

181. Fourth, it is in my view telling, that at no point prior to the initiation of these proceedings did the applicants (or, for that matter, anyone else) suggest that there was an expectation that there would be a second round of representations before the Minister introduced the actual Directive. In point of fact, the Irish Fish Producers Organisation argued in its submission that a *new* consultation process was required, strongly suggesting that at least that organisation was under the impression that there was to be no second opportunity to address the flaws they identified in the consultation initiated by the Minister. Had there been any such understanding one might have expected that it would be reflected in the submissions delivered in response to the consultation paper or, for that matter, in the correspondence sent before these proceedings were initiated. Not only was it not raised or identified, but even in their evidence in the proceedings themselves, the applicants never actually state that it was their understanding when they participated in the consultation process that, in fact, there would be a second stage. Mr.

Kennedy certainly avers to his *contention* that there was to be such a second round: however, there is no evidence that this belief was entertained during the course of the consultation process or, perhaps more importantly, that the applicants adjusted their representations in any way at that stage because they so believed.

182. Given that the court is engaged not in construing a contract but a document issued for consumption by the general public, I see no reason why the subjective assessment of the parties and indeed the public is inadmissible in the construction of the consultation paper (and it was never suggested that it was so inadmissible). Indeed, given that the claim was based on an entitlement to enforce as against the Minister the claim to a second consultation process as a promise, it could be said with some force that it was incumbent on the applicants to assert that they had in fact known of, if not relied upon, that promise at the time of their participation in the consultation. If they were not aware when they embarked upon the consultation process that there was in fact to be a second round, it becomes difficult for them to credibly assert that there was any unfairness in depriving them of that further opportunity to make such representations to the Minister.

183. Fifth, the applicants in their submissions attached very considerable importance to the following statement, which appeared (in bold) in the concluding section of the consultation paper:

> *'A Sea-Fishing Boat license holder should not carry out any activities or make any plans on an assumption that a change of policy may happen'*

184. This (it was said) was a direct appeal to the license holders which, it was said, was in effect a promise to revert to them before any changes in policy occurred. Counsel

argued that that the Minister was, by this statement, advising the licensed trawler owners that '*nothing will happen until we speak to you'*. I must confess that I cannot see how this statement could bear that construction: the Minister here was simply advising licence holders that they should not make any assumptions as to the outcome of the consultation process pending its conclusion. It does not promise anything.

185. One final point that was stressed by the applicants falls to be addressed. They said that they had no notice of the entitlement granted by the Minister that they could fish for two years in the 6 nm zone for sprat. They should, they contend, have had rights of representation in regard to that aspect of the Policy Directive, at least. I do not agree. They had had full consultation rights in relation to the three options and the Minister chose to adopt one of those three options. That was to the applicants' detriment but, having regard to the consultation process that had taken place, they could have had no complaint about that. Instead, they were granted a benefit. They had no right to make representations so as to obtain a greater benefit. If they wanted a facility of a particular kind, it was open to, and incumbent upon, them to explain what and why in the consultation process itself.

Conclusion

186. This case presented a wide range of issues. My conclusions are as follows:

(i) The Policy Directive was a measure for the conservation of fish stocks within the meaning of Article 19 of the Regulation.

(ii) The failure to notify the measure pursuant to that provision at the time when it applied only to Irish sea-fishing vessels has no effect on its validity.

(iii) It follows from (i) that the Policy Directive was also a measure for the conservation and management of fish stocks within the meaning of Article 20(1) of the Regulation.

(iv) The Policy Directive as amended by the 2019 Act was a measure which, as of the enactment of that Act, applied to vessels of another Member State. That this consequence followed from two legal instruments rather than one cannot affect the obligation of notification imposed by Article 20(2).

(v) The Policy Directive should therefore have been notified in accordance with Article 20(2), certainly before it came into force in January 2020.

(vi) The Policy Directive was not discriminatory.

(vii) The Policy Directive was *intra vires* s. 3(3) of the 2003 Act even though it was adopted in part in order to benefit those fishing using smaller vessels and coastal communities.

(viii) The Policy Directive has not been shown to be irrational, and it was not invalid as involving a disproportionate interference with the applicants' constitutional rights.

(ix) The reasons given for the measure were legally adequate.

(x) A reasonable reader construing the consultation paper would not have concluded that the applicants enjoyed any right to a second consultation before the Policy Directive was adopted.

187. As stated earlier in this judgment, the court will receive submissions from the parties as to whether that part of the Policy Directive affecting Northern Irish vessels was severable, and if so, how, insofar as it ought to have been notified under Article 20(2) of the Regulation and the relief – if any – to be granted (a) having regard to the prospect of such severance and/or (b) the fact that there is now, by reason of the departure of the United Kingdom from the European Union, no requirement that the Policy Directive be notified in accordance with Article 20(2) of the Regulation. The parties will be advised separately of the timetable. Costs cannot be determined until this issue is addressed.