[2018] IEHC 772

THE HIGH COURT

Record No. 2017/884 JR

BETWEEN

PAT FITZPATRICK AND MICHAEL J. FLANNERY

Applicants

and

MINISTER FOR AGRICULTURE, FOOD AND THE MARINE AND THE SEA FISHERIES PROTECTION AUTHORITY

Respondents

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 30th day of October, 2018

General background

1. A more detailed exposition of the facts and relevant legal provisions in this case is set out in my earlier judgment of the 11th January, 2018 concerning an application for interlocutory relief. By way of summary for the purposes of this judgment, I will confine myself to the following.

2. At the heart of the dispute between the parties is the question of how the second respondent (hereinafter "the Authority") calculated the figure representing the total fish catch in respect of the species *Nephrops norvegicus* (more commonly known as Dublin Bay prawns) in a particular sea area off the west coast of Ireland during the year 2017. The sea area in question is known as Functional Area 16 (hereinafter "FU 16"). This total figure of catch is relevant, *inter alia*, for calculating whether or not the annual EU quota for Irish vessels is being approached or has already been reached at any given time.

3. The respondent Minister closed FU16 in respect of fishing for Nephrops from the 1st August, 2017 onwards, and the EU Commission issued a closure notice with effect from the 2nd November, 2017. This was done on the basis of information furnished by the Authority to the Commission on the 17th October, 2017; the information furnished being that, in the Authority's opinion, the figure for the Nephrops fished from FU16 to date by Irish vessels was a figure of 1991 tonnes, and that the annual quota had been exceeded. The core of the applicants' complaint is in respect of the methodology used by the Authority when calculating this figure of 1991 tonnes.

4. The applicants maintain that the primary method of calculating fish catch or "outtake" is and should be with reference to the information contained in each vessel's electronic fishing logs. They argue that if this information had been used, as it should have been, the appropriate calculations would have yielded the much lesser figure of 733 tonnes. The Authority, however, had taken the view that there was a serious problem of Irish fishermen underreporting in their electronic fishing logs the amount of Nephrops actually caught in FU 16, and that this problem was of such a grave proportion that the Authority, in order to comply with its statutory and European law duty to transmit accurate information, had to employ another methodology in order to arrive at a more accurate estimate as to the actual amount of Nephrops being fished in the relevant area.

5. The methodology used by the Authority is primarily based on "time spent" in FU16 and is described in more detail below, but for ease of reference in this judgment, I will refer to it as the "time spent" methodology. The Authority says that, having used this methodology, it became clear that the European quota for fishing Nephrops in 2017 had already been exceeded by July 2017. It stands over the use of the methodology in question. The Minister submits that the decision taken by him in light of the information furnished by the Authority was an entirely reasonable and legitimate decision and was not irregular or invalid in any way.

6. Leave was granted to the first applicant to bring the present proceedings on the 17th November, 2017. An application was brought for interlocutory relief, and on the first day of the interlocutory hearing in December 2017, the Court gave liberty to join the second applicant to the proceedings. The interlocutory relief was refused for the reasons set out in my judgment dated the 11th January, 2018.

7. As regards the reliefs sought more generally in the proceedings, it is the position that numerous reliefs, sixteen in total, were sought, including orders of *certiorari*, declaratory relief and damages. I hope it is fair to summarise these in broad terms by saying that they were reliefs directed at quashing or declaring as invalid (a) the decision of the Minister to close the fishing grounds and/or to rely on the figures provided by the Authority; (b) the decision of the Authority to employ the "time spent" methodology; (c) the decision of the Authority to communicate to the Minister and the EU Commission the figures calculated with reference to the "time spent" methodology; and directed at ensuring that the Minister/Authority would not rely on figures calculated in this manner in the future. The damages sought were for alleged losses suffered by the applicants as a result of the actions of the Minister and the Authority by reason of those decisions.

Relevant Dates

8. In my earlier judgment, I also set out a more detailed chronology of events and I do not propose to repeat that chronology here. For present purposes, I think it is sufficient to summarise those events in the following terms. By letter dated the 14th July 2017, Mr. Micheál O'Mahony, Authority member, wrote to the Minister and described in forthright terms the nature and scale of the problem as it was perceived by the Authority. The Authority considered that there was a significant problem of widespread under-reporting of catches of Nephrops from FU16 and that the electronic fishing logs were not reliable in this particular respect. There were then a number of meetings between representatives of the fishing industry, the respondent Minister, and the respondent Authority between July and September 2017. By letter dated the 5th October 2017, Dr. Susan Steele, Chair of the Authority, wrote to the Minister. This was a short letter in which she referred to the Authority's functions under s. 43 of the Sea Fisheries and Maritime Jurisdiction Act, 2006 (hereinafter "the Act of 2006") and continued as follows: -

> "In relation to the question of data for the outtake of Nephrops from the FU 16 from January 2017 until its closure at the end of July, the total provisional figure from the fishermen's logbook records is 733 tonnes. It is the opinion of the SFPA that this figure is unreliable and the more accurate figure of outtake is 1991 tonnes of Nephrops. That figure of 1991 tonnes is based upon our assessment of the vessels that fishes FU 16 Nephrops during the course of a trip, 89% of the operational time reported was in FU 16 itself and only 11% outside. As per the letter of the 14th July, 2017, the SFPA have formed the expert opinion that the current policy in relation to allocation of quota is not leading to effective implementation of sea fisheries law. The SFPA will report the figure of 1991 tonnes to the EU Commission".

9. By means of successive monthly fishery management notices between August and November 2017, the Minister provided for a zero monthly quota in respect of Nephrops fishing within FU16. The figure of 1991 tonnes was communicated to the European Commission by the Authority on the 17th October, 2017. The Commission issued a closure notice with effect from 2nd November, 2017. Thus, Irish fishermen had no access to FU16 for fishing Nephrops from August 2017. Further, Article 105 of the Control Regulation provides for consequential quota deductions in circumstances where a member state has exceeded the quotas allocated to it.

10. The matter came on for hearing in May 2018. The issues raised at the hearing are now dealt with in turn.

Locus Standi

11. Order 84, rule 20(4) of the Rules of the Superior Courts provides that the test for *locus standi* in judicial review proceedings is whether or not a person has a "sufficient interest" in the proceedings. The respondents in their respective Statements of Opposition pleaded that the applicants had no *locus standi* and this was pursued to some extent by each of the respondents at the final hearing; more strongly, it may be said, by the Minister than by the Authority. The respondents complained that the fishing vessels the subject of the relevant licences were owned by corporate entities and submitted that the appropriate applicants to bring judicial review proceedings were the companies rather than the individual applicants. They submitted that the applicants had failed to explain why they had brought proceedings in their individual names and had no standing to maintain the proceedings.

12. The applicants, in seeking to establish their *locus standi*, relied on their close connections to the vessels and companies as follows: Mr. Fitzpatrick averred that he was director and company secretary of the company whose sole asset was the vessel known as the "*Shauna Ann*" and whose sole activity was fishing. He said he owned 50% of the shares and his wife the other 50%. He averred that he was the beneficial owner of the *Shauna Ann* and that there was a mortgage secured on the vessel. He said that 6 men work with him on it and approximately 15-20 persons on shore are also reliant upon it for employment. He said that if the company were to fail, he would lose his boat and his only means by which he earned his livelihood. Mr. Fitzpatrick was also personally named on the relevant fishing licence in respect of the vessel. Mr. Flannery averred that he was the beneficial owner of the fishing vessel "*Cú na Mara*" and that there was a mortgage secured on it. He averred that the operation of the vessel was financed with loans which were personally guaranteed by him and that any failure of the business would directly affect him, his family home and other assets. He said that between 6 and 8 men work on it with him, and that 20-25 persons on shore were also reliant upon it for employment. Mr. Flannery was also personally named on the relevant vessel licence. Both of the applicants put forward some financial details before the Court, as described in paragraphs 41-47 of my earlier judgment. While these figures were not without some controversy, I accept on the balance of probabilities that fishing for Nephrops in FU16 usually constituted a significant part of their respective incomes.

13. I am satisfied that, having regard to the above facts, the applicants have sufficient *locus standi* for the purpose of O. 84, r. 20(4) of the Rules of the Superior Courts. The fact that the judicial proceedings could have been brought in the names of the two corporate entities does not necessarily mean that all non-corporate persons linked with those entities lack standing to bring the case. More particularly, the authorities cited to me do not seem to me to establish that the applicants lacked *locus standi.* These included *Lancefort Ltd. V. An Bord Pleanala (No. 2)* [1999] 2 IR 270, where Keane J (as he then was) referred to the "tension between two principles", namely "ensuring, on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of the absence of indisputably qualified objectors" and "on the other hand, that the critically important remedies are not abused". He continued:

> "In the latter area, the courts have dwelt on occasions on the dangers of giving free rein to cranks and busy bodies. But it is to be borne in mind that the citizen who is subsequently seen to have performed a valuable service in, for example, bringing proceedings to challenge the constitutionality of legislation, while exposing himself or herself to an order for costs, may at the outset be regarded by many of his or her fellow citizens as a meddlesome busybody. The need for a reasonably generous approach to the question of standing is particularly obvious in cases where the challenge relates to an enactment of the Oireachtas or an act of the executive which is of such a nature as to affect all the citizens equally: see, for example, *Crotty v. An Taoiseach* [1987] I.R. 713. But it is also the case that a severely restrictive approach to locus standi where the decision of a public body is challenged would defeat the public interest in ensuring that such bodies obey the law.
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> Nevertheless, the requirement that, as a general rule, locus standi must be established where a person seeks to challenge the decision of a public body remains, although the criteria have changed over the years, a "sufficient interest" in the matter having replaced the somewhat more restrictive concept of a "person aggrieved". In the particular case of challenges by way of *certiorari*, with which these proceedings are concerned, the insistence on the party having such an interest reflects the policy of the courts which is intended to ensure that this most potent and valuable of legal remedies is not resorted to by the merely officious or men or women of straw who have nothing to lose by clogging up the courts with ill-founded and vexatious challenges."

I cannot see that the applicants' bringing of this case could conceivably be described as an abuse of the remedy of judicial review, or an ill-founded or vexatious challenge, given their close connection to the fishing vessels in question.

14. In *Construction Industry Federation v. Dublin City Council* [2005] 2 IR 496, the respondent Council had contended that the applicant had no locus standi to challenge a development contribution scheme drawn up by the respondent under planning legislation on the basis that the applicant was an unincorporated trade association and did not itself engage in development or make applications for planning permission, and therefore would not be liable to pay any development contributions under the scheme. The High Court found in favour of the applicants on this point, but the Supreme Court held that to allow a representative body to be entitled to bring judicial review proceedings in the instant case would be to ask the court to deal with a hypothetical question. It was noted that the challenge could have been brought by any of the members of the applicant representative body who were affected, many of whom were very large and financially substantial companies, and that the case could then be dealt with on the basis of the damage to the member and how the measure affected the circumstances of that member. The analogy does not hold for the present case: it does not seem to me that the Court is being asked to deal with a hypothetical scenario. That might have been so if one of the fishing industry organisations had sought to bring the proceedings. However, the applicants are individuals closely connected with particular fishing vessels and actual figures as to the impact on the relevant businesses have been provided to the Court and provide concrete context to the questions raised in these proceedings.

15. As to the issue of who holds the licence, in *Hennessy Eco Ltd. V. Cork County Council* [2016] IEHC 633, the High Court accepted that the applicant company had standing to bring judicial review proceedings in circumstances where the company itself did not have a waste collection permit and the permit was held by an individual director of the company. The proceedings concerned the validity of a confiscation measure in respect of waste material, and the grounding affidavit averred that the company was engaged in the business of buying metal products and processing metal products and scrap vehicles. In the case before me, the situation is reversed;

it is the company which holds the permit, and the individual who seeks to bring the proceedings. It does not seem to me that the *Hennessy* case supports the proposition that the technical issue of who actually holds the permit or licence in question determines whether the applicant has a "sufficient interest" for O. 84, r. 20(4) of the Rules of the Superior Courts.

16. Further, while one of the respondents sought to rely on the principle concerning the corporate "veil" in *Salomon v. Salomon* [1897] AC 22, as discussed by the High Court Laffoy J. in *Fyffes v DCC* [2006] IEHC 32, it does not seem to me that this is relevant in this context. The context in which the discussion of that principle took place in the *Fyffes* case was not one where *locus standi* to bring judicial proceedings was in issue. I do not think it can be seen as an authority for any proposition that would shut out the individual fishermen from bringing judicial review proceedings simply because their fishing vessel is owned by a corporate entity. The question of whether the corporate veil can be lifted for the purposes of establishing liability or not seems to me to be an entirely different question to the question of whether an individual has standing to bring judicial review proceedings.

17. Accordingly, I am satisfied that the applicants had *locus standi* to bring the proceedings.

Delay

18. The issue of delay was raised by the Authority as a preliminary objection in its statement of opposition. It will be recalled that leave to bring the proceedings was obtained from the Court on the 17th November, 2017. In essence, the Authority took the view that the application for judicial review ought to have been brought at the very latest by the end of October 2017 on the basis that the grounds for review were created by the advice given by the Authority on the 14th July, 2017, referred to above. This advice had been communicated to the applicants by emails to their solicitor on the 22nd July, 2017, and in a meeting between the authority and the applicants' professional associations on the 26th July, 2017. On the Authority's view, it was the advice which created the grounds for review as it was the basis for every subsequent decision taken by the Authority. Accordingly, when the applicants sought judicial review on the 13th November, 2017, the Authority submits, this was outside the three-month time limit imposed for bringing an application under O.84 r. 21(1) of the Rules of the Superior Courts.

19. The applicants submitted that the reliefs were not statute barred on the basis there was no identifiable act or omission to review as of July 2017. It was submitted that, at that stage, all that was in existence was a trend of thought or behaviour by the Authority, which it then shared with the Minister and the professional bodies. It was only in October 2017, according to the applicants, when the purported unlawful exercise of powers by the respondents occurred and the grounds for review then arose. Furthermore, the applicants submit that it is not possible to conflate knowledge possessed, and steps taken, by the professional bodies the applicants belong to with the applicants themselves. The decision to keep FU16 closed for October and November was one which could have been reversed if those bodies' interventions been successful. In addition, the applicants submitted that they were obliged to await alternative remedies before launching judicial review proceedings, and that an application was brought as soon as it became apparent that no such remedies existed.

20. At paragraph 36 of my earlier judgment, I noted that various meetings took place with representatives of the fishing industry in July, August and September 2017. It was noted that the industry representatives agreed that FU16 would be closed for the months of August and September 2017 for "pricing reasons" rather than because they accepted the Authority's view on the figures and quota exhaustion. In other words, the industry did not object to the closure for August and September. However, it advocated the re-opening of FU16 to Nephrops fishing for later months, when prices for Nephrops caught in FU16 would be higher. It seems to me, therefore, that time should be deemed to run from the first date on which it became manifestly clear that the Authority's view on the figures was going to prevail against the opposing view of the industry i.e. the date upon which it was first indicated by the Minister that the FU16 Nephrops quota would be zero for a particular month against the view of the industry. I understand this to have been the 26th September, 2017, the date of the Fisheries Management Notice No. 57 of 2017, setting the quota as zero for the month of October 2017. From the papers before me, there is some doubt about this, and it may have been the 26th October, 2017, the date of the subsequent Fisheries Management Notice for the month of November. This does not matter for present purposes because no matter which of those dates is taken as a commencement date, leave was obtained within the required 3-month time-limit for judicial review proceedings.

The Methodology Issue

Relevant facts and evidence

21. Under the current regime established by Council Regulation (EC) No. 1224/2009 (hereinafter "the Control Regulation") and related measures (such as Commission Implementing Regulation (EU) No. 404/2011 and Council Regulation (EC) No. 1005/2008), each vessel over 10 metres is required to maintain an electronic fishing logbook. Despite its title, the electronic fishing logbook system is one which involves the information being manually inputted by human hand. The information is of course thereafter electronically stored and capable of electronic transmission. It is "automated" only in that limited sense. The electronic system does not itself count or record the nephrops taken in FU16; a human counts the fish and inputs the information manually into the electronic system.

The evidence of Mr. O'Mahony

22. As set out in further detail in my judgment of the 11th January, 2018, the Authority had significant doubts about the accuracy of the figures contained in the logbooks concerning the volume of nephrops caught in FU16 during the relevant period. By letter dated the 14th July, 2017, Mr. O'Mahony of the Authority wrote a long letter to the Minister expressing the basis for those concerns, and this is dealt with in further detail in that earlier judgment at paragraphs 30-35. A short letter dated the 5th October, 2017 was sent by the Authority to the Minister, the content of which I have set out above. This letter indicated that the Authority took the view that a more accurate figure was 1991 tonnes, not the figure of 733 tonnes which would be arrived at by adding the figures contained in the logbooks. The figure of 1991 tonnes was then communicated to the European Commission on the 17th October, 2017. The Commission, by fax and email, indicated the closure of the fishery FU16 for Nephrops fishing from the 2nd November, 2017. My earlier judgment describes the chronology of events surrounding these two letters in more detail, but I do not think it necessary to set these out again for present purposes.

23. Mr. Michael O'Mahony of the Authority swore a number of affidavits in these proceedings, setting out the concerns of the Authority and the reasons for them, which elaborate upon the content of the Authority letters of July and October 2017 referred to above. I have set out at paragraphs 48-51 of my earlier judgment the information averred to by Mr. O'Mahony in this regard and again I do not propose to repeat it here.

24. In a further affidavit sworn after the interlocutory hearing and before the final hearing, Mr. O'Mahony also described, in support of his contention that there was substantial misreporting in respect of FU16, a phenomenon which he called the "disappearing fisheries". He averred that in the months following the closure of FU16, the reported yield of prawns from the areas *surrounding* FU16 dropped drastically. From January to July of 2017, 1,407,757 kg of prawns were reported to have been caught in the areas outside of FU16 (totalling 51% of the total reported catch). However, in the months of August to December (when FU 16 was closed) the reported

yield for prawns fished outside of FU 16 fell to 32, 366 kg (3% of the total reported prawn catches for that time period). Mr. O'Mahony opined that this stark contrast in the figures again supported the view that fishing vessels had been reporting yields actually caught *within* FU16 as having been caught *outside* FU16.

25. Having regard to the various letters referred to, and all of the affidavits of Mr. O'Mahony, I would briefly summarise all of the points made by him as follows: -

> i) That there is a significant financial motivation for a fisherman to under-report Nephrops caught inside FU16 and to over-report the amount of Nephrops caught outside FU16, given the existence of the highly restrictive quota in respect of FU16 and the greater price for Nephrops caught within FU16 on the market.
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> ii) That there was a great disparity between (a) the time spent within FU16 and the recorded catches for within FU16, and (b) the time spent outside FU16 and the recorded catches for outside FU16.
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> iii) That there was a great disparity between the recorded catches within FU16 as between Irish and English fishermen (a ratio of 1:10).
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> iv) That there was a great disparity between the catch rate within FU16 during the relevant period and (a) the catch rates prior to that period and (b) the period after the closure of FU16.
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> v) That it was unlikely that fishermen would spend long periods of time within FU16 if the catches were actually as low as those reported, this being financially unviable and, conversely, it was unlikely that fishermen would spend such little time in the areas outside FU16 if the catches were actually as high as those reported. In other words, the reported figures made no business sense.
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> vi) Information about the historical prawn catches in the relevant fishing areas suggested the reported figures could not be accurate or true.

The evidence of the applicants Mr. Fitzpatrick and Mr. Flannery

26. In his first affidavit, Mr. Fitzpatrick, the first applicant, stated that the methodology employed by the Authority was erroneous, fundamentally flawed, opaque, irrational, and not the practice in other European jurisdictions. Mr. Fitzpatrick stated that there may be many reasons other than overfishing for the variation in yields within areas; a greater density of prawns in certain grounds, the nature of the sea bed, the type of fishing equipment employed, the skill and knowledge of the captain, and the weather and tide generally. Mr. Fitzpatrick averred that since the Authority did not give any details of the breadth of the study/analysis it engaged in, or the factoring in of the above variables, it was "facile" for the Authority to decide that 80% of a vessel's time spent in one area should deliver an equal yield to 80% of a vessel's time spent in another.

27. In relation to the comparative analysis conducted on foreign and Irish vessels, Mr. Fitzpatrick averred that this analysis lacked vital information which could explain the difference between the two cohort's catch rates, such as the length of time that was given to the comparative study, the number of vessels and log sheets studied, whether the comparison of each cohort related to the same window of time, whether the vessels were of the same type, size and engine power and whether the same gear was employed by both. Mr. Fitzpatrick stated that without this information it was difficult to interrogate the reliability of the Authority's methodology.

28. Mr. Fitzpatrick averred that there was nothing suspicious about vessels spending large quantities of time in FU16 with low yields. He stated that FU 16 is a unique ecosystem, residing as it does in deeper water than the other surrounding areas, where the density of nephrops is lower than usual. He also pointed out that particular tidal cycles can make the Nephrops difficult to catch in the Porcupine bank and can result in a vessel trawling for 3 hours with very little catch to show for it. He also pointed to the presence of predators which further increased the difficult in catching nephrops, mandating a lengthier period spent fishing here.

29. In an affidavit dated the 2nd February, 2018, Mr Fitzpatrick continued to criticise the Authority's methodology by exhibiting a report detailing the "catchability" of Nephrops in the Bantry Bay fishery funded by the National Development Plan, the European Union and the Irish Sea Fisheries Board. Mr Fitzpatrick relied on this report to demonstrate that the concentration of nephrops fluctuates from area to area. Mr. Fitzpatrick also exhibited a report from the Irish Council for the Exploration of the Sea (the "ICES") published on the 31st October, 2017 which states that while there had been a slight decline in the abundance of Nephrops stock in FU16 in 2017, the quantity of stock remained above average. Mr. Fitzpatrick averred that this evidence was inconsistent with the conclusions of the new methodology which indicated that "dramatic overfishing" had taken place, stating that if this was the case then the decline in stock would not have been "slight".

30. In an affidavit sworn in April 2018, Mr. Flannery, the second applicant, averred that the State possessed the resources and technology to track fishing vessels in real time using VMS in order to counter overfishing in FU16. He criticised the Authority for instead "inventing" a "new technology for measuring outtake which bears no relation to the actual collection of data". He joined with Mr. Fitzpatrick's criticisms of the methodology as described above.

The evidence of Dr. Coughlan and Dr. Lordan

31. After the interlocutory application had been heard and judgment delivered by me, affidavits were sworn by two further witnesses on behalf of the respondents for the trial of the action. The first witness in this regard was Dr. Susan Coughlan. Dr. Coughlan is a Sea Fisheries Protection Officer and works in the Statistic Unit of the Authority. In two affidavits with exhibits, she set out the basis of the methodology complained of (the "time spent" methodology). She explained that the method involves using some of the figures provided by the fishermen themselves, namely the figures concerning (1) time spent in a particular area, and (2) total catch. The method assumes that the time spent in an area is a better indicator of the location of the catch than its location as reported by the fishermen. So, for example, if a vessel remains in FU16 for 3 days and outside FU 16 for 1 day, it is considered that 75% of the total catch is from within FU 16.

32. On this basis, she determined that the Irish vessels in 2017 spent a total of 89% of their fishing time in FU16; and 89% of the total catch figure yielded a figure of 1991 tonnes. She explained that when landing declarations are submitted, sometimes late, this can affect the figures in respect of the total catch, and that she had revised her analysis in January 2018 when some more landing declarations came in. This had resulted in a downwards adjustment of the figure from 1991 tonnes to 1979 tonnes. She averred that this revised figure was provided to the Commission on the 15th February, 2018.

33. In a second affidavit, Dr. Coughlan exhibited a detailed spreadsheet containing the figures for each and all the relevant vessels fishing in FU16 during 2017 and showing, in a transparent manner, the manner in which she had arrived at her conclusions using the above method. The spreadsheet has 12 columns and 388 rows representing 338 fishing trips.

34. Column 1 gives each fishing trip a number, running from No. 1 to No.338 Some vessel made several trips and therefore appear several times on the spreadsheet.

35. Column 4 sets out the percentage figure of reported time spent by the vessel outside FU16, while column 5 sets out the percentage figure of time spent by the vessel inside FU16. For example, a vessel might spend 4% of its time outside FU16, and 96% of its time inside FU16. These figures are furnished by the fishermen and are not disputed by the Authority but rather used as part of their calculation.

36. Column 6 sets out the reported kg weight of Nephrops reported by the vessel as caught outside FU16, and Column 7 sets out the reported kg weight of Nephrops reported by the vessel as caught inside FU16. The figures added together represent the 'total catch'.

37. Using the "time spent figures" and the total figure of Nephrops caught, Dr. Coughlan then calculated a "new" catch figure for Nephrops caught within FU16. This is Column 12. She did this for each fishing trip, and then calculated the overall total.

38. The following is an extract from Dr. Coughlan's spreadsheet; what has been extracted are a number of fishing trips (column 1), and columns 4, 5,6,7, 8 and 12 . The extract was prepared by me for the purpose of this judgment. I should note that where Dr. Coughlan used decimal figures to precisely estimate the relevant time spent in the relevant areas, I have changed this to percentages; for example where in Trip 59 Dr. Coughlan calculated that 0.977272727 of the trip's length was spent in FU16 and 0.022727273 of the trip was spent outside of it; I have expressed this time as 97.7% and 2.3% respectively. Similarly, decimal figures used to express the amount caught were rounded to the nearest whole number.

Fishing Trip number	**Time Spent Outside FU16 During Trip**	**Time Spent in FU16 During Trip**	**Logged Catch outside FU16 (kg)**	**Logged Catch inside of FU16 (kg)**	**Total Catch According to Landing Declaration**	**Estimated weight actually Caught in FU16 (kg)**
59	2.3%	97.7%	1755	1719	3474	3395
99	10.4%	89.6%	3627	1197	4824	4323
120	35.3%	64.7%	5643	738	5463	3539
128	21.5%	78.5%	4086	1719	5805	4559
134	7.9%	92.1%	4086	1818	5904	5440
151	5.5%	94.5%	4896	1359	6255	5913
180	1.9%	98.1%	4761	2358	7119	6987
197	3.2%	96.7%	4212	3384	7596	7346
203	2.7%	97.3%	5148	2565	7713	7506
220	5.5%	94.5%	6957	1521	8478	8016
234	2.5%	97.5%	7500	1890	9255	9028
235	3.2%	96.8%	5319	3951	9270	8982
241	5.7%	94.3%	6921	2979	9636	9089
247	5.5%	94.5%	8568	1656	10224	9665
251	3.7%	96.3%	8730	1989	10413	10037
267	4.1%	95.9%	7983	3744	11727	11256
281	5.7%	94.3%	11664	2430	14181	13373
282	4.9%	95.1%	11628	2772	14400	13696
284	2.3%	97.7%	12420	2331	14751	14420
288	4.1%	95.9%	12564	2952	15516	14885
289	4.4%	95.6%	13194	2340	15534	14855

39. Another affidavit sworn after the interlocutory hearing was that of Dr. Colm Lordan, who has been working in the Marine Institute in Galway for 20 years. Dr. Lordan is with the Fisheries Ecosystems Advisory Services (FEAS) section of the Marine Institute, which assesses and advises on the sustainable exploitation of the Irish marine fisheries resources, and is charged with meeting Ireland's obligations under the EU Data Collection Framework. The Framework supports the scientific advice which underpins the Common Fisheries Policy. In addition to that post, Dr. Lordan also works for the International Council for the Exploration of the Sea (the "ICES"), apparently the world's oldest intergovernmental science organisation.

40. Dr. Lordan averred that during his career he had developed scientific sampling programmes and scientific surveys for Nephrops on the Porcupine Bank, and that his responsibilities included submitting data on these to the ICES (since 2003). He described work that had been carried out in respect of Nephrops fishing in FU16 from 2009 onwards. He described how in 2009/10 the sustainability of the Porcupine Bank Nephrops stock was a major concern and that measures were taken in order to protect it. He describes surveys being carried out on fishing vessels in 2010/2011, and the development of methodology to estimate catches in FU16 more accurately.

41. Dr. Lordan said that it was quite common for the ICES to adjust catch information when there is suspected area misreporting, because a failure to do so would lead to inaccurate advice being given. He gave details of this being done in two particular instances; one relating to cod-fishing in an area of the west of Scotland, and the other relating to sandeel in the North Sea.

42. Dr. Lordan said that in 2013, the ICES carried out a survey of the Porcupine Nephrops stock and a revised algorithm was developed in order to produce a scientific estimate of area mis-reported catch. He exhibited ICES working group reports which described this methodology in detail. He said that the methodology took account of the specific habitat requirements of Nephrops, normally areas with muddy seabed at a suitable depth (20-800m) in which they can construct burrows. He noted that since 2011,

reported catches of Nephrops by Irish vessels in ICES rectangle 32D4 had increased significantly, whereas in his view this area was in fact too deep for Nephrops to occur in significant quantities. He noted that prior to 2011, there were either zero or very minor landings reported from that rectangle; whereas, for example, in 2016, over 170 tonnes were reported as having been caught there.

43. Commenting specifically on the "time spent" methodology used by Dr. Coughlan, which he noted was different to that used by the Marine Institute, Dr. Lordan averred that this method was, in his expert opinion, a "scientifically valid means of analysing the available data" and "likely to be more reliable than a blind reliance on the log book declaration figures as to FU16 outtake".

44. I note that the applicants did not put any expert scientific evidence before the Court.

Relevant legal provisions

45. In broad terms, the legal obligations of the second respondent are not in dispute. The second respondent is, for Ireland, the Single Control Authority designated under the Control Regulation. Article 5(5) of the Regulation places upon it the responsibility for "co-ordinating" the "collection, treatment and certification of information on fishing activities" and for "reporting to, cooperating with and ensuring the transmission of information to the Commission…".

46. Under Article 33(2)(a) of the Control Regulation, the Authority must report to the EU Commission the aggregated "data" for "the quantities of each stock or group of stocks subject to TACs [total allowable catches] or quotas landed during the preceding month", i.e. in the present case, the quantities of FU16 Nephrops landed.

47. Under Article 34(a) of the Control Regulation, the Authority must notify the Commission when "it establishes" that "the catches of a stock or group of stocks subject to a quota made by the fishing vessels flying its flag are deemed to have exhausted 80% of that quota".

48. Under s.43(1)(g) of the Act of 2006, the Authority must "collect and report data in relation to sea-fisheries and food safety as required by the Minister and under Community law". This is in the context of s.43 as a whole, which confers a number of functions upon the Authority, including the enforcement of sea-fisheries law and advising the Minister in the exercise of his or her functions.

49. The dispute in the present concerned the precise method by which the Authority is entitled to calculate the information and data referred to above. The applicants maintained that the Control Regulation and related measures set out a comprehensive and exhaustive EU-wide regime in respect of the fishing industry across the EU and that the reporting of the figures contained in the electronic logbooks is not only central to this regime but cannot be supplanted by some other method of calculating figures. In other words, on their view, the Authority must accept the figures for Nephrops caught within FU16 contained in the electronic logbooks and cannot depart from those figures, even if it has a reasonable basis for believing those figures to be inaccurate. They submitted that if the Authority had concerns about the accuracy of the figures, there were other means under the Control Regulation by which this could be addressed, but that the Authority could not unilaterally introduce the methodology they had in fact employed.

50. The Authority maintained that it was entitled to look at a number of information sources, and not merely the electronic logbook, when calculating the figures. In effect, it said that all of its obligations to furnish figures under the European and domestic regimes contained an implicit requirement that the figures be, in its view, accurate, and that it is precluded from simply providing figures based on the electronic log books where it had reached a conclusion that these figures are inaccurate.

51. There is no doubt that the Authority was extremely concerned about the disparity between the information provided by the logbooks and its other sources of information. Having regard to the information put before the Court, I can readily see why this was so, and their concerns seem entirely reasonable. The legal question, however, is not whether the Authority reasonably and genuinely had a concern as to the accuracy of the figures, but rather whether the Authority was legally entitled to deal with its concern in the particular manner in which it did, namely to calculate the figures for Nephrops caught within FU16 with reference to 'time spent' in FU16.

Submissions and Discussion

52. The applicants pointed to recitals in the Control Regulation which emphasised the need for a comprehensive and standardised regime of control across all member states, including recital 4, 5, 9 and 47. These refer to such matters as the desire to "create a level playing field for fishermen across the Community", the need for the rules of control to be "harmonised", and the need for "standardised and coordinated inspection procedures". It was argued that the effect of the Authority's approach was to create an uneven playing field as between Irish fishermen and other EU fishermen, contrary to the intention of the Control regime. Emphasis was laid in this regard upon certain correspondence exhibited by the applicant Mr. Fitzpatrick from fishermen/producers' bodies on behalf of fishermen from the United Kingdom, Netherlands, France, Germany and Lithuania. These letters said that the method of recording catches in those countries was by means of the electronic logbook system. Each of the letters also refers to the monitoring of vessels over 12 metres by VMS. It was submitted that the Authority's "time spent" methodology had resulted in Ireland unilaterally diverging from the common approach set up by the Control Regulation.

53. The applicants also pointed to the various provisions in the Regulations which demonstrated the centrality of the electronic logbooks to the entire system. I have set out these provisions out in my earlier judgment and do not intend to repeat them here. At the trial of the action, counsel on behalf of the applicants also sought to rely upon a parsing of the Control Regulation and the use of the word 'data' within this and the related Regulations in order to ground a submission that the Regulations envisage that the "data" which must be transmitted by the Authority must include or be based upon the electronic logbook figures. It was argued that the word "data" in s.43(1)(g) of the Act of 2006, which requires the Authority to "collect and report data in relation to sea fisheries and food safety as required by the Minister and under Community law", was restricted to the data referred to in Article 14(2), 14(9), 15 and 33(1) of the Control Regulation. Article 33(1) specifically refers to data contained in the electronic logbooks, landing declarations, transhipment declarations, fishing effort reports and sales notes insofar as it says: "Each flag Member State shall record all relevant data in particular data referred to in Articles 14, 21, 23, 28 and 62" as well as fishing opportunities.

54. A related argument was that based upon article 109 of the Control Regulation, which is entitled "general principles for the analysis of data". It requires member states to set up a computerised database for the purpose of validating data recorded in accordance with the Regulation, and to ensure that all data recorded is "accurate, complete and submitted within deadlines laid down in the common fisheries policy". It requires member states to perform "cross checking, analyses and verifications of the following data through automated computerised algorithms and mechanisms" and goes on to list, *inter alia*, VMS data, the fishing logbook data, the landing declaration, transhipment declarations, and sales notes. Subsection (3) provides that the validation system shall allow the immediate identification of inconsistencies, errors and missing information. Subsection (5) provides that if an inconsistency in the data has been identified, the member states shall undertake the necessary investigations and, if there are reasons to suspect that an infringement has been committed, take the necessary action.

55. Another part of the argument put forward on behalf of the applicants was that the Authority had illegally and unilaterally chosen to invent an entirely new system for calculation of outtake based on an assumption that the entire fishing fleet for Nephrops had made a decision to misreport, whereas it should have used its powers to investigate the unreliability of the figures in respect of individual vessels. In this regard, the applicants referred to the power to stop, board and search vessels, to monitor the position of vessels, and to seize records. It was argued that the State authorities were seeking to substitute or camouflage their inadequate employment of these investigative powers by simply substituting "guesstimate" figures for the actual recorded figures. The Authority's methodology was described by the applicants as a "desk-top exercise" which visited the alleged misconduct of some miscreants upon all those engaged in fishing the area FU16. It was argued that the authorities could have used technology to much greater effect in order to ensure that figures recorded were accurate figures.

56. Further, reliance was placed upon Case 34/73 *Variola v. Amministraione della Finanze Case* [1973] E.C.R 1973 -00981 for the proposition that a member state may not unilaterally vary the regime set out by EU Regulation as this would involve obstruction of the direct applicability of the measure.

57. I have no doubt that the electronic logbooks are intended to be a central part of the system envisaged and required by the Control Regulation, and that in the normal course, figures furnished by the Authority to the Commission or the Minister would consist of or be based upon figures contained in the electronic logbooks. However, having regard to the figures set out by the Authority in the proceedings before me, and the matters referred to above at para. 25, it seems to me that the situation presenting by July 2017 was very far from a normal situation. What the figures set out in Dr. Coughlan's spreadsheet suggest is that there was a remarkable and extraordinary disparity between the recorded catch figures and the "time spent" figures. This was not merely a disparity of a minor or even a moderate nature. I am not persuaded that these disparities could be explained away by such matters as those referred by Mr. Fitzpatrick in his affidavit, such as fishermen's expert knowledge of regularly fished fishing grounds, a greater density of prawns in certain grounds, the nature of the sea bed, the type of fishing equipment employed, the skill and knowledge of the captain, or and the weather and tide generally. Such matters might explain *some* disparity between the recorded catch figures and the "time spent" figures, but not the level of disparity actually shown. To demonstrate the extent of the disparity, I have taken, in relation to the extracted fishing trips referred to above, the figures for the kg weight of Nephrops recorded as having been caught within FU16, and calculated it as a percentage of the overall catch (i.e. both within and outside FU16). When one juxtaposes this figure with the "time spent" figure for FU16, the extent of the disparity becomes very clear. I should note that any errors in calculating these percentages are my own and not grounded in the underlying figures themselves.

Fishing Trip number	**Approximate time spent in FU16 (%)**	**Estimated amount of total Catch logged as caught in FU16 (%)**
120	64.7%	11.5%
203	97.3%	33.2%
220	94.5%	17.9%
267	95.9%	31.9%
281	94.3%	17.2%
282	95.1%	19.2%
284	97.7%	15.8%
288	95.9%	19.0%
289	95.6%	15.0%

Fishing Trip number	**Approximate time spent in FU16 (%)**	**Estimated logged amount of total Catch as caught in FU16 (%)**
59	97.7%	49.4%
99	89.6%	24.8%
128	78.5%	29.6%
134	92.1%	30.7%
151	94.5%	21.7%
180	98.1%	33.1%
197	96.7%	44.5%
234	97.5%	20.0%
235	96.8%	42.6%
241	94.3%	30.0%
247	94.5%	16.1%
251	96.3%	18.5%

I note that it was argued on behalf of the applicants that the overall stock of Nephrops in FU16 does not appear to be currently under threat and that this fact undermined the Authority's view that there was overfishing in FU16. I do not think it is necessary for the Authority to establish that the stocks were actually in jeopardy, since the issue was the narrower one of whether the quota was being exceeded or not.

In the circumstances then arising, the Authority had a dilemma: should it rely on, and furnish onwards to the Minister and the EU Commission, figures which it believed (and on my view, believed on reasonable grounds) to be seriously incorrect? Or was it entitled to employ some other reasonable method of arriving at a figure which it could stand over? I have reached the conclusion that the latter is the correct position, for the following reasons.

58. I am not persuaded by the argument based on a linguistic parsing of the Regulations that the obligation on the Authority to report

"data" excludes the "time spent" methodology employed by the Authority. Article 14(2) which sets out what should be contained in the electronic logbook uses the term "information" (not "data"), and Article 15 refers to both "data" (in its title) and "information" (in its text). Article 34 again refers to "data" in its title, but in the text refers to "the catches of a stock…subject to a quota". From a perusal of these and other provisions of the Control Regulation, as well as the Commission Implementing Regulation (EU) No. 404/2011, the Act of 2006, and SI 490/2011, I am not persuaded that the term "data" was intended as a term of art which was restricted to the specific and narrow meaning contended for on behalf of the applicants. In my view, if such a restrictive interpretation were intended, very clear language would be required. I say that such unambiguous clarity in favour of the applicants' suggested interpretation of the word "data" would be required because of the fundamental requirement that in interpreting the various provisions of the fisheries regime, regard must be had to the fundamental objectives of the Common Fisheries Policy. It would seem to me to be in direct conflict with that policy, which includes the conservation of particular species, if the national authority responsible for reporting figures to the EU authorities were forced to transmit figures which the Authority itself believed, on reasonable grounds, to be grossly inaccurate. Such an interpretation would constrain the Authority to act in a mechanistic way and not to exercise its independence and expertise in the area. To interpret the Regulations as constraining the Authority in this manner would, in my view, required clear language, which is not currently present within the various provisions examined.

59. One of the criticisms made by the applicants of the methodology employed by the Authority was that the methodology was not "scientifically grounded". But it is important to remember as a starting point that entries in the electronic logbooks are simply the figures entered manually by individual fishermen. They are only as accurate as the individual fisherman is honest. The electronic logbook entries themselves are not 'scientific' in any way. Accordingly, I am not sure where the suggested requirement of a "scientifically grounded" methodology, central to the applicants' submission, is derived. It seems to me that the *legal* obligation placed upon the Authority, having regard to its role within the European and domestic regimes, must be an obligation to report figures that it believes, on reasonable grounds, to be reasonably accurate. If that is correct, then it seems to me that an Authority must have a number of possible ways of dealing with the matter, provided they are not irrational or unreasonable. Perhaps that is the legal equivalent of the suggested "scientifically grounded" test. In any event, the Court had before it the evidence of Dr. Lordan, to the effect that the methodology employed by the Authority was a scientifically respectable one, not dissimilar to that used by the ICES, which itself advises the Commission at a more macro level in relation to stock quotas. No doubt the figure emerging from this type of "time spent" analysis is not as perfectly accurate as if the Authority itself, or State officials, stood on board every vessel on every trip to FU16 and counted the Nephrops catch, but it seems to be a reasonable alternative to the electronic logbook figures in circumstances where the latter figures were, for good reason, suspected to be unreliable.

60. As regards the applicants' submission that the State should have employed what I might describe as other weapons from the control arsenal, such as boardings and checks, investigations and prosecutions, imposition of penalty points, or use of technology; or that the appropriate response to the situation that had arisen was the use of specific fact-finding missions (an example of which is Regulation (EU) 185/2013, described at paragraph 28 of my earlier judgment and which dealt with a problem of mackerel overfishing in Spain in 2013), it seems to me that these could not, in any realistic or practical way, deal with the problem faced by the Authority in this case. The quota was time-specific and so was the obligation to report. For example, there can be no doubt that investigations, leading in appropriate cases to individual prosecutions, are one useful and deterrent component of the regime as a whole, but it seems rather impractical, given the scale of the misreporting apprehended by the Authority, to suggest that this method could realistically be used to arrive at global figures needed to discharge the Authority's data-collection obligations within the necessary time-frames. Further, whether the vessel monitoring system leads to constant real-time monitoring or two-hourly reports (on which there was some conflict of evidence), it does not seem to me that knowledge of the location of a vessel pinpoints where the Nephrops have been caught, and therefore addresses the problem, unless one is using the "one fishing area per fishing trip" method. As regards the latter approach, this was one of the options suggested by the Authority in its letter of the 14th July, 2017 and is apparently also the system laid down in certain subsequent Fisheries Management Notices. For example, the Fisheries Management Notice for February 2018 (No. 14 of 2018) provided that: -

> "During February 2018, in any one fishing trip, a person on board an Irish sea-fishing boat, targeting Nephrops in ICES Areas VI and VII may only fish in either of
>
> - ICES Area VI and ICES Area VII, excluding Functional Unit 16 of ICES Subarea VII, or
>
> - Functional Unit 16 of ICES Subarea VII."

On the face of it, this approach would appear to have much to commend it as a method for ensuring reporting accuracy. However, the fact that there is an alternative approach which would ensure the accuracy of logbook entries in the future does not in my view necessarily render illegal the Authority's employment of the "time spent" methodology in the autumn of 2017 when faced with the problem in existence at that particular time.

61. As noted above, one of the submissions pressed on behalf of the applicants was that the departure from the electronic logbook entries by the Authority would create an uneven playing field for Irish fishing vessels *vis a vis* vessel from other member states. If one pauses to consider this submission, it appears to involve an assumption or allegation that vessels from other member states are engaging in false reporting, because that is the only basis on which an 'uneven' playing field would be created. It seems to me that if this is so, the remedy lies in lobbying the Commission with proposals for addressing the situation, rather than interpreting the obligations on the Authority in a manner that would require it to turn a blind eye to what it believes on reasonable grounds is widespread mis-reporting by Irish vessels. I should perhaps also add, for completeness, that in my view the evidence from the other fishermen's organisations presented on behalf of the applicants did not in reality go as far as they suggested it did. It did not amount to more than evidence that the only way catches "are recorded" is via the electronic logbook system and that VMS is used in those countries. The evidence said nothing about the view or practice of other member state Authorities as to how they would or do deal with the recorded figures when reporting to domestic or EU authorities in circumstances where they believe the electronic logbook figures to be inaccurate.

62. In view of the foregoing, I am of the view that the Authority did not act otherwise than in accordance with the Control Regulation and related measures in employing the "time spent" methodology for calculating the figures of Nephrops caught by July 2017 in FU16.

63. It also follows that I am of the view that the Minister did not act *ultra vires* in accepting that information furnished by the Authority and making the decision, based upon that information, to issue the Fisheries Managements Notices in question.

64. The applicants made a final argument related to the precise obligation on the member state under article 34 of the Regulation to inform the Commission without delay when it establishes that the catches of a stock subject to a quota made by the fishing vessels flying its flag are deemed to have exhausted 80% of the quota. It will be recalled that the Authority notified the Commission of the figure of 1991 tonnes on the 17th October, 2017, at which point it deemed the quota to have been 100% exhausted. At best, this is

an argument that certain information should have been furnished earlier but I cannot see this as a basis for holding invalid or unlawful the communication of information that in fact took place, or to suggest that this information should never have been transmitted at all.

The Fair Procedures Argument

65. The applicants pleaded in their amended Statement of Grounds that the respondents had acted "in breach of natural justice, in that they acted irrationally and arbitrarily and otherwise without jurisdiction and in so doing they have breached the Applicants' rights in the preparation of the exploitation of the fishing opportunities at fishing ground FU16 and in deciding to close same". They also pleaded that the respondents had "further acted in breach of European Union law by unilaterally adjusting the data recordings for each individual vessel at fishing ground FU16 without advising each individual of the relevant adjustment to the recordings on their logbook" and that this was "in breach of the Applicants' right to be heard in advance of an adverse decision being made, in breach of the rights of the defence, in breach of the right to good administration and in the absence of an appeal on the merits a breach of the right to an effective remedy all guaranteed by European Union law".

66. In my judgment on the interlocutory application dated the 11th January, 2018, I referred to a number of decisions that had been cited in support of the above submissions and the responses of the respondents to them. I indicated that I expected further argument in respect of these matters at the trial of the action. However, arguments in relation to the fair procedures limb of the case did not loom large during the final phase of the case. Nonetheless the issue remains live in the proceedings and I must address it at least to some extent.

67. In their written submissions in advance of the trial on the issue of fair procedures, the applicants relied primarily on Article 47 of the EU Charter of Fundamental Rights (the right of all persons to an effective remedy before an independent and impartial tribunal established by law, and the possibility of being advised, defended and represented), and the decision in *Case C-277/11 M v. Minister for Justice, Equality and Law Reform* [2012] ECLI:EU:C:2012:744 and *Case C-560/14 M v. Minister for Justice, Equality and Law Reform* [2017] ECLI:EU:C:2017:101. It was submitted that the Authority was acting on the basis that all data reported by fishermen in respect of FU16 was false instead of identifying individual instances of illegal fishing and then correcting the data, and without offering the persons concerned any opportunity to address the suggestion that the data was false. It was submitted that the determination that the data was false was in effect a finding of unlawful, and criminal, conduct. It was expressly stated in the course of oral submissions that the submission in respect of fair procedures was not grounded on any purported property "right" to fish in a particular fishing ground, but rather on "a right to be regulated in accordance with the law", namely the control regime.

68. It was submitted on behalf of the Minister that none of his actions involved any adjudication or determination of any individual rights of the applicants, nor was there any decision made or administrative process undertaken which gave the applicants a right of appeal or other remedy under either national or European law. Similarly, the Authority submitted that, in advising the Minister, the Authority was not deciding any individual rights of the applicants in respect of which they were entitled to fair procedures. Further, it was pointed out in fact that the Authority had in fact engaged in a process of communication with the relevant fishermen's organisations, as described in the affidavits exhibiting and recording the communications and meetings between July and October 2017.

69. It seems to me that the starting point is to identify what is in reality complained of by the applicants. The core of the applicants' complaint has at all times related to the method by which the Authority calculated the figure of Nephrops caught in FU16 during the relevant period (the "time spent" method). The communication of the figure of 1991 tonnes by the Authority to the Minister and EU Commission was impugned only by reason of the fact that the figure contained in the communication was arrived at by using that method. Similarly, the Minister's decision to close the grounds was impugned only insofar as it was based on figures reliant upon the "time spent" methodology, furnished by the Authority to the Minister. The Minister does not have discretion with regard to closing fishing grounds where a quota is exceeded (Article 35(2) of the Control Regulation) and so the complaint of the applicants did not relate to the exercise of a discretion to close the grounds but rather his reliance upon the Authority's figures in arriving at the view that the quota had been exceeded. Accordingly, it seems to me that the only decision which is in reality under challenge is the decision of the Authority to rely on a particular methodology for calculating the volume of Nephrops caught in FU16. That being so, the key question is whether this decision falls within the category of decision which requires that individual fishermen have the right to the fair procedures contended for in advance of any decision being made, and a right of appeal thereafter.

70. In my view, it is not. The decision to use the "time spent" methodology by the Authority was a decision to use a general method of calculating figures for the purpose of an overall fishing quota and I am not persuaded that it consisted of a determination, adjudication or exercise of a discretion within the meaning of those terms as employed within the judicial review authorities. It may be noted that the authorities cited to me in support of the argument on fair procedures involved decisions on determinations of bodies affecting individuals, rather than any decision of a general nature. For example, in the *M case* (cited above), what was in issue was an individual's asylum application. In the various fisheries cases, what was in issue was a determination in relation to an individual licence; *Atlantean limited v. Minister for Communications and Natural Resources* [2007] IEHC 233; *O'Shea Fishing company Limited* [2008] IEHC 91; and *O'Sullivan v Sea Fisheries Protection Authority & Others* [2017] IESC 75. In *Atlantean* and *O'Shea* Fishing company Limited, the question concerned the absence of an appropriate process to determine the fact and amount of undeclared landings in the case of a particular vessel, which factual determination led to a reduction to reduce of the vessel's quota. The case of *O'Sullivan v. Sea Fisheries Protection Authority and Minister for Agriculture, Food and the Marine* [2017] IESC 75 concerned a challenge to the "points system" in respect of fishing licences but it is noteworthy that it arose in the context of the application of that system to a particular vessel licence. None of the cases, therefore, involve a Ministerial decision concerning the closing of a fishing ground in its totality, as distinct from a decision regarding a particular vessel or licence.

71. Perhaps it was precisely because of the absence of any similarity between the individual determinations in issue in the above cases and the generalised type of decision in the present case that the applicants sought to construct the following argument: that the decision of the Authority to employ the "time spent" methodology which yielded the overall figure of 1991 tonnes necessarily involved the Authority making numerous implicit individual determinations of unlawful and criminal conduct. I say "implicit determinations" because of course there was never any explicit determination by the Authority or the Minister that anybody had engaged in unlawful or criminal conduct. The argument of the applicants was that in rejecting the figures of Nephrops catch as reported by Irish fishermen in the electronic logbooks, the Authority was implicitly finding that all of those figures had been falsely recorded and this was "tantamount to a finding of unlawful conduct on the part of the fishermen concerned", as it was put in the written submissions.

72. Despite this more nuanced version of the argument on behalf of the applicants, I am still not persuaded that there is sufficient similarity between the type of determination in a criminal forum or a penalty point or licence determination, on the one hand, and the decision of the Authority in the present case, on the other. Another forum (a criminal court) might in due course find the facts underlying some or all of the instances referred to in Dr. Coughlan's spreadsheet amount to a criminal offence of mis-reporting; but it

does not follow what the Authority did in the present context must be characterised as a determination of criminal conduct. Conversely, might I add, it does not follow that because the Authority and Minister can rely on the "time spent" methodology in the present context that the figures based on this methodology would necessarily be sufficient to prove a criminal case of mis-reporting. I cannot see how the Authority's calculation and reporting of a figure of 1991 tonnes in the context of its generalised reporting function could possibly be interpreted as an implicit determination that the applicants had engaged in unlawful and criminal conduct; even if it could be construed as being premised upon an implicit determination that there had been unlawful conduct on the part of some, this is so generalised and non-particular to any individual person or vessel that, in my view, it could not possibly trigger rights of fair procedures on the part of any individual fishermen or vessels.

73. In O'Sullivan, a number of comments were made by O'Donnell J. which may have some resonance in the present context. One of the arguments put forward on behalf of the plaintiff in that case was that the European Regulations did not permit a points system being introduced as a stand-alone procedure, and that points could only be allocated to a licence after there had been a conviction on a criminal charge. This argument was rejected and it was held that the European Regulations did permit of a system in which points could be allocated independently of the criminal system, because it enhances the effectiveness and deterrent effect of the Irish system as a whole, which was the aim of the European Regulations. In the course of his judgment on this aspect of the case, O'Donnell J. said, at paras 34-5: -

> "I can certainly see that there are potential incongruities which may arise between the operation of the rigorous procedure under the criminal law, and the almost mechanical system of allocation of points under the 2014 Regulations. It is easy to see that there is a real possibility of inconsistent outcomes between the two procedures in relation to the same event. This may be so for a number of reasons such as the evidential requirements in criminal procedures, and the standard of proof, but it is certainly easy to anticipate that the same incident may not result in the conviction of the master of the vessel, but may result in the allocation of points on the licence….The possibility of points being allocated even before criminal proceedings are completed, or even though the outcome of the criminal proceedings may be an acquittal, is not a reason to conclude that the standalone system is incompatible with the European regulations since that outcome will, if anything, increase the possibility of enforcement of the rules, and in dissuading operators and licence holders from permitting breach of them. A standalone system of points allocation certainly does not weaken enforcement. It can also be truly said to be complementary to the existing enforcement regime since it enhances enforcement and therefore compliance. In my view it is clear that such a system of points allocation is permissible under the European regulations…"

Accordingly, there is nothing wrong in principle with the existence of a points system which is independent from the criminal process, such that a licence might be the subject of the application of points even if the same underlying facts do not lead to a successful criminal prosecution. To an extent, this has some resonance in the present case insofar as I take the view that the Authority is not precluded from deeming the overall quota exhausted nor the Minister precluded from closing the fishing ground on the basis of the information furnished by the Authority simply because there exists a separate criminal process which may or may not have been invoked in respect of individual allegations of offending in respect of that fishing ground and which process might require a different form of information or level of proof.

74. It seems to me important to keep to the forefront of the discussion the particular context in which the calculation of figures was being done by the Authority. The context was that of an agency responsible for reporting figures to State and EU bodies at a macro-level in the overall context of quota management. In this regard, it may be helpful to recall the remarks of Clarke J. in *O'Shea Fishing Company Ltd v Minister for Agriculture, Fisheries and Food* [2008] IEHC 91, when he talked about the role of the Minister in this area and addressed various analogies that had been put forward for his consideration:

> "In all the circumstances I have reached the conclusion that a situation such as that which faced the Minister does not really have any true analogy at all. The Minister was faced with a finite cake in circumstances where there was a prima facie case that certain entities were responsible for the cake being smaller than it otherwise should have been. In those circumstances I am satisfied that it was well within the margin of statutory discretion afforded to the Minister to decide that, on an interim basis, the burden of meeting the shortfall should be borne by those against whom that prima facie case has been made out".

It might also be observed that the applicants' unsuccessful argument about fair procedures in the *O'Shea* case was indeed stronger than that in present case insofar as it concerned a Ministerial decision on a specific licence, as well as the fact that there was prima facie evidence of wrongdoing on the part of the vessel/licence-holder, but my main purpose in citing the above passage is to emphasise the unusual, and perhaps unique, context in which the State authorities must operate when dealing with EU fishing quotas and that the Minister has a margin of statutory discretion when dealing with evidence that the finite resource of a specific EU quota has been reduced or exhausted.

75. It also seems to me that consideration should be given to the practicalities of affording the fair procedures sought, namely the right to be heard and a right of appeal. It is a well-established principle that the level of fair procedures required must be tailored to the particular circumstances. This was mentioned again in *O'Sullivan*, where, even though the applicants in that cases were successful in their submission that the impugned penalty points system breached their rights to fair procedures, O'Donnell J. again emphasised that there was no one-size-fits-all set of fair procedures for all decision-making processes. He said that relevant matters would include the subject matter of the decision, its significance, the difficulties of proof and the consequences of error. By way of example, he said that issues such as the dangerousness of the activity licenced or the urgency of the decision could all affect what was necessary in terms of fair procedures. In the present context, even if I am incorrect and the decision did involve some kind of implicit determination of unlawful conduct (contrary to what I have held above), I cannot see how it would be helpful, practical or appropriate to construe the requirements of natural justice, the Constitution or the provisions of the EU Charter to confer upon each individual Irish fisherman with significant connections to an Irish vessel fishing in FU16 the right to be heard on whether the Authority could use the "time spent" methodology, as well as a right to appeal. As it happens, there was in fact consultation with the fishermen's organisations during the July-September 2017 period (as described at paragraph 36 of my earlier judgment) and strong objections were expressed on behalf of the industry. I cannot see that anything more than that was required, even if some level of fair procedures were required as a matter of law.

76. In conclusion, no authority, Irish or European, was cited to me in which a comparable decision with a generalised impact upon a class of persons made by a State authority was held to have triggered a right to be heard prior a decision or a right of appeal. I am not persuaded, having regard to the authorities opened to me, that the decision complained of in this case was of a nature to attract the individual rights to fair procedures on the part of individual fishermen contended for.

Reference to CJEU

77. Finally, I should perhaps record that I was not requested at the trial of the action to make a reference to the CJEU pursuant to article 267 of the TFEU. I mention this because there had been some reference to it in the course of the interlocutory application but it was not pursued at the hearing of the action.

Conclusion
78. For the reasons set out above, I refuse the reliefs sought.