

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 98 JR]

BETWEEN/

CRAYDEN FISHING COMPANY LIMITED

APPLICANT

AND

SEA FISHERIES PROTECTION AUTHORITY

RESPONDENT

AND

THE MINISTER FOR THE MARINE, IRELAND AND THE ATTORNEY GENERAL

AND

MICHAEL O'CONNOR

NOTICE PARTIES

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 26th day of January 2016**Introduction**

1. EU legislation concerning the common fisheries policy requires Member States to operate a penalty point system dealing with serious infringements of certain fisheries Regulations. In this jurisdiction the system is provided for by the European Union (Common Fisheries Policy) (Point System) Regulations 2014 (S.I. 3 of 2014), made by the first named notice party pursuant to the powers conferred by s.3 of the European Communities Act 1972. The respondent (also referred to here as "the SFPA", or "the Authority") is the body charged with implementing the points scheme.

2. The applicant, a fishing company, claims in these proceedings that it was subjected to unfair procedures under the Regulations. In particular, it complains that a decision by the respondent, to impose the maximum allowable number of penalty points on its fishing licence, was made in the absence of any opportunity to be heard. It also asserts that the decision does not record any consideration of evidence or any finding as to the actual occurrence of the alleged infringements, and that no adequate reasons were given for the decision.

3. While the Regulations provide a right of appeal, and in this instance an appeals officer had decided before the institution of these proceedings to hold an oral hearing, an appellant can succeed only by satisfying the appeals officer on the balance of probabilities that it is not liable for an infringement, or that the infringement was not serious. The applicant does not take issue with the appeal system set out in the Regulations but claims that the availability of an appeal of this nature does not remedy the flaws in the original decision.

4. There is no challenge in these proceedings to the legal validity of the Regulations by reference to the power of the Minister to make them, but the applicant seeks a declaration that the procedures prescribed therein are contrary to natural and constitutional justice. There is a plea in the statement of grounds that the Regulations are "*void for uncertainty*" but no relief is claimed in this respect and it was not addressed at the hearing.

5. The fourth named notice party is a barrister and is the appeals officer designated under the Regulations to hear the applicant's appeal. The matter did not reach the stage of an appeal hearing and no complaint is made of any conduct on his part.

Factual background

6. The applicant is a limited company and is the owner of a fishing vessel, the *Anders Nees*. On the 2nd December, 2014, the *Anders Nees* returned to port after a fishing voyage. The vessel was inspected by Sea Fisheries Protection Officers ("SFPOs"), and as a result of what was found its master was interviewed under caution.

7. In a statement made a few days later, the SFPO in charge of the inspection, Ms. Nic Dhonnchadha, recounted what had been discovered on the vessel. The master had stated that his electronic logbook was up to date. However, when steel shuttering in the fish hold was removed by the SFPOs a large quantity of unboxed fish was found in a compartment behind it. The master admitted that this fish was additional to what had been recorded in the electronic logbook. The catch was landed and examined, and it was said to be clear that the master had under recorded the whiting catch by 126.8% and had over recorded all other species. He had exceeded the December quota for whiting in the first two days of that month.

8. Ms. Nic Dhonnchadha said in her statement that she deemed these breaches to be serious infringements of the rules, specifically those relating to the recording and reporting of the catch, and to the obstruction of the work of officials. The obstruction was said to relate to the initial statement by the master about the logbook and to the concealment of unrecorded fish.

9. The master was quoted as having said, under caution, that he had not expected to get so much fish so quickly and that he had been trying to spare some quota for the following week.

10. Under cover of a letter dated the 15th December, 2014, the applicant received a copy of Ms. Nic Dhonnchadha's report relating to the inspection of the 2nd December, 2014. Under the heading "*Infringements or Observations*" the report lists, as six separate matters, the following:

a) The weight of a number of named species of fish was outside the permitted 10% tolerance, contrary to EC 1224/2009 Title IV, Chapter 1, Section 1, Article 14(3). (This relates to the difference between the recorded and actual weights.)

b) The obligation to record and report catch or catch related data, including data to be transmitted by satellite vessel monitoring system, had not been fulfilled, contrary to Article 90 paragraph 1 of the Control Regulation in conjunction with Article 42 paragraph 1(a) and Article 3 paragraph 1(b) of Regulation (EC) No 1005/2008.

c) Obstruction of work of officials or of observers in the exercise of their duties by failing to record all of catch onboard – the reference is the same as at a) above.

d) Exceeding the whiting quota under Fisheries Management Notice No. 54 of 2014 (made under s. 12 of the Sea Fisheries and Maritime Jurisdiction Act 2006).

e) Not recording the catches of four named species separately as required by Fisheries Management Notice No. 50 of 2014.

f) Not recording the catches of the same four species separately as required by Fisheries Management Notice No. 54 of 2014.

g) The equivalent of 152 boxes of fish found stored in the forward section of the hold, behind shuttering, that had not been boxed and had not been recorded in the operations section of the electronic logbook.

11. The same (or almost the same) list appears under the heading "*Inspector's comments*". The final heading is "*Action Taken*", where the note is "*Preparation of Case File*".

12. Neither the covering letter nor the report itself made any reference to any contemplated action in respect of these alleged infringements. No submissions or comments were invited from the applicant.

13. On the 19th January, 2015, the legal case management unit of the SFPA wrote a letter to the applicant headed "*Alleged Serious Infringements*". Three items described as "*alleged infringements*" were set out as follows:

"1. Not fulfilling of obligations to record and report catch or catch related data, including data to be transmitted by satellite vessel monitoring system under Annex XXX(1) of EU 404/2011 in that the master Mr. Michael Harrington under recorded whiting by 126.8%. Specifically, there was an 18084.12kg discrepancy between the operational estimate in the electronic logbook and the landing declaration. A liability of 3 points is attributed to this infringement.

2. Concealing, tampering or disposal of evidence relating to an investigation under Annex XXX(4) of EU 404/2011 in that 152 boxes of whiting were found to have been concealed in the fish hold. Using the average box weight, this is equivalent to 6829.36kg of whiting. A liability of 5 points is attributed to this serious infringement.

3. Fishing in a closed area or during a closed season, without or after attainment of a quota or beyond a closed depth under Annex XXX(8) of EU 404/2011 in that the master exceeded the whiting quota for December 2014 by 12336.12kg between the 1st and 2nd December 2014. A liability of 6 points is attributable to this serious infringement."

14. The letter went on to state that these infringements "*have been determined as being serious*" and that they amounted to 14 points. However, under Art. 126(2) of Regulation 404/2011 the maximum number of points that could be awarded in respect of a single occasion was 12. The next sentence reads:

"A total of 12 points will consequently apply as set out in that Regulation".

15. The next paragraph is headed "Assignment of Points" and reads as follows:

"It is therefore proposed to assign 12 points to you as the licence holder of the sea fishing boat "Anders Nees"...in respect of the serious infringements outlined."

16. The letter then informs the applicant that the determination panel for the assignment of points had sat on the 16th January, 2015. It had "*examined the evidence to assess the gravity of the infringements detected against criteria such as the nature of the damage, its value, the extent of the infringement and its repetition*" and had determined that the infringements were serious in nature.

17. The applicant was advised that it could appeal against the assignment of the points by writing to the appeals officer within 21 days. If no appeal was lodged, the points applicable to the fishing boat licence would be notified to the Licensing Authority. Any points applied would remain extant on the licence for three years.

18. The applicant lodged a notice of appeal on the 6th February, 2015. This appeal was stated to be expressly brought without prejudice to the applicant's contention that the penalty point system established by the Regulations was contrary to the Constitution. It was asserted, in summary, that the determination in relation to the penalty points had been made in breach of natural and constitutional justice, in that the applicant had been provided with no notification of the accusations, no statements of any evidence relied upon and no opportunity to be heard. The reasons for the decision and the imposition of a penalty were not apparent, and a proper appeal was impossible. Having regard to these matters, it was submitted that no infringement had been made out.

19. On the 15th February, 2015, the appeals officer notified the parties that the appeal would be heard on the 27th February, 2015. It appears that he directed the parties to exchange documents informally. On the 17th February, 2015, the respondent furnished the applicant's solicitor with the materials relating to the decision of the determination panel. These were the determination itself, the inspection report, the statements made by the SFPOs engaged in the inspection, including a memo of the interview with the master, information taken from the vessel's records, the weight and valuation of the different species in the catch, information about the quotas in force and details of the vessel including the master and owner. Also included were copy notices issued by the Minister, in exercise of statutory powers, relating to quota management and restrictions on various species of fish during the months of November and December 2014.

20. There is also a document headed "*Recommended charges*". This sets out a total of 18 infringements said to have been detected over the course of the investigation. Two of these appear to relate to the weight of whiting caught and the exceeding of the quota, and two to the method of recording species caught. There is one of obstruction by failing to indicate all of the catch on board. There are separate allegations, in respect of 13 other species, that the difference between the weight caught and the weight recorded was outside the permitted tolerance.

21. The respondent then lodged a response, described as a "*statement of opposition to the appeal*". This document stated that it was not accepted that the term "penalty" was applicable to points assigned for serious infringements. It was noted that the applicant had been furnished with the inspection report, which recorded the infringements detected. The statement then summarises what was said to have been found in the inspection.

Application for judicial review

22. The applicant was granted leave to seek judicial review on the 26th February, 2015. The reliefs sought are an order of certiorari in respect of the decision of the determination panel, a declaration that the procedures prescribed in the point system Regulations are contrary to fair procedures and to natural and constitutional justice, and a declaration that the manner in which the respondent has purported to impose penalty points was contrary to natural and constitutional justice.

The respondent's evidence

23. In an affidavit sworn by the respondent's Director of Operations, Mr. Seamus Gallagher, it is explained that in September, 2014 the respondent established a "standard operating procedure" relating to the penalty point system. The procedure is set out in a document dated September, 2014.

24. The purpose of the procedure is stated to be to facilitate the determination of liability to points in a consistent and transparent manner, following the detection of an infringement.

25. The tasks of the SFPOs and of the determination panel are described. On detection of an infringement the SFPO must record that fact in an inspection report. A copy of the report must be provided to, *inter alia*, the operator. If criminal proceedings are contemplated the points system is to take place in parallel.

26. Under the heading "Determination process" the document reads as follows:

"Following receipt of an inspection report and/or any other report of an infringement of the rules of the Common Fisheries Policy a Determination Panel will make a determination of the assignment of points. The authority to review any evidence presented and to make such determination of points for serious infringements will be afforded to the above mentioned determination group under the seal of the Sea Fisheries Protection Authority."

27. A section entitled "Consideration of the evidence of serious infringement" provides that

"[D]etermination will be based on the evidence provided by way of written statements, exhibits and or direct evidence from the inspecting officer(s) to the determination panel. The Determination panel may request additional evidence from the inspecting officer(s)...The evidence will be examined to assess the gravity of the infringement detected against criteria such as the nature of the damage, its value, the extent of the infringement and its repetition."

28. The panel is to be made up of at least three people drawn from the members of the Authority, the Authority's director of operations, the "SFPA SFPO or national manager of legal case management" and an officer nominated by the Irish Naval Service.

29. Under the heading "Assignment of Points" the document reads as follows:

"Having considered the evidence as presented and having undertaken the assessment against the set criteria the decision to assign points will be made and recorded on each file presented. The record on each file will include the detail of the assessment made, the decision taken and the points to be assigned as a result of those considerations."

The number of points to be assigned will be directed as per Annex XXX of EU Commission Regulation 404/2011.

A decision not to assign points will be recorded, the relevant SFPOs informed and the file closed regarding points.

The Legal Officer shall notify the parties concerned, and shall remind the liable person of the opportunity to appeal the decision."

30. The document has little to say about appeals other than that the legal case manager is obliged to facilitate the process.

31. Draft minutes of the meeting of the determination panel on the 16th February, 2015, have been exhibited. Insofar as the applicant is concerned, this document refers to the vessel and summarises the infringements as "Logbook infringement" and "Concealment of catch & quota". Under the heading "Panel Decision/Determination" it simply records: "Considered a serious infringement by Inspecting Officer". There is no record of any assessment made, decision taken or the assignment of points to the applicant, as required by the standard operating procedure. It may have to be borne in mind that, perhaps, the minutes had not been finalised as of the date upon which the affidavit was sworn, but no explanation has been furnished to the Court.

32. Mr. Gallagher describes the determination of the panel as being the first step in a process that includes an appeal to the appeals officer. The latter is entirely independent. Because the system is new, there have to date been very few appeals but it is to be noted that oral evidence with examination and cross-examination is permitted. A written, reasoned decision is delivered by the appeals officer. Mr. Gallagher says that the Authority believes that at the hearing of the appeal it should take responsibility, in the first instance, for setting out the evidence and explaining why the alleged infringements detected by the SFPOs constitute serious infringements. He therefore avers that a high level of procedural fairness is built into the process, and that a licence holder will have every opportunity to make its case before any decision relating to points becomes effective. He notes that there is also an appeal on a point of law to the High Court.

33. Mr. Gallagher avers that he finds it almost impossible to believe that a responsible entity engaged in commercial fishing would not be aware of the introduction of the points system and the general nature of the Regulations brought in to give effect to it. He notes that commercial fishing in Ireland is a highly regulated industry, and that the obligation is on owners and operators to ensure compliance with Regulations. Mr. Gallagher also avers that, given the information that was provided to the applicant in the inspection report and subsequently, it must have been aware of the substance and detail asserted by the Authority and of the basis of the determination of the determination panel.

Relevant legislation

The Control Regulation

34. Council Regulation (EC) No. 1224/2009 is known as "the Control Regulation" and is described as such in the 2014 Regulations. Its purpose is to establish a Community control system for ensuring compliance with the rules of the common fisheries policy, by

consolidating, rationalising and simplifying the then current control provisions. By virtue of Article 3, it applies without prejudice to national control measures that go beyond the minimum requirements, provided that such requirements comply with Community legislation and are in conformity with the common fisheries policy.

35. The recitals refer to the necessity for deterrent sanctions, to be applied consistently across the Community. Recital 40 reads in full as follows:

"The establishment of sanctions should be complemented by a point system for serious infringements on the basis of which a fishing licence should be suspended if a certain number of points have been attributed to the holder of a fishing licence following the imposition of sanctions for serious infringements. If the fishing licences have been suspended five times on the basis of this system and again the number of points are attributed the fishing licence should be withdrawn altogether. In this context Member States should enter in a national register all infringements of the rules of the common fisheries policy."

36. A fishing licence, for the purposes of the Regulation, is an official document which confers on the holder the right, as determined by national rules, to use a certain fishing capacity for the commercial exploitation of living aquatic resources. A Community fishing vessel may engage in such exploitation only with a valid licence.

37. An "operator" is defined as

"the natural or legal person who operates or holds any undertaking carrying out any of the activities related to any stage of production, processing, marketing, distribution and retail chains of fisheries and aquaculture products".

38. Title IV of the Regulation imposes obligations on the masters of fishing vessels over a certain size in relation to, *inter alia*, the keeping of records for all quantities of each species of fish caught. The required information must be recorded by electronic means and sent to the competent Authority at least once a week, and in any event after the last fishing operation before entering a port. Further information must be notified to the Authority at least four hours before entering the port. The master must complete a landing declaration indicating specifically all quantities of each species landed, and send it by electronic means to the Authority.

39. Member States must, under Article 74, set up and keep a list of officials responsible for carrying out inspections to ensure, *inter alia*, the legality of the catch on board and the accuracy of the documents or electronic transmissions relating to it. These officials are empowered to examine all relevant areas of a vessel and to question any person deemed to have relevant information.

40. Article 75 deals with the obligations of the operator in relation to inspections. It must facilitate access to the vessel, ensure the safety of officials and must not obstruct or hinder them.

41. Article 76(1) provides that after an inspection, the officials must draw up an inspection report and forward it to the competent Authority. Paragraph (2) and (3) read in relevant part as follows:

"(2) Officials shall communicate their findings from the inspection to the operator, who shall have the possibility to comment on the inspection and its findings. The operator's comments shall be reflected in the inspection report..."

(3) A copy of the inspection report shall be sent as soon as possible to the operator, and in any case no later than 15 days after the completion of the inspection."

42. Under Article 82, where the information collected during an inspection leads an official to believe that an infringement of the rules has been committed, that official must note the suspected infringement in the inspection report, immediately forward the report to the Authority, and inform the natural or legal person suspected of committing the infringement that it may result in the assignment of the appropriate number of points in accordance with Article 92. This information is to be noted in the inspection report.

43. Where an infringement is discovered in the course of or after an inspection, the competent Authorities are required by Article 85 to take appropriate measures in accordance with Title VIII against the master or against any other legal or natural person responsible for the infringement.

44. Title VIII is the part concerning enforcement. As a general obligation Member States must ensure that appropriate measures are systematically taken, including administrative action or criminal proceedings, against any natural or legal person suspected of a breach of the rules of the common fisheries policy.

45. Article 89(2) stipulates that sanctions are to be calculated, in accordance with national law, in such a way as to make sure that they effectively deprive the responsible persons of the economic benefit derived from the infringement "without prejudice to the legitimate right to exercise their profession". The sanctions must also "*be capable of producing results proportionate to the seriousness of such infringements*".

46. Article 90 lists certain activities that are to be considered as serious infringements, depending on the assessment of gravity by the competent Authority. That Authority is to take into account criteria such as the nature of the damage, its value, the economic situation of the offender and the extent of the infringement or its repetition. Member States must ensure that the natural or legal person responsible is punished by effective, proportionate and dissuasive sanctions. In fixing the sanction, they must also take into account the value of the prejudice to the fishing resources and the marine environment concerned.

47. Article 92 of the Regulation requires Member States to apply a points system for serious infringements. Where a natural or legal person is held responsible for such an infringement the appropriate number of points is to be assigned to the holder of the licence. The points assigned are to be transferred to any future holder of the licence if the vessel is sold or otherwise changes ownership. Paragraph (2) stipulates that the holder of the licence shall be entitled to review proceedings in accordance with national law. Under paragraph (3), accumulation of a specified number of points automatically incurs a period of suspension of the licence for a period of at least two months. Sequential suspensions are for increased periods of time, and the licence is to be permanently withdrawn in the event of a fifth suspension. Points are to be deleted if the holder does not commit another serious infringement within three years.

The Commission Implementing Regulation (EU) No. 404/2011

48. This is described as the "Commission Regulation", the purpose of which is to lay down detailed rules for the implementation of the Council Regulation. Title VI sets out rules for, *inter alia*, the conduct of inspections and the obligations of officials completing an

inspection report.

49. Article 113, which refers to "General obligations of operators", requires the operator to facilitate officials and to provide necessary information on request. The operator must not obstruct, intimidate or interfere with officials.

50. Article 114 refers to the obligations of the master during inspections. In essence, the obligations are to facilitate officials and to provide access to relevant areas and to information.

51. Under Article 115 officials are to note any infringement detected in the inspection report. Article 115(3) is significant in respect of this case and reads as follows:

"Officials shall communicate their findings to the natural person in charge of the fishing vessel, vehicle, aircraft, hovercraft or premises being inspected (operator) at the end of the inspection. The operator shall have the possibility to comment on the inspection and its findings. Comments by the operator shall be noted in the inspection report. In case where officials do not speak the same language as the inspected operator, they shall take appropriate measures to make understandable their findings."

52. Article 116 requires the official to sign the report and to invite the operator to sign it. Without prejudice to national law, signature is to be taken as an acknowledgement of the report and not as acceptance of its contents. Under Article 117 a copy of the report must be sent to the operator within 15 working days.

53. Title VII of the Regulation is concerned with enforcement, and mandates the establishment of a point system for serious infringements. Article 125 requires Member States to designate the competent Authority to be responsible for the setting up and operation of the system.

54. Article 126 deals with the assignment of points and reads in relevant part as follows:

(1) The number of points for serious infringements shall be assigned in accordance with Annex XXX to the holder of the fishing licence for the fishing vessel concerned by the competent authority of the flag Member State.

(2) When two or more serious infringements by the same natural or legal person holding the licence are detected in the course of one inspection, points in respect of each serious infringement concerned shall be assigned to the holder of the fishing licence referred to in paragraph 1 up to a maximum of 12 points.

(3) The holder of the fishing licence shall be informed that points have been assigned to him.

(4) The points are assigned to the holder of the licence on the date set in the decision assigning them. Member States shall ensure that the application of national rules concerning the suspensory effects of review proceedings do not render the point system ineffective.

55. Annex XXX of the Regulation lists the matters to be regarded as serious infringements and the points to be assigned in relation to each. They include the non-fulfilment of obligations to record and report catch or catch related data, including data to be transmitted by satellite vessel monitoring system (3 points); the concealment of, tampering with or disposal of evidence relating to an investigation (5 points); fishing in a closed area or during a closed season, without or after attainment of a quota or beyond a closed depth (6 points); and obstruction of the work of officials in the exercise of their duties (7 points).

56. Under Article 129 the accumulation of 18 points automatically triggers the first period of suspension of the licence.

Council Regulation (EC) No. 1005/2008

57. This Regulation has the objective of preventing and deterring illegal, unreported and unregulated ("IUU") fishing. It is therefore referred to as the "IUU Regulation".

58. Article 3 provides that a fishing vessel is to be presumed to be engaged in IUU fishing if it is shown that, contrary to the conservation measures applicable in the fishing area concerned, it has *inter alia* not fulfilled its obligations to record and report catch or catch-related data; fished in a closed area or during a closed season; concealed, tampered with or disposed of evidence relating to an investigation; or obstructed the work of officials in the exercise of their duties.

59. Article 3(2) provides that these activities are to be considered serious infringements

"depending on the gravity of the infringement in question which shall be determined by the competent authority of the Member State, taking into account the criteria such as the damage done, its value, the extent of the infringement or its repetition."

The European Union (Common Fisheries Policy) (Point System) Regulations 2014 (S.I. 3 of 2014)

60. The Regulations came into force on the 20th January, 2014. Their purpose is to give full effect to Article 92 of the Control Regulation and Title VII of the Commission Regulation, and they establish the procedure for a points system in the State. The Sea Fisheries Protection Authority is designated as the competent Authority.

61. Article 3 of the Regulations defines a "serious infringement" as

"an infringement of the rules of the common fisheries policy mentioned in Annex XXX to the Commission Regulation that is determined by the SFPA, on the balance of probabilities, to be serious having regard to the criteria, and guidance notes, referred to in Regulation 5(2);"

62. Article 5 deals with the procedure for the assignment of points by the SFPA. In relevant part Article 5(1) reads as follows:

"5. (1) Where a serious infringement is detected by a sea-fisheries protection officer—

(a) involving an Irish sea-fishing boat, wherever the boat may be...

the SFPA, as soon as may be, on notification to it of the detection and having determined that the infringement is a serious infringement, shall—

(i) in case the vessel is an Irish sea-fishing boat—

(I) propose to assign the appropriate points to the holder of the Irish licence relating to the boat concerned for the serious infringement, and

(II) notify the holder of the Irish licence of the proposal to assign points...”

63. In determining whether an infringement is a serious infringement, for the purposes of paragraph (1), the SFPA shall have regard to —

“(a) the criteria set out in Article 3(2) of the IUU Regulation, and

(b) guidance notes published by the SFPA, from time to time, under paragraph (9).”

64. The assignment of the points in accordance with paragraph (1) is not to occur until either the period allowed to make an appeal to an appeals officer under Regulation 10 has expired, without such an appeal having been made, or, in case the appeal is withdrawn, the date of the withdrawal, or, in case the appeals officer decides to uphold the proposal of the SFPA, the date of that decision.

65. Points assigned by the SFPA in accordance with the Regulation apply from the date of detection of the serious infringement concerned.

66. A report prepared, or material collected, by a sea-fisheries protection officer in the exercise of his or her powers may be used for the purposes of a proposal to assign points.

67. Pursuant to Article 5(9), the SFPA may issue guidance notes, to be published on its website, for the purpose of providing practical guidance in identifying the criteria employed by it in determining whether an infringement is a serious infringement. As of the date of the hearing of these proceedings no guidance notes have been published.

68. Article 10 sets out the procedure for appeals. The holder of a licence may appeal in writing against the “*proposal to assign points*”. The appeals officer may decide, at his or her discretion, whether or not to conduct an oral hearing for the purposes of the appeal, and may direct that further information be provided by either party. The appeals officer may “*confirm that the points shall be assigned*” to the holder of the licence, or allow the appeal, in which event the points shall not be assigned.

69. Article 10(7) provides for a reverse burden of proof, in that the appeal may be allowed only if the appeals officer, on the balance of probabilities, considers that the alleged infringement did not occur, or that it was not serious, or that it did not involve the fishing vessel in question.

70. A party to the appeal may “apply” to the High Court on a point of law. This presumably means an appeal on a point of law.

Submissions on behalf of the applicant

The right to be heard

71. On behalf of the applicant, Mr. Michael O’Higgins SC submits that a decision profoundly affecting its interests was reached in breach of fair procedures. The “overarching” complaint is said to be the absence of an opportunity to be heard before the decision of the determination panel was made.

72. Under the Regulations this decision would take effect in the absence of a successful appeal. Mr. O’Higgins submits that it amounts to a verdict or finding of wrongdoing. The availability of an appeal is not an answer to a complaint about flawed procedures at first instance – the applicant is entitled, it is argued, to two fair and proper determinations.

73. It is accepted that aspects of the determination may concern findings of fact – for example, the inaccuracy of the landing declaration – which might be difficult to dispute. However it is submitted that some are open to debate – for example, whether the fish in the fish hold were “concealed”. An argument could, it is suggested, be raised in respect of duplicity on the second and third charges.

74. It is also submitted that establishment of the facts does not automatically establish the seriousness of the breaches. The latter issue is one to be assessed by reference to the criteria referred to in the IUU Regulation, which require consideration of the context. The Control Regulation requires the sanction to be proportionate, and to be tailored to the circumstances of the licence holder. These are said to be matters that a licence holder must be entitled to address the decision-maker about.

75. It is submitted that the procedures adopted by the respondent in this case were in breach of the requirements of the Control Regulation. The applicant was not given an opportunity to comment on the inspection report, as mandated by Article 76 of that Regulation and Article 115 of the Commission Regulation. The questioning under caution of the master of the vessel could not be considered as the provision of an opportunity for the applicant to make its case.

76. Mr. O’Higgins points out that while the Regulations make specific provision for the appeal process, they are silent on the procedure by which the respondent is to make its initial decision. Applying the principle that he who asserts must prove, it would be assumed that the Authority must establish the infringements to the satisfaction of the determination panel. If, on the other hand, the process involves the same onus of proof as the appeal, the licence holder is the subject of a rebuttable presumption. It must therefore be given an opportunity to be heard at that stage.

77. The letter notifying the applicant of the determination is criticised as amounting to a simple recitation of the charges, coupled with the statement that they were serious, without giving any reasons and without any inquiry as to the applicant’s economic circumstances. There was no attempt to relate the statutory criteria to the evidence.

78. The applicant relies on the judgments of the Supreme Court in *Dellway Investments Ltd & Ors. v. The National Asset Management*

Agency & Ors [2011] 4 I.R. 1 for the proposition that, apart from certain exceptions, a person affected by a decision is entitled to have an input into the decision-making process. It is argued that no exception arises in this particular context. While it is accepted that the State is obliged to have a penalty point system, and that it must not be unduly protracted or complex, there must be an opportunity to be heard.

79. In so far as it is relevant to this case, *Dellway* concerned the question whether the principles of fair procedures were applicable to a decision by the National Asset Management Agency to acquire loans made to a Mr. McKillen and his companies. The Agency was of the view that the loans represented a "systemic risk". The decision to acquire them was made without notice or consultation. Mr. McKillen asserted a right to be heard prior to the making of the decision.

80. On this issue, the Supreme Court granted a declaration that the applicants were entitled to be informed of the intention to consider the making of a decision to acquire the loans so as to afford them an opportunity of making representations. The headnote of the report summarises the ruling of the Court as follows:

"[That] a person, whose interests were capable of being directly affected in a material way by a decision, should be allowed to put forward reasons as to why the decision should not be made or that the decision not take a particular form, even if that decision was justified in the interests of the common good. However, the mere diminution of property values would not normally suffice to establish the right to be heard. The right to be heard before a contemplated decision was made was not dependent on establishing interference with a specific and identifiable right. No distinction should be made between an effect which modified the legal content of rights and a substantial effect on the exercise or enjoyment of rights. The courts had never laid down rigid rules for determining when the need to observe fair procedures applied: it depended on the circumstances and subject matter. The fundamental underlying principle was fairness."

81. The applicant also relies on the Supreme Court decision in *O'Ceallaigh v. An Bord Altranais* (unrep., 17th May, 2000). This case concerned, in part, the right of a nurse to participate at the stage where the Fitness to Practise Committee was considering whether or not to hold an inquiry under the Nurses Act 1985. It was part of the applicant's case that she had been notified at that stage of the process in relation to one complaint, but not in relation to three subsequent ones.

82. The respondent said that because it received relatively few complaints it had no fixed practice on the issue. It argued (in reliance on a passage from de Smith, Stanley A., and J. M. Evans, *de Smith's Judicial Review of Administrative Action*, 4th edition (1980)) that where an act or a proposal was only the first step in a sequence of measures that might culminate in a decision detrimental to a persons interests, the Courts would generally decline to hold that the person was entitled to be heard at that stage. This was particularly so if the person was entitled to be heard at a later stage.

83. In considering this latter proposition, Hardiman J. referred to the somewhat different treatment of the same topic in H.W.R. Wade, *Administrative Law*, 6th edition, (1988) at pp. 570-571:

"Natural justice is concerned with the exercise of power that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedures may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the persons affected."

84. It was noted by Hardiman J. that in *Scariff v. Lieutenant Col. David Taylor and Others* [1996] 1 I.R. 242 the Supreme Court had held that a soldier was not entitled to be represented at a statutorily-required informal hearing before being sent forward for formal Court Martial. *Per* Denham J. in that case:

"... cases such as In Re Haughey (1971) JR 217 insofar as they apply to a right to legal representation do not apply to the preliminary proceeding to the Court Martial, but rather to the Court Martial itself."

85. Hardiman J. did not consider this case to be of assistance to the respondent, and made the following observations in relation to the facts.

"The elaborate procedures of the preliminary investigation included the accused person's right to hear the witnesses against him (and not merely a statement of the allegation) and actually to cross-examine them at that stage. This was so although the only direct outcome of the preliminary investigation is that the Commanding Officer could exercise a discretion either to dismiss the charge or to remand it for Court Martial. Moreover, it was stated in the judgment of Hamilton C.J. that:

'In the execution of such investigation and in the exercise of discretion to dismiss the charge, the first Respondent was obliged to act in a fair and proper manner and in accordance with fair procedures.'

In this case the Applicant's complaint is that no procedures whatever, not even notification of the fact of a complaint, was accorded to her until after a decision to hold an inquiry on the basis that there was a prima facie case had been taken. The same sort of decision attracted the entire panoply of procedural justice (other than legal representation) in Scariff's case."

86. It was noted that in the 1998 edition of Hogan & Morgan on *Administrative Law in Ireland* the authors had stated that the traditional view, that the principles of constitutional justice did not apply to preliminary inquiries, had been rejected by the Irish Courts. The authority for this statement was *State (Shannon Atlantic Fisheries Limited) v. McPolin* [1976] I.R. 93. In that case a report had been made by an inspector investigating the cause of a maritime accident. His report, sent to the Minister, had no legal effect in itself but might, in circumstances not applicable to the particular case, lead the Minister to initiate a prosecution. Finlay P. quashed the report on the basis that the owners of the vessel had not been interviewed or given a chance to comment on the relevant matters. Even though no prosecution could ensue in the circumstances of the case, the findings of fact made by the inspector would remain on record in the Department, with damaging effects on the owners' reputations. Hardiman J. considered that the case was authority for the proposition that, in some circumstances at least, a preliminary inquiry without direct legal effect may give rise to an obligation to apply principles of procedural justice.

87. Geoghegan J. agreed with Hardiman J. on the fair procedures issue, saying:

"If a professional body is invested with the power of receiving complaints relating to a member of that profession and deciding whether an inquiry should be put in motion the outcome of which might lead to the person complained about being no longer able to practise his or her profession, that body cannot be said to be exercising its power lawfully and fairly without the person complained about being informed of the complaint and the Board having sight of any response to such complaint."

88. Barron J. also considered this issue. At p. 45 of his judgment, having reviewed a number of Commonwealth authorities, he said:

"Clearly, as in Parry Jones v. The Law Society where the right to proceed does not arise until a particular opinion has been formed, it is not the law that the person who may be affected by the proceedings based upon that opinion should be informed prior to the issue of those proceedings so as to be able at that stage to argue to the contrary. His or her right to be heard arises once the proceedings are put in train. The question in any particular case as to when the person affected has a right to be heard depends upon the existence of the relevant procedure. There can be no right to be consulted until some step has been taken to set the procedures in motion. Once that has been done, the right to be consulted, the right to be heard etc. will depend upon what is proper, what is fair. There can be no hard and fast rule. It is not the step in the procedures or the stage which they have reached which governs the right. What might require notice in one case may not require it in another for varying proper reasons, the most obvious being urgency or other necessity. It is entirely a question of what is fair and proper."

89. Barron J. considered that the filtering system required by the Nurses Act meant that a step had taken place which increased the importance to be attached to the matter. Fair procedures required that inquiry should be made of the nurse at that stage.

The obligation to give reasons

90. The applicant also submits that a proper or fair appeal is hampered by the failure of the determination panel to give reasons for its decision, beyond the statement that evidence, which was not described, had been considered, that the infringements were serious and that points would be applied to the licence.

91. The applicant cites *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750, where Murphy J. said (at p.757):

"It is clear that the reason furnished by the board (or any other tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations ..."

92. Reference is also made to *The State (Sweeney) v. The Minister for the Environment* [1979] I.L.R.M. 35, where Finlay P. outlined (at p.37) the rationale for the requirement to give reasons.

"It is to give the applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and secondly to enable him to arm himself for the hearing of such an appeal."

93. The applicant submits that such requirements have not been met in the determination of the SFPA in this case.

94. In summary, the applicant says that the fact that the Regulations do not expressly provide for the application of the rules of fair procedures does not mean that they have no application. At a very minimum, it is submitted, the rules require that the applicant should have been put on notice of the charges and the evidence, and should have been afforded an opportunity to make representations in writing. If serious allegations are made, with the potential for a serious impact on interests, there should be a right to an oral hearing.

Submissions on behalf of the respondent

95. On behalf of the respondent, Mr. Quinn SC submits that the 2014 Regulations are an important element in the legal architecture established by the State to ensure control over and compliance with fishing legislation in the context of evolving EU obligations. They achieve a balance between the need for effective control of commercial fishing, in compliance with EU law, and the rights of those engaged in such fishing.

96. It is contended that, despite the terminology used in the Regulations, the finding of facts, the decision of the determination panel and the appeal are in fact parts of a single, unified process. The licence holder does have the right to be heard during that process, at the appeal stage. The law does not require that that right be afforded at the preliminary phase. The applicant has, it is said, proceeded on a fundamental misapprehension of the nature and effect of the procedure set out in the Regulations, and has sought to isolate one aspect of the overall scheme. The application is premature, in that the process should have been allowed to run its full course.

97. It is suggested that the applicant's case is that it did not know what was happening. However the inspection report made it clear what was at the heart of the case and further information was furnished as the matter progressed. The appeal was to be heard by an independent person, who had decided to hold an oral hearing. It must be presumed that his decision would be taken fairly. It was clear that the appeals officer had taken into account the fact that the applicant was not heard at an earlier stage, since that must have informed his decision to hold an oral hearing and to ensure that documents were furnished to the applicant.

98. It is submitted that under the Control Regulation the master of the vessel was the "operator". He had the opportunity to comment on the inspection, although Mr. Quinn says that he does not want to overstate the significance of the interview under caution. It is accepted that there was no opportunity provided for the applicant, which was the owner of the vessel, to engage with the determination panel.

99. Mr. Quinn says that fair procedure requirements are not rigid. He distinguishes *Dellway* on the basis that it concerned a final decision with direct and inevitable consequences, rather than, as here, a provisional decision that will not come into effect in the event of a successful appeal. He does, however, rely on certain extracts from the judgments in *Dellway* as supporting the argument that the application of fair procedures to a given situation will be dependent on the facts of the case. Reference is made to the endorsement by Fennelly J. of the following passage from Woolf, Jowell and Le Sueur, *de Smith's Judicial Review* (6th ed. Sweet & Maxwell, London, 2007) at p.377:

"The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject-matter. The requirements necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully fledged hearing with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms."

100. Denham, Hardiman and Macken JJ. all referred to the fact that the decision under consideration was a final one with no provision for appeal or review. The respondent submits that this is an important factor in determining whether the right to make representations exists. In the present case, the decision of the SFPA to propose to apply points has no effect at all if the right to appeal is invoked.

101. Mr. Quinn also cites two passages from the judgment of Hardiman J. as follows:

"It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears. He is also, very probably, entitled to reasons for the decision taken, if any."

"I do not see in the circumstances of the present case a positive need for an oral hearing, though NAMA's obligations may of course be met in that way. I would not otherwise prescribe the nature of the hearing, which will ultimately depend on the circumstances of the individual case."

102. It is submitted that *O'Ceallaigh* does not support a general principle that the law requires, in all situations that involve a 'preliminary' phase, the full panoply of fair procedural rights. The case is distinguished by reference to the practical implications of the first phase of the inquiry in *O'Ceallaigh*, leading as it ultimately could to erasure from the register. By contrast the points assigned to the applicant do not entail suspension of the licence and will be deleted in the event that no further infringements occur. The effect of suspension on a nurse, or indeed the mere fact of an inquiry, could have very serious financial and reputational consequences. It cannot, it is argued, be compared with the awarding of penalty points to a commercial entity that has been given a licence to fish in a context of limited natural resources.

103. A further consideration is that there was no EU element in *O'Ceallaigh*. The State is obliged under EU law to operate an effective points scheme in implementation of the common fisheries policy.

104. In arguing that the Regulations establish a single, unified process Mr. Quinn says that the determination panel does not make a decision as to whether or not an infringement has been committed. That finding is made by the SFPOs who carry out the inspection. The owner is then given a copy of the inspection report. The decision of the determination panel is described as a "provisional" decision that will never become effective if the person concerned mounts an effective appeal.

105. The respondent submits that there is a distinction between cases where an order becomes effective when made, and those where the effect is delayed, or is made conditional. It is argued that the scheme provided for in the Regulations is analogous to the situation considered by the High Court in the case of *Gammell v. County Council for the County of Dublin* [1983] ILRM 413.

106. In that case, the plaintiff bought a caravan park in 1974, which had been used as such since 1959. She was informed by the local authority that no action would be taken in relation to the site under planning legislation. The following year she was notified that the site was not licensed, as required, under the Local Government (Sanitary Services) Act 1948. She did not apply for a licence. In 1977 the defendant local authority issued an order, under statutory powers, prohibiting the erection of temporary dwellings on the site. Notice of the order was published in newspapers and it was provided that affected persons had a 14-day period to appeal to the Minister for the annulment of the order. The plaintiff did not see the notice, and was not aware of the inspections by health and safety officials that led to the making of the order. She claimed that her right to fair procedures had been breached because she was not notified prior to the making of the order, so that she could make representations. She relied upon *Ingle v. O'Brien* (1974) 109 ILTR 7, where Pringle J. had quashed the revocation of a licence done without giving the licence holder an opportunity to make representations, and argued that the right to apply to the Minister did not remedy the alleged lack of natural justice at the initial stage.

107. Having considered *Ingle*, Carroll J. said:

"However in this case we are not dealing with an order effective when made and an appeal therefrom to an appellate body. Under s. 31 of the Act the order has no effect until the person aggrieved has been given an opportunity of stating reasons why it should not come into effect. There is no 'appeal' to the Minister from an operative order. There is machinery set up under the section whereby an aggrieved party can make representations why the order should not come into operation. If successful, the order is annulled by the Minister and it never becomes operative. This is very different to the Ingle case and the Moran case where the revocation of the licence became operative immediately and of necessity there had to be a time lag between the revocation and the determination of an appeal in the District Court."

108. She considered that the case was more analogous to *State (Duffy) v. Minister for Defence* (unrep., Supreme Court, 9th May, 1979). In that case the applicant had been told that it had been decided that he was to be dismissed from the Navy and was offered an opportunity to make representations as to why this should not be done. The Supreme Court held that this was sufficient compliance with the requirements of *audi alteram partem*, in that he had been given the time and opportunity to make a case. Carroll J. therefore concluded that the *audi alteram partem* rule was not breached provided representations could be made before a decision became final.

109. Reference is also made to the decision of McGovern J. in *McNamee v. The Revenue Commissioners* [2012] IEHC 500. This concerned a challenge on fair procedure grounds to the issue of a notice by a Nominated Officer to the applicant, informing him that he was of the opinion that particular transactions together constituted a "tax avoidance transaction". The consequence was that a particular "tax advantage" was withdrawn. The applicant lodged an appeal but did not pursue it. In judicial review proceedings he claimed *inter alia* that because of the refusal of the respondent to furnish him with the report of the inspector of taxes to the Nominated Officer, which formed part of the basis for the opinion of the latter, he could not make submissions prior to the making of the adverse determination. He relied on *Dellway* and *Gammell*.

110. The respondent relied on the fact that the applicant had been invited to make submissions before the report was forwarded to the Nominated Officer, and also on the fact that once the notice of opinion was issued the applicant had a right of appeal.

111. McGovern J. held that there had been no breach of fair procedures in the issue of the opinion, and that the appeal constituted an effective alternative remedy to judicial review proceedings. Having considered *Dellway* he observed (at paragraph 46) that:

"[A] key factor may be that a decision does not come into effect until the appeal has been heard or, if no appeal is taken, until the period for appeal has elapsed."

112. In that case, the opinion did not become final until the appeal process was exhausted, including an appeal by way of rehearing in the Circuit Court.

113. Mr. Quinn stresses the fact that the appeal under the Regulations is conducted by an independent person who is obliged to act fairly, and that the Court should not presume that the appeal would be conducted unfairly. He submits that the rules of constitutional justice do not require two full hearings on the merits and refers in that regard to *Carroll v. Minister for Agriculture & Food* [1991] 1 I.R. 230 and *Quinn v. The Honorable Society of King's Inns* [2004] 4 I.R. 344.

Recent judgment

114. Shortly before the date on which this judgment was due to be delivered the Court was made aware that a judgment had been delivered on the 15th January, 2016, by O'Connor J. in separate proceedings entitled *O'Sullivan v. The Sea Fisheries Protection Authority*. The judgment is as yet unapproved but the respondent in the instant case has very properly made it available to this Court. The result in that case is that the Regulations have been held to be invalid having regard to the provisions of Article 15.2.1 of the Constitution, as interpreted in *Cityview Press v. An Chomhairle Oiliuna* [1980] I.R. 381. O'Connor J. held that the Regulations failed the test applicable to delegated legislation, and that they were not saved by the provisions of Article 29.4.6, because he considered that they were not "necessitated" by the European Union legislation.

115. Since no challenge was made to the validity of the Regulations in the instant case, and since no final order has been made in *O'Sullivan*, I think it appropriate to deliver this judgment without awaiting further developments. The parties have been offered an opportunity to make submissions in relation to any potential effect of the decision in *O'Sullivan* on these proceedings and have both declined.

Discussion and conclusions

116. I think that it is helpful to commence the discussion of the issues by reference to the following passage from the judgment of Fennelly J. giving the decision of the Supreme Court in *Mallak v. Minister for Justice Equality and Law Reform* [2012] 3 I.R. 297. In the opening paragraph, at p. 300 of the report, he said:

"The phenomenon that is the modern law of judicial review, though rooted in history, has witnessed extraordinary development over the past thirty years. At its heart it insists that, to adapt the language of this court in The State (Lynch) v. Cooney [1982] I.R. 337, any administrative decision, in that case an opinion of a minister which enabled him to make an order prohibiting broadcasts, must be "bona fide held and factually sustainable and not unreasonable". The underlying principles of judicial review are universal. Courts of the common law have developed and expanded the historic rules of natural justice, in more recent times with inspiration from international human rights instruments such as the European Convention on Human Rights 1950 and, in this jurisdiction, from the Constitution. The Court of Justice of the European Union speaks of a "complete system of legal remedies" as set out in Les Verts v. Parliament (Case 294/83) [1986] E.C.R. 1339 at para. 23. The rules are composed of a number of interrelated features, the underlying fundamental presumption being that those to whom discretionary powers are entrusted will exercise them fairly insofar as they may affect individuals. Where fairness can be shown to be lacking, the law provides a remedy. The right of access to the courts is an indispensable cornerstone of a state governed by the rule of law."

117. Dealing with the obligation to give reasons, Fennelly J. said at p. 320:

"The only significant relevant decision of this court is that in The State (Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51, which concerned a decision of the respondent tribunal to reject a claim for compensation under the former non-statutory scheme of compensation for personal injuries criminally inflicted. The applicant's husband had died while trying to prevent a van in which his infant son was a passenger from crossing a road where children were likely to be playing. Thus, the deceased had been trying to save a human life. Although no contrary evidence had been offered, the tribunal rejected the claim because it was "not satisfied that the death ... arose because of or in the course of ... attempting to save human life". The court held unanimously, applying The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642, that the decision of the tribunal was at variance with reason and common sense. Finlay C.J. also stated, at p. 55:-

"Once the Courts have a jurisdiction and if that jurisdiction is invoked, an obligation to inquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the Courts should be able to ascertain the reasons by which the tribunal came to its determination. Apart from that, I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi-judicial nature."

The Minister submits that the statement quoted above was an obiter dictum. That may, strictly speaking, be true. The court first reached its conclusion that the decision of the tribunal was invalid before making these observations. However, the views of Finlay C.J. on the absence of reasons was logically closely related to the earlier holding of irrationality, which was, in turn, closely connected with the refusal of the tribunal to elaborate the reason for its decision. That statement was made with the agreement of Walsh and McCarthy JJ. and is, in any event, clear, logical and worthy of considerable respect."

118. Having regard to the inherent flexibility of the rules of fair procedures, it is necessary to analyse the structure of the process established by the regulations.

119. The first issue is whether the respondent is correct in contending that this is a single process, in which the finding that an infringement has occurred is made by the SFPOs, while the determination panel decides on the allocation of points, with the process culminating in the appeal.

120. To begin with, that does not appear to be what occurred in this case. The inspection report listed six infringements. The document referred to in paragraph 20 above expands those six to eighteen (by making each species in the catch the subject of separate charges as to recording and weighing). The determination panel reduced the number to three. Two of these are, in effect, consolidated versions of the original list but the third (fishing in a closed area or during a closed season) is new. It is apparent, therefore, that the SFPOs did not regard themselves as having made formal "findings" of infringements, in the sense of a verdict, in the report; while the panel saw itself as having the role of determining what infringements had occurred, as well as the assignment of points. However, it continued, in part, to use terminology appropriate to mere accusations, referring as it did to "alleged" infringements and (using the language of the Regulations) the "proposed" assignment of points.

121. There is certainly, in my view, some difficulty with the interpretation of the Regulations. I think that it is clear enough from regulation 5(1) that the SFPOs' role under the Regulations is to "detect" infringements and to report them to the Authority. This seems to me to be analogous to the role of a police force in detecting crime – they find evidence of infringements. The respondent Authority, having been notified of the detection, must then determine whether there has been a serious infringement. The SFPOs are, presumably, entitled to express an opinion as to the correct classification of their findings but they are not given a determinative role.

122. The Regulations do not prescribe any process for the making of that decision, other than to impose an obligation on the Authority to have regard to the criteria set out in Article 3(2) of the IUU Regulation and to any of its own guidance notes. The method the respondent has chosen is to establish determination panels, and to permit such panels to act under the authority of its seal. The panels therefore exercise the power of the Authority in making determinations. That includes the obligation to assess the evidence in deciding whether or not infringements meriting the assignment of points have occurred. The panel is not engaged in a mere "box-ticking" exercise, based on findings set out in the inspection report, as is demonstrated by the fact that it can seek further evidence, whether written or oral.

123. That decision having been made, the Regulations provide for a right of appeal. I cannot see that it is useful to describe an "appeal" as part of a "single, unified process" if what is meant to be conveyed by that phrase is that the determination panel carries out only a preliminary part of the process. The word "appeal" would not be apt in such circumstances. In any event I cannot see that this is an accurate description of the process. The panel makes a determination which has a defined legal effect on the licence concerned. The fact that the consequences are automatically stayed, or suspended, pending either the expiry of the time-limit for, or the result of, an appeal does not alter that position.

124. The question then arises as to the rights of a licence holder in relation to the determination procedure.

125. I accept the submission that the principles outlined in *O'Ceallaigh* and *Dellway* represent the modern law on the subject of the right to participate in proceedings which may result in an adverse decision and that they are, in the circumstances of this case, more apposite than *Gammell* or *McNamee*. (I note here that in *Gammell*, the plaintiff had been notified that she did not have a sanitary licence and had decided, for whatever reason, not to apply for one. In *McNamee* the applicant had been invited to make submissions prior to the issue of the opinion in question.) In my view, having regard to the Supreme Court authorities and to the EU Regulations intended to be implemented by the Irish Regulations, the licence holder must be entitled to an opportunity to make its case at the first instance.

126. Although the case was not pleaded in terms of failure to comply with the EU legislation, I am, I consider, obliged to interpret the Regulations in the light of the obligations imposed by that legislation. It is clear that neither the Control Regulation nor the Commission Regulation envisage a process in which the licence holder has no right to natural justice. The competent authorities are obliged to impose effective sanctions, but they must assess the individual circumstances in each case and must have regard to the right to the legitimate right to exercise one's profession.

127. In the first instance, after the inspection and before the points determination procedure commences, the operator must be given an opportunity to comment on the findings of the inspection, and those comments must be reflected in the inspection report. In this context, by virtue of Article 115 of the Commission Regulation, the "operator" is the master of the vessel. However, I do not consider that the asking of questions after the administration of a caution (which is designed to convey to the individual questioned that he has a right to remain silent, in the context of potential criminal proceedings) should be seen as the only opportunity to comment by such other person or entity as may be the licence holder.

128. The definition of "operator" (set out in paragraph 37 above) is broad, and encompasses the possibility that, depending on context, different individuals or entities may be considered to be the operator. The assignment of points to the licence of the vessel is a matter that engages the interests of the licence holder, who must in that context, as the person "holding the undertaking", be seen as the operator. The EU Regulations require the Authority to send the inspection report, when complete, to the operator. In this instance it was sent to the applicant, who is the owner and licence holder, not to the master. That seems to me to be entirely appropriate.

129. The licence holder was thereby notified that the Authority was of the opinion that infringements had been committed, and was also aware of the basis upon which that opinion was based. It may be accepted, for the purposes of argument, that persons involved in a commercial fishing venture would probably have been aware that further consequences could follow, and may well have been aware of the new points system. However, there is nothing to indicate that the applicant would have been aware in December, 2014 of the standard operating procedure adopted by the Authority in September, 2014.

130. The applicant was not informed that a determination panel would be convened and was not invited to make any submissions to it. As it happens, there are two notable aspects of the decision of the panel that may reflect the absence of input from the applicant. One is that a new charge was added, that had not been included in the inspection report, without any notice to the applicant. The other is that an assignment of points was made without reference to any information about the applicant's economic circumstances. That appears to be a breach of the obligation to take those circumstances into account in assessing the gravity of the infringements.

131. In my view, it is necessary to inform a licence holder that a panel will be convened to assess the evidence of alleged infringements, to determine whether serious infringements have occurred and to assign points in respect of serious infringements. The licence holder should be given an opportunity to make representations in respect of these matters having regard to the statutory criteria. The licence holder should also be notified if, as happened here, the view of the determination panel as to the appropriate charges differs from the view set out in the inspection report. I do not consider that the process would, in normal circumstances, require an oral hearing.

132. Since part of the rationale for the imposition of an obligation on administrative bodies to give reasons is to enable the affected person to assess the prospects of an appeal, I consider that the determination panel must give reasons for its decision. This is also

required by the consideration that justice should be seen to be done, as outlined in *Creedon* and endorsed in *Mallak*, so that the licence holder is made aware in general terms of the grounds on which the decision was made. In line with established authority, these are not required to be lengthy or discursive.

133. In the circumstances I propose to grant a declaration that the manner in which the respondent has purported to assign points to the applicant's fishing licence was contrary to fair procedures.