THE HIGH COURT

[RECORD NO. 2017 884 JR]

BETWEEN

PAT FITZPATRICK

AND

MICHAEL FLANNERY

APPLICANTS

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

AND

THE SEA FISHERIES PROTECTION AUTHORITY

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 11th day of January 2018

Nature of the case

1. The question before the court at this time is whether the applicants should be granted interlocutory injunctions pending the resolution of a dispute between the applicant fishermen and the respondents. At the heart of the dispute is the question of the methodology by which figures are arrived at which represent fish catch in respect of the species Nephrops. Both applicants are engaged in the business of fishing and maintain that fishing for the species Nephrops, more commonly known as Dublin Bay Prawns, in a particular fishing area off the west coast of Ireland is an important part of their business. The particular sea area in question is known as Functional Area 16 (hereinafter "FU 16"). The respondent Minister closed this area in respect of fishing for Nephrops Norvegicus for September, October and November 2017. This was done on the basis of information furnished by the second respondent, which is the authority responsible for coordinating the collection of information on fishing activities and for reporting to and transmitting data to the European Commission and the Minister. The core of the applicants' complaint is that the Authority reached a conclusion, and transmitted information, both to the Minister and to the EU Commission, about the extent of the 2017 Nephrops quota which had been fished as of that time by a methodology which is not authorised by the fishing control regime established by EU law. They 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 fishing logs. The second respondent, for its part, says that there was a serious problem of fishermen underreporting in their fishing logs the amount of Nephrops actually caught in FU 16, and that this problem was of such a proportion that the Authority, in order to comply with its statutory and European law duty to transmit accurate information, had to employ other methodology in order to reach a more accurate estimate as to the actual amount of Nephrops being fished in the relevant area. The Authority says that, having done so, it became clear that the European quota for fishing Nephrops in 2017 had already been exceeded by July 2017. The figures disclosed by the fishing logbooks and the methodology employed by the respondent Authority are 773 tonnes and 1991 tonnes of Nephrops caught in FU16 respectively. The difference between the two figures is therefore substantial, and its implications for the national annual quota for Nephrops fishing in FU16 is far-reaching.

2. The precise terms of the mandatory injunctions sought are set out below, but in broad terms it can be said the purpose of the interlocutory relief sought is to enable the applicants to resume fishing for Nephrops in FU 16 as soon as possible, and core to this is the contention that the respondents are not entitled to calculate, or make decisions based on calculations, fish catch or outtake with reference to the methodology described by the Authority; they contend, indeed, that this is not a scientific methodology at all but rather a "guesstimate". They maintain that they will suffer irreparable damage to their livelihoods by reason of what they say is an unauthorised modification of the fishing control regime by the Irish authorities and which applies only, and unfairly, to Irish fishermen.

3. They also maintain that the case raises a question of interpretation of EU law which will require a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union, and that the interlocutory relief is necessary to prevent the irreparable damage that will be caused to them while time continues to elapse pending the outcome of that reference.

The reliefs sought

4. The applicants in the substantive judicial review proceedings seek the following reliefs against the respondent Minister: -

> (1) An order of *certiorari* quashing the decision of the Minister, made on or before 17th October, 2017 by which he refused to permit the fishing of Nephrops in FU 16 on the grounds that the decision was *ultra vires* his powers under domestic and European law and in breach of natural justice and fair procedures;
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> (2) An order of *certiorari* quashing the refusal of the Minister by which he refused to exercise his statutory competence and discretion in making a decision not to permit the fishing of Nephrops in the fishing ground known as FU 16 by unlawfully derogating his functions to the second respondent;
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> (3) An order of *certiorari* quashing all the fisheries management notices issued by the Minister prohibiting the fishing of Nephrops in the fishing grounds known as FU 16 made on foot of or in connection with his decision of 17th October, 2017, on the grounds that this was unlawful and *ultra vires* his powers under domestic and European law and in breach of natural justice and fair procedures;
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> (4) A declaration that the Minister acted *ultra vires* and otherwise unlawfully under the regime provided for by European law under the Common Fisheries Policy and the implementing Irish legislation by refusing to grant the relevant authorisation or allocation of a quota and by refusing to reopen FU 16 in October and November 2017 and months thereafter;
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> (5) A declaration that the applicants have been deprived of the right to be heard in advance of an adverse decision being made against them, of their right to a defence, of their right or good administration and/or in the absence of an appeal on

the merits, that they have been deprived of their right to an effective remedy, all in contravention of their rights under European Union law;

(6) An order of *mandamus* directing the Minister to perform his statutory functions under s. 12 and 13 of the Sea Fisheries and Maritime Jurisdiction Act, 2006, and Articles 34 and 35 of Council Regulation (EC) No 1224/2009 of the 20th November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (hereinafter "the Control Regulation") by analysing all relevant data, including the manner of the collection of the data, prior to exercising his competencies under the legislation, in particular the assignment of the monthly quota allocation for FU 16;

(7) Damages in respect of losses suffered by the applicants as a result of the Ministers action and inaction together with interest under the Courts Act.

5. For the purposes of the present judgment, it is necessary to examine the specific reliefs sought by way of interlocutory relief. As against the Minister, these are as follows:

(1) An interlocutory order by way of injunction/stay, suspending the decision of the Minister by which he has refused to permit the exploitation of FU 16 by the applicants;

(2) An interlocutory order by way of injunction requiring the Minister to reopen or make a quota allocation for FU 16 based on the data for fish outtake or catch as disclosed in the fishing logbooks prepared in accordance with Article 14 of the Control Regulations pending the determination of the proceedings;

(3) An interlocutory order by way of injunction/stay restraining the Minister from relying on the methodology employed by the SFPA and the advice provided by them by way of letter dated 5th October, 2017 or otherwise regarding the calculation of fish outtake or catch from FU 16 between July 2017 and the initiation of these proceedings;

6. As regards the reliefs sought in the substantive judicial review proceedings against the Sea Fisheries Protection Authority (hereinafter "the Authority"), the second respondent, they are as follows: -

(1) An order of *certiorari* quashing the decision of the Authority of the 5th October, 2017, by which it advised the Minister not to open the fishing grounds for Nephrops known as FU 16, using a methodology which was *ultra vires* its power, unlawful and in breach of principles of natural justice and fair procedures;

(2) An order of *certiorari* quashing the decision of the Authority to report to the European Commission figures for the exploitation of the fishing opportunities in FU 16 from 1st January, 2017 to September 2017 in circumstances where monthly figures had already been reported to the Commission in exercise of the Authorities' functions by reason of which the decision was unlawful;

(3) A declaration that the Authority acted *ultra vires* its powers and functions and otherwise unlawfully/in breach of natural justice and fair procedures under the legislative regime created by the Common Fisheries Policy in the manner in which it performed its functions as regards the methodology used in calculating fish outtake or catch from FU 16 between July 2017 and the initiation of the proceedings and in the advice given by way of letter dated 5th October, 2017 to the Minister;

(4) A declaration that the applicants had been deprived of the right to be heard in advance of an adverse decision being made against them, of their right to a defence, of their right to good administration and/or in the absence of an appeal on the merits, that they have been deprived of their right to an effective remedy, all in contravention of their rights under European Union law;

(5) An order of *mandamus* directing the Authority to perform its statutory functions under s. 43 of the Sea Fisheries and Maritime Jurisdiction Act, 2006, and Article 5 (5) of the Control Regulations in accordance with European and domestic law and not in an arbitrary or irrational fashion.

7. The precise interlocutory reliefs sought against the Authority are as follows: -

(1) An interlocutory order/injunction staying the Authority from publishing its conclusions to the European Commission in respect of the exploitation of the fishing opportunities in FU 16 during the currency of these proceedings;

(2) An interlocutory order/injunction requiring the second respondent to base its report to the European Commission on the exploitation of the fishing opportunities in FU 16 on the data contained in the fishing logbooks during the currency of these proceedings.

Dublin Bay Prawns/Nephrops and the fishing area known as FU16

8. The species Norway Lobster (Nephrops Norvegigcus) is known by the consumer as "prawns" or "Dublin Bay prawns", and in the fishing industry as Nephrops. They will be referred to as Nephrops in this judgment. There are certain commercially important stocks of Nephrops in particular areas off the Irish coast. The Nephrops fishery is apparently the second most valuable fisheries resource available to the State and is, according to the affidavit evidence on behalf of the Minister, worth an estimated €70 million landing value. An area known as the Porcupine Bank off the west coast of Ireland is an important component of the Nephrops fishery. The Nephrops from this area tend to be larger than from other areas and command a better price on the market. Around 2008 and 2009, the stock in the Porcupine area was severely depleted. In order to protect the Nephrops stock in that area, a management measure was put in place which involved seasonal closure for the month of May in order to protect the spawning stock. A second measure was the imposition of an outtake or catch limit referred to as an "of which no more than" provision, such that a quota of Nephrops was imposed of which no more than a particular tonnage was to come from this area. The area in question is known as Functional Unit 16, or FU 16. This area straddles a number of sub-sectors of a more general fishing area known as Area VII.

Relevant legal context

The EU Treaty

9. Article 3 (d) of the Treaty on the function of the European Union provides that the Union shall have exclusive competence in the conservation of marine biological resources under the Common Fisheries Policy. Article 4 (d) provides that the Union shall have shared competence with member states in the area of agriculture and fisheries, excluding the conservation of marine biological resources. Article 43 subparagraph (2) of the Treaty provides that the European Parliament and the Council shall establish the common organisation of agricultural markets provided for in Article 40 (1) and the other provisions necessary for the pursuit of the objectives of the Common Agricultural Policy and Common Fisheries Policy.

10. The Common Fisheries Policy is contained in Regulation (EU) 1380/2013 of the European Parliament and of the Council. The objective of the Common Fisheries Policy (hereinafter the CFP) is to manage a common resource and give European fishing fleets equal access to EU waters and fishing grounds. One of the mechanisms by which this is done is through the mechanism of Total Allowable Catches (hereinafter TACS), which are shared between EU countries in the form of national quotas. EU countries can also exchange or swap quotas with other EU countries.

11. The individual member states have the responsibility for managing the national quotas and ensuring that the quotas are not overfished. When all the available quota of a stock is fished, the member state must close the fishery. If national quotas are exceeded in a particular year, deductions are applied in the following year involving a multiplying factor where the overfishing exceeds 10%. Under the Sea Fisheries and Maritime Jurisdiction Act, 2006, the Minister may, under s. 12 of the Act, set down catch limits for the whitefish fisheries by means of Fisheries Management Notices. These notices are used to open and close fisheries as well as to set catch limits in certain fisheries for Irish vessels.

The Control Regulation and related Regulations

12. Council Regulation (EC) No 1224/2009 of 20th November 2009 (the "Control Regulation") sets out the control system for ensuring compliance with the rules of the Common Fisheries Policy. Counsel on behalf of the applicant drew my attention in the first instance to the detailed recitals set out at the beginning of the Regulation, in particular those which emphasised that one of the purposes of the Regulation was to provide for a comprehensive and standardised regime of control as across all member states. Counsel then engaged in a detailed examination of the provisions of the Regulation. I will mention only some, and hopefully the most important, of the articles referred to by him, but I should perhaps preface this by saying that this exploration was with a view to persuading the Court not only of the central importance of the electronic fishing logbook to the regime established by the Regulation but also of the level of the detail in the Regulation, underscoring the point that the regime is intended to be detailed and comprehensive.

13. I should note that it was made clear to the court that the electronic fishing logbook system is one which, despite its name, involves the information being manually inputted by human hand, the information being thereafter electronically stored and capable of electronic transmission.

14. Article 1 provides that the regulation establishes a Community system for control, inspection and enforcement to ensure compliance with the rules of the Common Fisheries Policy. The definition of "control" within Article 4 is 'monitoring and surveillance'. Article 5 contains the general principles relating to the role of member states in controlling the activities. Counsel for the applicant pointed in particular to Article 5.3 which requires member states to adopt appropriate measures, allocate adequate financial, human and technical resources and set up all administrative and technical structures necessary for ensuring control, inspection and enforcement of activities carried out within the scope of the Common Fisheries Policy and that they should make available to their competent authorities and officials all adequate means to enable them to carry out their tasks. He submits that the members states cannot therefore plead lack of resources as a justification for departing from a methodology prescribed by the Regulation. Article 5.5. provides that a single authority in each member state shall coordinate the control activities of all national control authorities and that it shall also be responsible for coordinating 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 and other agencies and countries. In Ireland, this authority is the second named respondent. Title III deals with general conditions for access to waters and resources and covers such matters as fishing licences, fishing authorisations, marking of fishing gear, the installation of vessel monitoring systems, automatic identification systems, vessel detection systems and new technologies.

15. Title IV covers the control of fisheries. A central part of this is Article 14 which deals with the completion and submission of the fishing logbook. It provides that masters of community fishing vessels of ten metres length overall or more shall keep a fishing logbook of their operations, indicating specifically all quantities of each species caught and kept on board above 50kg of live-weight equivalent. Further provisions of Article 14 deal with what should be in the logbook and how it should be maintained, and subparagraph 9 provides that the accuracy of the data recorded in the fishing logbook shall be the responsibility of the vessel master. Under Article 15, the information shall be sent by electronic means to the competent authority of the flag member state at least once a day.

16. Another important article is Article 33, which provides as follows:

> 1. Each flag member state shall record all relevant data, in particular data referred to in Articles 14, 21, 23, 28 and 62 on fishing opportunities as referred to in this Chapter expressed both in terms of landings and where appropriate fishing effort, and shall keep the originals of those data for a period of three years or longer in accordance with national rules.
>
> 2. Without prejudice to specific rules laid down in Community legislation before the 15th of each month, each flag member state shall notify the Commission or the body designated by it, by computer transmission of the aggregated data:
>
> > (a) for the quantities of each stock or group of stocks subject to TACs or quotas landed during the preceding month…."

17. Article 34, entitled "Data on the exhaustion of fishing opportunities" provides that "A Member State shall inform the Commission, without delay, when it establishes that:

> a. "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…"

18. Article 35 provides that:- "Each Member States shall establish the date from which: (a) the catches of a stock or group of stocks subject to a quota made by the fishing vessels flying its flag shall be deemed to have exhausted that quota…".

Subparagraph 2 provides that as from that date, the member state concerned hall prohibit fishing either for the stock or group of

stocks whose quota has been exhausted, the decision must be made public and immediately communicated to the Commission; must be published in the official journal of the European Union and on the public website of the Commission.

19. Title VI places an obligation on member states to carry out surveillance on fishing vessels by inspection vessels, surveillance aircraft, a vessel monitoring system or "any other detection and identification methods". Title VII deals with inspection of vessels.

20. Title VII deals with enforcement and *inter alia*, a penalty points system. My attention was drawn to the fact that article 89 (2) refers to the legitimate right to exercise the profession (of fishing) insofar as it provides that the overall level of sanctions shall be calculated in such a way as to deprive those responsible for infringements of the economic benefit thereby derived, "without prejudice to the legitimate right to exercise their profession".

21. Within Title XI, "Measures to ensure compliance by member states with common fisheries policy objectives", Article 105 provides that when the Commission has established that a member state has exceeded the quotas which have been allocated to it, the Commission shall operate deductions from future quotas of that member state. Article 105.2 provides a table indicating the relevant deductions and, as I understand it, the relevant multiplier in the present case, if the Authority's figures are to be relied upon, would be 1.8, in which case the relevant percentage to be deducted from the quota would be 40% to 50%. I also note generally the various measures within this Title, including suspension and cancellation of Community financial assistance, closure of fisheries, deductions of quotas and of fishing effort, all of which are designed to ensure that member states play their role in ensuring that the fisheries policy is observed.

22. The applicants draw attention to Title XII which deals with data and information. They point to Article 109 which refers to the setting up of a computerised database for the purpose of validating data recorded in accordance with the Regulation. Subparagraph 2 requires member states to ensure that all data recorded in accordance with the Regulation are accurate, complete and submitted within deadlines. It refers to member states cross-checking analysing and verifying the following data through automated computerised algorithms and mechanisms and goes on to refer to, *inter alia*, the fishing logbook. The applicants contend that the "guesstimates" of the second respondent do not fall within the cross-checking and analytic or verification methods envisaged by Article 109.

23. The Commission Implementing Regulation (EU) no. 404/2011 of 8th April, 2011 lays down detailed rules for the implementation of the Control Regulation. This contains, *inter alia*, detailed requirements with regard to the electronic fishing logbook.

24. The applicants also draw attention to Council Regulation (EC) 1005/2008 of 29th September 2008 (which concerns illegal, unreported and unregulated fishing and is sometimes described as the IUU Regulation) and, in particular, Article 41 thereof, entitled "Immediate Enforcement Measures" which provides that where a natural person is suspected of having committed or is caught in the act while committing a serious infringement or a legal person is suspected of being held liable for such an infringement, member states shall start a full investigation of the infringement and take immediate enforcement measures such as in particular the immediate cessation of fishing activities, the rerouting to port of the fishing vessel, the seizure of fishing gear, catches or fishery products, the suspension of the authorisation to fish. Subparagraph 2 provides that the enforcement measure shall be of such nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete its investigations.

The Sea Fisheries and Maritime Jurisdiction Act, 2006

25. The Sea Fisheries and Maritime Jurisdiction Act 2006, which obviously predates the two regulations referred to above, established the second named respondent, the Sea Fisheries Protection Authority. The functions of the Authority are described at s. 43 (1) as follows: -

> "(a) to secure efficient and effective enforcement of sea-fisheries law and food safety law,
>
> (b) to promote compliance with and deter contraventions of sea-fisheries law and food safety law,
>
> (c) to detect contraventions of sea-fisheries law and food safety law,
>
> (d) to provide information to the sea-fisheries and seafood sectors on sea-fisheries law and food safety law and relevant matters within the remit of the Authority, through the Consultative Committee established under section 48 or by any other means it considers appropriate,
>
> (e) to advise the Minister in relation to policy on effective implementation of sea-fisheries law and food safety law: the Minister shall consider any such advice for the purposes of Chapter 2,
>
> (f) to provide assistance and information to the Minister in relation to the remit of the Authority,
>
> (g) to collect and report data in relation to sea-fisheries and food safety as required by the Minister and under Community law,
>
> (h) to represent or assist in the representation of the State at national, Community and international fora as requested by the Minister, and
>
> (i) to engage in any other activities relating to the functions of the Authority as may be approved of by the Minister."

The 2011 Regulations (SI 490/2011)

26. S.I. no 490 of 2011 was designed to implement the EU regime. *Inter alia*, Section 5 (1) provides that a master of a community fishing vessel to which Article 14 (1) of the Council Regulation relates shall complete a fishing logbook and submit it to the Minister or the competent authority in the member state where the landing has taken place in accordance with specified articles of the Regulations. Subsection 2 provides that a master of a fishing vessel shall complete a fishing logbook in accordance with Article 14 (8) of the Council Regulation.

27. Section 20 provides that the Single Authority for the purposes of Article 5(5) shall be the Sea Fisheries Protection Authority.

The Spanish overfishing example

28. The applicants also draw attention to Commission Implementing Regulation (EU) 185/2013 of 5th March 2013 which provided for deductions from certain fishing quotas allocated to Spain in 2013 and subsequent years on account of the overfishing of the 2009 mackerel quota. The applicants point out that one of the recitals refers to inconsistencies in the data having been corroborated through the conduct of several audits, verification missions and inspections in Spain in accordance with Regulation 1224/2009. They say that this demonstrates the correct way of going about problems such as those which the authorities perceive to have arisen in the present case but that it is neither appropriate nor legally permissible to adopt the approach which was fact adopted in the present case.

Chronology relevant to these proceedings

29. The background to these proceedings is that Nephrops fishing in FU 16 became closed to all Irish fishing vessels from 1st August, 2017 in the circumstances described below. A letter from the second respondent to the first respondent of 14th July, 2017 provides a useful starting point.

The letter of the 14th July 2017

30. By letter dated the 14th July 2017, Mr. Micheál O'Mahony, Authority member, wrote to Minister Michael Creed. The subject of the letter was described as: "*Significant widespread catch area misdeclaration, Porcupine prawns*". Mr. O'Mahony in the letter said that he was writing in order to provide advice in relation to policy on the effective implementation of sea fisheries law. It is a strongly worded, lengthy letter, and I will set out some of the letter *verbatim* and paraphrase other parts.

31. The opening statement gives a clear picture of the problem under discussion:-

> "The informed expert opinion of SFPA is that national policy around prawn fishing from waters west of Ireland is currently being systematically and repeatedly circumvented by the Irish fishing industry.
>
> It is our view that there is a widespread practice of prawn fishing in FU 16 (Porcupine area) with these catches mis-declared as caught elsewhere in Area VII. The immediate issue is that the prawn stock on the Porcupine Bank is being fished far in excess of the monthly limits set down in policy, bringing Ireland rapidly closer to national quota exhaustion for FU 16. The fishery outtake data derived from fisherman declarations which are supplied by SFPA to DAFN therefore become incorrect and wholly unreliable, with outtake data for FU 16 (Porcupine area) dramatically underestimated, and outtake for the remainder of Area VII dramatically overestimated. Irish food is sold with fraudulent provenance contrary to the Foodwise 2025 Vision for trusted Irish food chains.
>
> SFPA is striving to enforce government policy but the scale of the issue brings substantial contingent repercussions. We therefore urge an active review of the manner in which the quotas are allocated, with a view to safeguarding the policy objective. In the following pages we describe how we have arrived at this conclusion and we suggest some options that might ameliorate this issue. We are happy to meet with you or your officials in relation to this issue."

32. The letter then continues by setting out various matters. It explains that the quota allocation model gives "dramatically different" quotas to fishers within the FU 16 part of Area VII (three tonnes per month) compared to other parts of area VII (twenty tonnes per month). It points out that the Authority has access to various data streams, including vessel quota, VMS feed (vessel position speed and heading at two-hourly intervals), and ERS feed, (retrospective daily catches of vessels logged every midnight). It says that in situations where fishing vessels have different entitlements on different sides of a notional line in the sea, this creates an inevitable compliance risk, as there is a potential for catches taken from the lower-quota area to be logged as taken from the higher-quota area in order to legitimise illegal catches from the low-quota area. The Authority said that it is their experience that such risk increases with increasing magnitude of the entitlement differential between sea areas. What they have observed in the data streams are disproportionately long periods spend at fishing speed on the low-quota side of the notional line, with remarkably low catches logged, and disproportionately short periods of time spend on the high-quota side of the line, with remarkably large catches logged. The document continues by saying that based on the data available to the Authority, it was their view that the compliance risk was currently happening on a widespread and repeated scale by "most Irish fishers of these stocks", Fishing vessels were spending most of their time in FU 16 but logging most of their catches in other parts of Area VII. It was their view that the vessel movement patterns were much more likely to be consistent with the bulk of the catches being caught in the low-quota area FU 16 and then mis-declared as caught in the high-quota area elsewhere in Area VII. It says, *inter alia*, that one index worth considering is the notional individual boat catch rates. Nominal expected catch rate for these vessels is around 50kgs per hour of fishing activity when prawns are on the ground. Many trips have supposed catch rates in the order of 400kgs per hour in Area VII outside of FU 16, with some outliers logging over 2000kgs per hour. It says: -

"In addition to apparently extraordinary productive hours spend in these Area VII grounds close to shore with these massive catch rates, the vessels see fit to spend several days of their trip in the more distant FU 16 grounds where they log catches at a rate of less than 10kgs per hour. It makes no business sense that a vessel would expend fuel to leave supposedly lucrative grounds close to shore in order to exploit supposedly low-yielding grounds far from shore".

33. The document goes on to say that they note that UK vessels were typically logging catches in the order of 50kgs per hour spent in FU 16, which is relatively normal commercial catch rate. They say that there are various other analyses of the activity in both areas that are consistent with their conclusions. These include; analysis of the prevalence of fishing speed periods in both areas; the absence of historical prawn catches in the areas of large catch logging; the warp-length on-board being shorter than sea depth where the large catches are logged; and they physical constraints of nets, gear, crew and freezing capacity which simply would not support such exceptionally high catch rates. All of these considerations in their view supported the exceedingly low likelihood of logged events having occurred and much higher likelihood of catches occurring in FU 16.

34. The document then refers to the role of the Authority in securing compliance with all sea fisheries legislation and says that "we remain hamstrung by an extremely narrow regulatory toolkit with effectively only one sanctioning option for such matters of criminal prosecution." It refers the inherent limitations of criminal sanction and investigation. It refers to case files having been sent to the DPP. It also mention Navy resources, referring to a vessel detention earlier that week, where the vessel was found to have logged catches before entering FU 16 although there were no such fish on board. The document says that notwithstanding this resource deployment and individual-vessel enforcement activity, "the trend of flagrant flouting of the legal requirements continues at an alarming rate". It says that extrapolation of the scale of apparent noncompliance "recurrently by over 40 vessels" points to potential catches rapidly approaching the trigger levels for closure envisaged in Article 53 of the Control Regulation. In order to protect the integrity of government policy, the Authority would therefore be notifying the individual vessel owners of their intent to invoke the provisions of Article 43 of the EU Regulation 1005/2008 to direct apparently non-compliant vessels to cease fishing and return to port for investigation.

35. The document concludes with a paragraph entitled "*Potential policy alternatives*". Two options are set out as follows: (1) One function area per trip. With this option fishers would continue to get separate monthly quotas for FU 16 and the remainder of Area VII but could only exploit these on separate trips and not both on the same trip. (2) Effort-based disaggregation of catches. With this option fishers would get a combined prawn quota for all of Area VII, and their total catches could be disaggregated retrospectively according to effort in each area. Thus, a five-day trip with four days spent in FU 16 would result in 80% of the catch being attributed to FU 16. It may be noted that the document does not recommend the closure of FU 16 in respect of Nephrops fishing.

Events following the letter of 14th July, 2017

36. Several meetings then took place between representatives of the fishing industry, the respondent Minister, and the respondent Authority. Meetings of the Quota Management Advisory Committee, a body which advises the Minister on fishing quotas and which relies on data from the respondent Authority, took place on the 20th of July, the 23rd of August, and the 21st of September 2017. At the first of these meetings, the industry representatives were informed of the potential for quota exhaustion of FU16 and they agreed to close the area. The first applicant, Mr. Fitzpatrick, averred that this agreement was forthcoming for pricing reasons rather than any agreement from industry representatives as to the Authority's assessment of quota exhaustion, on the basis that it is more lucrative to fish Nephrops later in the year. At the second meeting, it was again agreed that the area would remain closed for September. At the third meeting, it appears that the second named respondent's consultative committee declared that the annual quota had been overshot. This meeting was adjourned so that representatives of the fishing industry could meet with the SFPA separately on the 22nd September to discuss this, and it was at this time that industry representatives advocated re-opening FU16 for November and December 2017. They also indicated their position that they would not make recommendations to the Minister until it was indicated that the logbook data from vessels would be relied upon rather than the information provided by the Authority.

The letter of 5th October, 2017

37. By letter dated 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 2006 Act 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". (emphasis added)

Communication to the European Commission

38. Mr. O'Mahony in an affidavit on behalf of the Authority averred that the figure of 1991 tonnes was communicated to the European Commission on the 17th October 2017. Certain screenshots were exhibited to the court appearing to confirm that this was the case, although some questions were raised by the applicants as to the dates thereon.

The fishery management notices July to November 2017

39. The Fisheries' Management Notice No. 39 of 2017 from the Department of Food, Agriculture and the Marine, which concerned the period 1st July to 1st August 2017, provided that the quota for Nephrops within FU16 was 3 tonnes. The Fisheries Management Notice No. 45 of 2017 provided that the quota for Nephrops within FU16 was 0 tonnes. The Fisheries' Management Notice No. 51 of 2017 for September provided that the quota for Nephrops within FU16 was O tonnes. The Fisheries' Management Notice No. 57 of 2017 for October provided that the quota for Nephrops in FU16 was 0 tonnes. The Fisheries' Management Notice No 64 of 2017 for November provided that the quota for Nephrops in FU16 was 0 tonnes.

40. Following some correspondence between solicitors, leave to bring the judicial review proceedings was granted to the first applicant on the 17th November 2017. This leave included liberty to issue and serve a notice of join a co-applicant to the proceedings. The court granted leave to join to the second applicant on the 12th December, 2017, the first day of the hearing of the interlocutory application.

Averments of the applicants regarding the impact of situation on their businesses

41. Mr. Fitzpatrick averred that he was a fisherman involved in the business of fishing out of Ros a Mhil, County Galway, for 30 years. He said that he was the beneficial owner of a fishing vessel, the Shauna Ann, and that there was a mortgage secured on the vessel, used to finance the vessel, its gear, and its operation. He said that six of the men who work with him on the vessel and fifteen to twenty persons on shore are reliant on the vessel for employment. He averred that the Nephrops fishery in FU16, "formed a very important part" of his fishing activity. He said that without the capacity to fish FU16 for Nephrops, the economic activity of his vessel would be under severe pressure and that he could be forced to cease fishing or to dedicate his vessel to other TAC species. If he were to start doing the latter, there was a danger that he might put another fisherman out of business, due to the additional competition for the same species. He said that his livelihood and his profession and that of many of his colleague fishing FU16 had been put in danger by the decision of the Minister.

42. In a second affidavit Mr. Fitzpatrick averred that he should qualify his earlier averment that he regularly fished Nephrops in FU16 by saying that while it was regular fishing ground of his and he had fished it for the last number of years, he had not fished it as of yet this year (2017). He went on to say that it was at all time his intention to fish it in the latter half of the year, given the seasonal rise in prices, the income derived from fishing this ground was an important element of the economic viability of his business. He averred that if the interlocutory relief were not granted, the likely effect would be that huge damage would be caused to his business and livelihood and "will quite possibility cause my business to fail" giving rise to great hardship for him and his family and those who work for him, in circumstances where undoing that harm would be very difficult. He was prepared to give an undertaking as to damages insofar as it might be deemed necessary.

43. In a third affidavit, Mr. Fitzpatrick averred that he was the beneficial owner of a vessel in the sense that he owns and runs the company and that if the company failed, he would lose his boat and the only means by which he earns his livelihood as would those who worked with him on the boat and on shore. He said that he was the owner of 50% of the shares in the company and his wife was the owner of the other 50%. He was director and company secretary of the company. It sole asset was the Shauna Ann and it sole activity was fishing. He also averred that he had been fishing Nephrops for over 20 years and had regularly fished FU16. The earning

he derived from fishing this segment were extremely important because the Nephrops FU16 fetch a much better price then Nephrops from other areas and that "the viability of my business will be severely effected".

44. He then exhibited certain accounts and financial records for the last three years. He also exhibited a letter from Sean O'Donoghue, CEO of Killybegs Fishermen's Organisation, in which Mr. O'Donoghue stated his opinion that "the closure of FU 16 will have an appalling effect on the business of Mr. Fitzpatrick who is one of the original fishermen who commenced fishing this ground before it became such a vital fishery to over 40 owners and vessels" and that it represented some 38% of his turnover and that FU 16 was "the cornerstone of his business". He disputed the suggestion that damages would be an adequate remedy in circumstances where, if the interlocutory were not granted, he would "most likely lose my vessel and my livelihood, and suffer considerable hardship". He said that his vessel and his fishing capacity were used as security for finance and if he were no longer able to fish FU16, it was likely that his fishing operation would no longer be sustainable, resulting in the loss of his vessel, the sale of this capacity, the loss of his licence and leaving him without his livelihood. Re-acquiring a vessel in the future might be possible, but the reacquisition of fishing capacity would be much more difficult and damages would not be an adequate compensation to the disruption to his business and his life.

45. The second applicant, Mr. Flannery, averred that he was a fisherman operating out of Dingle, Co. Kerry. He averred that he was the beneficial owner of a vessel called Cú na Mara and that there was a mortgage secured used to finance the vessel, its gear and its operation with AIB. He averred that between six to eight people worked with him on the vessel and that 20 to 25 people on shore were also reliant on the vessel for employment. He said that Nephrops in FU16 formed a very important part of his fishing activity and that without the capacity to fish FU16 for Nephrops the economic activity of his vessel would be under severe pressure and "I could be forced to cease fishing, or to dedicate my vessel for other TAC species". If he were to start fishing other TAC species then he might end up putting another fisherman out of business due to the additional competition. He averred that the drop in revenue as a result of the closure of the grounds not only this year but also for a considerable part of next year would very possibly cause his business to fail giving rise to great hardship for him and his family and those who worked with him in circumstances where undoing the harm would be very difficult. He had just completed a major investment project in the sum of €250,000 to enhance the vessel's ability operate in this very particular fishery. He was also prepared to provide any undertaking to damages as necessary.

46. In a further affidavit, Mr. Flannery put material before the court to support the financial damage he would suffer as a result of the closure of the fishery. He referred to a copy of the landing of the Nephrops from his vessel over the years 2016 and 2017 and a letter from his producers' organisation explaining this. He said that the figures were prepared by Francis O'Donnell of the Irish Fish Producers Organisation. He said that the figures amounted to 70,996kg of Nephrops caught in 2016, and 50,745 tonnes in 2016 which carried potential values of €976,195 and €697.743.75 respectively and that these earnings showed how vital his earnings from FU16 are, given the higher price Nephrops from this area command in the market. He went on to say that as a result of the closure of the fishery, he found himself having to fish off the south west coast of the United Kingdom and that he was at a substantial disadvantage in this new fishery as a new entrant. He said "the consequences for my business have been nothing short of catastrophic as a result of the numbers being proposed" by the authority and the decision of the Minister. He said that without the earning from the sales of Nephrops from FU16, his business "will cease to be profitable and will fail" and not only will I lose my vessel, fish capacity and livelihood, I will possibly be left with significant personal debt.

47. In the second affidavit of Mr. O'Mahony, a member of the SFPA, issue was taken with the figures provided on behalf of Mr. Flannery, which were described as inconsistent with his own fishing logbook information. In response, an affidavit was sworn by Francis O'Donnell, CEO of the Irish Fish Producers Organisation, in order to clarify that he had supplied the figures on behalf of Mr. Flannery. The alleged discrepancies arose because of the manner in which the data was furnished/ collected and the figures that he supplied related to a much larger area than functional unit FU16 as he had no access to those particular statistical rectangles, which would have allowed him to separate out FU16 catches from the bigger area as FU16 straddles part of four sub areas of area VII. He therefore disputed Mr. O'Mahony's position in relation to the figures furnished on behalf of the applicant Mr. Flannery.

Averments relating to the Authority's methodology

48. In a second affidavit sworn by Mr. O'Mahony, a member of the Authority, he furnished details of the data sources employed in arriving at their conclusions with regard to Nephrops fishing in 2017. He said that while logbook data was an important resource, there were many other data streams which contribute on a cumulative basis to assisting National Authorities in their task, including, fishing licences, fishing authorisations, vessel monitoring systems data (VMS data), landing declarations, sale notes and transport documents. He refered to the "obvious risk" that Nephrops caught in FU16, will be imputted as having been caught elsewhere and this is why it is vital to check logbook data against other data streams, including VMS data, so as to ascertain its reliability. In this case, the logbook data for Nephrops catch in FU16 was undermined by the very long periods over which very small catches were logged in that area of sea, while "incredible large" catches were logged by the same vessel during short periods when they were fishing outside of FU16.

49. As regards the letters from Fishermen's Organisations in other Member States, exhibited on behalf of the applicants, he says that they are silent on how the National Authorities calculate fish outtake and merely recite how fishermen record their catch by logbook declarations and are monitored by National Authorities using VMS. He said that there may be much more involved in calculating fish outtake than a blind reliance on logbook data only. He suggests that the Authority would be failing in this role under Article 5.5 of the Control Regulation if it limited itself to reporting of information solely based on those data streams. He gives certain examples of situations where there were examinations were carried out, going behind the logbook figures. One of these was a Scottish investigation in or about 2005 to 2007; another Frech investigation in 2007 to 2008; an investigation by the Authority itself in 2013/2014; and Regulation EU 185/2013 involved the EU Commission making deductions from Mackerel fishing quota allocated to Spain on the basis of inconsistencies in the Spanish landing data. He also says that the data available to the Authority showed the "striking fact" that in June and July 2017, the United Kingdom Vessels in FU16 had Nephrops catch rates which were in the order of 10 times more per hour than Irish vessels; from this one is driven to conclude that either the Irish vessels were under logging their FU16 catch or else they were much more competent than their UK colleagues. He said that the Authority's opinion did not simply stem from vessels spending long periods in FY16 and achieving low yield, but also arose from a number of matters, which included:

- The prohibitively low FU16 quota in the context of the relatively permissive wider Area VII quota;
- The general financial motive of the better market ability of the FU16 prawns;
- The implausibly high catch rate outside of FU16 and in areas where prawn fishing had not previously occurred to such an extent and which notably ceased occurring following the closure of FU16;
- The implausibly low catch rate within FU16 with continued and repeated return to the area despite such a low catch rate;

- The late log sheet data entry of catches, frequently modified retrospectively and;

- The commercial implausibility of vessels leaving supposedly remarkably high yielding fishery close to port in order to incur the expense and volatility of fishing on a low yielding ground distant from port.

50. He also averred that the Irish Authorities have put substantial measures in place to ensure compliance with the FU16 quota by inspections at sea and at landing and data cross-checks while at sea or after landing. However, he says that FU16 is a 68,000-square kilometre area of sea in the North Atlantic and that it would be necessary to have a fleet of sea going control vessels to effectively patrol the entire perimeter of FU16 at all times. He goes on to describe a number of sea inspections from the Naval Service and three detentions which resulted from this in May, June and July of 2017. All three cases were the subject of case files to the DPP and have been directed for prosecution on indictment. He said that 40 other investigations have also been initiated by the Authority.

51. He averred that VMS does not provide constant information on a vessel's position and that the information is generally provided every two hours; and furthermore, that VMS does not provided information on when a vessel is fishing or when it intends to depart of enter FU16.

Summary of the case for the Applicants
52. In essence, the case for the applicants is that the Minister should not have relied upon the information furnished by the Authority in deciding to close the fishing for Nephrops in FU 16 in the latter months of 2017; and that the Authority should not have employed the methodology that it did employ in arriving at its estimate of the quantity of Nephrops caught which informed the Minister's decision to do so. These claims are expressed as various legal claims that the respondents having breached aspects of both Irish law and European law, including claims that the Minister acted irrationally, unreasonable and arbitrarily, *ultra vires*, and in breach of natural justice under the Irish Constitution and/or the applicants' procedural rights under the EU Charter. I think it is fair to say that the applicants' case is not a one-dimensional case but rather one containing a number of different strands, with aspects of both domestic and European Union law featuring within it. Nonetheless, the applicants' case might perhaps be broadly sub-divided into two separate parts or groups of argument. The first group centres around the contention that the regime for the control of fishing (which is established by European law, in particular the Control Regulation, and implemented by Irish law) sets out the methods by which fish catch may be recorded and calculated and does not permit of the use of the methodology for calculating fish catch which was in fact employed by the Authority in arriving at its estimate of 1991 tonnes. I might describe this as the 'lawfulness of the methodology' or 'vires' argument, on the basis that it is essentially an argument as to whether the methodology for calculating the Nephrops outtake for FU16 in fact used by the Authority from July 2017 onwards is unlawful or *ultra vires* the scheme. The second group of arguments centres around "fair procedures", and central to this is that the decisions were taken in breach of the applicants' fair procedures both under the Constitution and under the EU Charter. While the applicants may describe the precise contours of these 'fair procedure' arguments in different terms as between Irish and European law, I characterise them both sets in broad terms as 'fair procedures' arguments; they involve matters such as a claimed right to notice of intended changes to methodology, and a right to make representations in relation to them.

53. The applicants submit that they have a strong case in relation to these matters, and rely upon the evidence set out above to argue that there would a great risk of hardship, insolvency, and irreparable damage to them if the interlocutory injunctions sought are not granted.

Summary of the position of the Minister
54. On behalf of the Minister, a number of arguments, including mootness and delay on the part of the applicants, are raised. It is also argued that the applicants must establish that they have a 'strong case' on the merits because what is sought is mandatory relief and that they have failed to establish a strong case. Further, considerable emphasis is placed upon the argument that the applicants are in effect seeking to force the Minister to authorise illegal fishing, which would leave the State open to various adverse measures by the EU for breach of the Common Fisheries Policy. As regards the issue of the adequacy of damages, it is argued, *inter alia*, that the applicants would not in any event be entitled to damages because a fishing quota is not "property".

Summary of the position of the Authority
55. The primary position of the Authority was that the application for interlocutory relief was moot because the information in question had already been published to the EU Commission and the Minister i.e. its conclusion that the Nephrops outtake for FU16 was 1991 tonnes. The Authority's position also included the view that it was entitled and obliged to advise the Minister and the EU Commission of its expert opinion which it had formed *bona fide*, but that it was not responsible for decisions of action of the Minister or the Commission following from those advices. It points out that the Authority did not advise the Minister to close FU16 and that in the letter of the 14th July, 2017 it suggested two different options to be adopted, neither of which involved advice to close FU16. The Authority pointed to Article 34 of the Control Regulation which imposes an obligation on the Authority to inform the Commission without delay where it establishes that the catches of a stock subject to a quota made by fishing vessels flying the Irish flag are deemed to have exhausted 80% of that quota. It is argued that as the single Authority in Ireland responsible for the certification of fishing activities, it had an obligation to ensure that it transmits accurate and reliable information to the EU Commission and that the log sheet declaration figures for FU16, which would suggest that the figure was 773 tonnes, are not reliable.

56. The Authority also takes issue with that suggestion that any loss suffered by the applicants would not be capable of being compensated by an award of damages in due course. The Authority in fact questions whether the applicant would sustain any losses, pointing out that the applicants had averred that he had the option of fishing for other species and that this cast doubt on whether they would suffer any personal financial loss at all, let alone loss which was not compensable by damages. It was submitted that the Authority would in any event would be able to meet any award of damages made against it. The Authority says that the applicants' failure to aver to the details of the availability of alternative fishing opportunities undermines the credibility of averments as to the consequences of not granting interlocutory relief.

My decision on Mootness
57. Insofar as the reliefs are directed towards decisions already made, information already provided and notices already issued, such as the notices for August, September and November 2017, it seems to me that the reliefs sought would serve no useful purpose and would be moot. However, it seems to me that there remains a portion of the interlocutory reliefs sought which would not be moot, namely such part as seeks to compel the respondents between now until the termination of the proceedings to behave in particular ways. For example, reliefs 3 and 4 in respect of the Minister seek to prevent him, for the duration of these proceedings, from relying on methodology/data other than the fishing logbooks in deciding the quota allocations on a monthly basis. Accordingly, insofar as decisions will have to be made by the Minister on a monthly basis while these proceedings are still undetermined, there is a live issue as to what methodology/data regarding fish catch figures may be used. Similarly, relief 6 sought in the Notice of Motion is that the applicants are seeking to compel the Authority to rely on the fishing logbook data when making any future reports to the European Commission during the currency of these proceedings, and that particular relief would therefore not be moot.

The test to be applied in respect of an interlocutory injunction in judicial review proceedings
58. The manner in which the question of interlocutory injunctive relief should be approached in judicial review proceedings was addressed by the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 IR 152. At para. 68 onwards of the judgment delivered by Clarke J., a detailed analysis was conducted as to whether the principles regarding injunctions as set out in *Campus Oil v. Minister for Industry (No. 2)* [1983] IR 88 and subsequent cases such as *B&S Ltd v. Irish Auto Trader Ltd* [1995] 2 IR 142 should be applied in the same way when the court was being asked to put in place a temporary regime pending the resolution of judicial review proceedings. Clarke J. concluded that the same underlying principle applies in any application taken in context of a judicial review designed to determine what position is to pertain until the substantive judicial review proceedings have determined, namely that the court must make an order which minimises the risk of injustice, and that the *Campus Oil* test provides a useful starting point. However, he said, the detailed rules for the implementation of that general principle did not necessarily work out in exactly the same way in the context of the sorts of issues with which a court was likely to be concerned in judicial review proceedings. Clarke J. proceeded to engage in a detailed discussion of the principles, at the conclusion of which he summarised the relevant principles to be applied in judicial review proceedings as follows, at paragraph 104: -

> "(a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
>
> (b) the court should consider where the greatest risk of injustice would lie. In doing so the court should: -
>
> (i) give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;
>
> (ii) give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,
>
> (iii) give appropriate weight (if any) to any additional factors which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,
>
> (iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;
>
> (c) in addition, the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,
>
> (d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case."

59. It may be noted that in the course of his judgment, Clarke J. also referred with approval to the 'strong case' requirement in respect of situations where a mandatory, as distinct from a prohibitory, injunction was sought, citing cases such as *Bergin v. Galway Clinic Doughiska Ltd* [2007] IEHC 386, *Giblin v. Irish Life and Permanent plc* [2010] IEHC 36, and *Maha Lingam v. Health Service Executive* [2005] IESC 89, (2006) 17 ELR 137. (See paragraphs 76 and 80 of his judgment in particular). I will return to this issue later.

60. In *Dowling v. Minister for Finance* [2013] 4 IR 576, the applicants were unsuccessful in their argument that the test for an interlocutory injunction involving a case which raised a point of EU law should be more stringent than the Okunade test. The Supreme Court considered leading European authorities such as *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollampt Paderborn* (Joined Cases C-143/88 & C-92/89) [1991] E.C.R. I-415 and *Unibet v Justitiekanslern* (Case C-432/05) [2007] E.C.R. I-2271. The court accepted that the rules must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by community law (principle of effectiveness), but was not persuaded by the argument that the *Okunade* test was not sufficient to meet these requirements when considering interlocutory proceedings involving questions of European Law. Clarke J. at para. 90 of the judgment of the Supreme Court pointed out that, if anything, the Irish national rules may afford greater protection than the European jurisprudence insofar as they require a person to establish a breach of their European Union rights to a lower standard for the purposes of obtaining an interim or interlocutory order. I will return later in this judgment of how the court in Dowling addressed the issue of the adequacy of damages and the question of irreparable harm.

61. For the present, it may be noted that the Court is therefore required, according to the principles set out by the Supreme Court in *Okunade*, to consider the strength of the applicants' case in the first instance; and only if that threshold has been met, to proceed to consider the remaining matters set out.

The strength of the applicants' case: is the appropriate test one of an arguable case or a strong case?
62. It was submitted on behalf of the respondents, particularly the Minister, that the applicants are in effect seeking 'mandatory' injunctions and therefore the higher test of establishing a 'strong case' applies, rather than the lower threshold of establishing an 'arguable case'. This submission was not strongly resisted on behalf of the applicants, at least in respect of some of the reliefs sought.

63. It seems to me that the dividing line between a mandatory and prohibitory injunction is not necessarily as obvious as might first appear, at least in some cases. Are the applicants seeking to restrain the State authorities from employing one particular methodology of calculating fish catches, or seeking to compel them to positively employ another? Are they simply seeking to 'restore' the status quo ante by re-instating the 'old' methodology or are they trying to force the State authorities to carry out their functions in a particular way? And, most importantly of all, what are the consequences of the classifying the relief sought as mandatory or not?

64. Of course, it is the substance of the relief sought, rather than its form or how it has been phrased in the pleadings, that is of importance, but even having regard to the substance of the matter, there nonetheless there seems to me to be some difficulty in pinning down the precise quality of what makes an injunction mandatory rather than prohibitive, particularly in cases which do not involve simple matters such as erecting or taking down physical structures such as buildings or fences. I have examined, in addition to the cases referenced by Clarke J in *Okunade*, which involved mandatory injunctions in the field of employment law, a number of cases referenced at page 231 of Injunctions, Law and Practice, Brendan Kirwan, 2nd edition, as well as the discussion of the issue in Equity

in the Law of Trusts in Ireland, Hilary Biehler, 6th edition, 2016, pages 635-646. The latter traces in some detail how the distinction between mandatory and prohibitory injunctions has been dealt with in the authorities. From this discussion, it seems to me that there is not only some difference as between English and Irish law on the matter, but that there are some differences of opinion within the Irish authorities also. One of the differences appears to be whether the characterisation of relief as mandatory or non-mandatory is relevant to the balance of convenience/irremediable damage stage of the analysis, or to the analysis of the strength of the applicant's case, or both. I accept that in *Okunade*, Clarke J. referred to the requirement of a strong case in mandatory injunction cases, but this does not appear to me to be part of the *ratio* of the case nor this part of the discussion a detailed discussion of the precise role of the 'strong case' requirement in the overall assessment of the injunction application in cases where it does arise.

65. My examination leads me to two conclusions. First, on balance, seems to me that the reliefs sought in the present case are probably best characterised as falling within the concept of mandatory relief because it is sought to compel the State authorities to carry out their legal obligations (into the future and pending the determination of these proceedings) in a very particular and precise way, namely to gather and transmit and based decisions upon a particular method, or group of methods, of collecting information in relation to, and calculating, prawn catch figures. Secondly, it seems to me that the Court should examine whether or not the applicant has reached the threshold of a "strong case" that is likely to succeed at trial, subject to the caveat (expressed, for example, by Kelly J. in *Shelbourne Hotel Holdings Ltd v. Torriam Hotel Operating Co Ltd* [2010] 2 IR 52) that this onus of proof would not be fatal if the withholding of the interlocutory injunction would carry with it a greater risk of injustice than granting it. I will therefore approach matters on this basis.

The first issue: have the applicants made out a strong case?
66. , I can readily appreciate what Clarke J. described (at para 80 of *Okunade*) as there being "*something of a tension between the practical requirements which suggest that the court should not engage in a detailed analysis of the facts (or indeed of complex legal questions) at an interlocutory stage, on the one hand, and the requirement, in categories of cases such as those referred to in Maha Lingham v. Health Service Executive [2005] IESC 89, or Allied Irish Banks v. Diamond [2011] IEHC 505, that a higher standard than 'fair issue to be tried' be established*." I take as my guidance what Clarke J. went on to say, at para 80 of the *Okunade* judgment, namely: "*However, even in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather, it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold".*

67. A central plank of the applicants' case, particularly as regards what I have characterised the 'lawfulness of the methodology' or 'vires' argument involves an examination of the precise terms of the Control Regulation itself and other Regulations such as the Implementing Regulation 404/2011. The applicants contend that the prescribed manner the regime established by the Regulation is one designed to ensure harmonious and consistent methodology throughout to the EU, and that it is a system to which the electronic logbook is central. It is contended that the legal regime also provides for other methods of checking illegal and unauthorised fishing, such as by deployment of naval patrols and detention of suspect vessels. The argument is made that this regime exhaustively sets out the methods which may be employed by State authorities in the control of fishing, and the regime does not permit of an individual authority such as the SFPA departing from it and engaging in what the applicants call "guesstimates" in relation to the figures for fish catch, based on other methodologies. It is further argued that Ireland has now become an outlier and that the other countries in the Common Fisheries Policy regime are not relying on such methods but are confining themselves to data from the electronic logbooks. In this regard the applicants rely on letters exhibited by the applicant Mr. Fitzpatrick, from fishermen/producers' bodies which suggest that the only way catches are recorded in the United Kingdom, Netherlands, France, Germany and Lithuania is by means of the electronic logbook system.

68. With regard to the second part of their case, the group of submission based on "fair procedures" arguments, the applicants point to their Charter rights and also rely on a number of domestic authorities. The Charter rights upon which they rely are article 15, freedom to choose an occupation and the right to engage in work; article 16, the freedom to conduct business; article 17, the right to property; and article 41, the right to good administration, in conjunction with article 51; and article 47, the right to an effective remedy and a fair trial. I note that the wording of article 41 includes the right of a person to be heard "before any individual measure which would affect him or her adversely is taken" and that the decisions in *M.M. v. Minister for Justice*, Case C-277/11, CJEU 22 November 2012, and *M v. Minister for Justice*, Case C-560/14, CJEU 9 Feb 2017, concerned applications by an individual in the context of asylum law. No doubt an important issue will be whether the Ministerial decisions concerning FU16 in the present case constitute 'an individual measure' for this purpose.

69. As regards authorities on this part of their case, in the first instance they rely upon the decision in *Atlantean Limited v. Minister for Communications and Natural Resources* [2007] IEHC 233. This was a case involving decisions made by the Minister which had the effect of reducing a mackerel fishing quota allocated to a vessel by the name of *Atlantean*. The Minister had based his decision on information furnished by the Scottish authorities by way of two schedules, and this information was communicated to *Atlantean*. Despite requests, no additional information was furnished to the applicants other than these schedules. Clarke J. considered that the principles in *Mooney v. An Post* [1998] IR 288 applied generally, but held that the decision-maker should be able to establish that it had made reasonable efforts to provide as much information and evidence as could be provided, so as to enable the potentially affected party to have a reasonable opportunity to answer the case against him. He held that this threshold had not been reached in the present case and he considered that it was, as a minimum, incumbent on the Minister to seek from the Scottish authorities further information about the basis upon which they had reached the conclusions reported to Irish officials. It may be noted that the *Atlantean* case concerned a decision directly affecting the quota allocated to a particular vessel based upon alleged misconduct by persons in connection with the vessel. To what extent this may translate into rights to fair procedures in the context of decisions made by the Minister in respect of a national quota in respect of a particular fishing area, which impacts upon all Irish vessels, remains to be teased out at the full hearing of the judicial review. I note that in the follow up judgment of Clarke J in *O'Shea Fishing Company Limited* [2008] IEHC 91, referred (at pp 17-8) to the unusual nature of fishing quotas, likening a quota to 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".

70. The applicants also rely upon the recent decision of the Supreme Court in *O'Sullivan v Sea Fisheries Protection Authority and Minister for Agriculture, Food, and the Marine* [2017] IESC 75. This was a case in which the Supreme Court held unconstitutional the penalty points system in respect of fishing licences provided for by SI 3/ 2014 (EU (Common Fisheries Policy) (Point System) Regulations. This conclusion was reached, in essence, on the basis that the system involved unfair procedures and in particular a reversal of the burden of proof such that the licence holder had the onus of initiating a hearing process and carried the burden of proof in what was effectively a single decision- making process. The applicants point to a passage at para.51 of the judgment where O'Donnell J said:

> "It is possible that the Regulations reflect frustration with the criminal process in terms of the procedures required and the length of time involved. It is dangerous however to seek a drafting solution to what are problems of resources. It may

> also be that the very high level of constraint created by the European Regulations means that there is limited incentive for operators to accept that a breach has occurred…. But whatever the rationale it remains the case that the system of point allocation has, and is intended to have, significant impact on a licence holder's capacity to earn a livelihood. Points attributed can rapidly reach the point of suspension and may ultimately lead to removal of the licence. The seriousness of this consequences for the licence holder is an aspect of the system which is quite deliberate since the system is designed to achieve the objective of encouraging compliance with the Common Fishery Policy rules in an area where detection is both difficult and costly. But the seriousness of the consequences also means that the process must accord with fair procedures".

Again, it remains to be seen to what extent such reasoning, which again was in the context of the proposed application of penalty points to a particular vessel licence, can be extrapolated to confer procedural rights upon the applicants in the present situation. I think; however, it is fair to say that no authority was cited to the court which directly supported the proposition that particular procedures should have been employed by the State authorities in the present circumstances, those circumstances involving a conclusion being reached as to the volume of a fish species being caught in the context of assessing whether the national annual quota has been reached or exceeded.

71. I should perhaps note that counsel on behalf of the respondent Minister raised an issue described as one of *locus standi*, but located this within its discussion of whether the applicant had a strong case. For example, it was submitted "that the Applicant cannot meet the higher threshold of a strong case because he is not the appropriate party to seek injunctive relief as he is not the owner of the Shauna Ann" and pointed out that the vessel was owned by a company. It was submitted that the company had a separate legal personality and that the applicant Mr. Fitzpatrick could not represent the company in court by virtue of being a director or 50% shareholder. Issue was taken with the respondent's reliance upon *Dellway Investments v. NAMA* [2011] 4 IR 1, in which Hardiman J. at para 301 said that the "trigger for fair procedures is that the person claiming them is a person affected by the decision". It seems to me that there may be some slippage here as between a number of different issues, namely (a) whether an individual has *locus standi* to bring judicial review proceedings under O. 84, (b) of the Rules of the Superior Court whether a person has a right to fair procedures in a given situation as a matter of Constitutional or EU law, and/or (c) who may have a right of audience in court in respect of a corporate entity. For the avoidance of doubt, it seems to me that the applicants had sufficient *locus standi* to bring the judicial review proceedings and injunction application on the basis that they had "sufficient interest" in the matter to which the application related within the meaning of O. 84, r. 20(4). Nor were they seeking to step into the shoes of, or represent, the corporate entity, the legal owner of the vessel, in doing so. However, this seems to me to be a different question from whether, even if there are some procedural rights to which somebody may be entitled in circumstances such as those arising in the present case, such rights would inhere in the applicants as individuals, rather than the vessel's corporate owner; which is, perhaps, more akin to the issue arising in the *Dellway* case. Perhaps the Minister's argument is that the applicants, as individuals, have no *locus standi* to present this particular "fair procedures" argument, as distinct from the first group of arguments (what I have called the "lawfulness of the methodology" argument). In any event, it seems to me at this stage premature, in the absence of full argument on the issue of fair procedures, to say that the applicants have no standing to make the argument.

72. Having considered the terms of the Control Regulation and the legal instruments opened to me, as well as the authorities referred to, it seems to me that the applicants have an arguable case on the various issues raised, but I would not state it any higher than that. I would not consider the case to be a "strong" one within the meaning of that phrase as deployed in the authorities concerning mandatory injunctions. It seems to me that strong counter-arguments can be made that an essential part of the legal regime is that the Authority must arrive at figures which are as accurate as possible, and that it has a duty to do so, and that notwithstanding the importance of the electronic fishing books within the overall regime, a national authority such as the Authority is not precluded from using other methods from calculating an estimate it considers to be useful where it suspects, on grounds which are reasonable, that there is large-scale under-reporting.

73. Similarly, while in my view there is an arguable case regarding fair procedures, it seems to me that there are yet many twists and turns to be had in that particular legal argument and that it could certainly not be described as a clear-cut issue in circumstances where the decisions of the Minister concern the implementation of a national quota allocated by the EU Commission with regard to a particular physical location in the sea, and does not consist of a measure imposed upon an individual vessel on the basis of an allegation of misconduct by the vessel's owners or masters.

74. On one view of matters, that should conclude my examination as to the application for interlocutory relief as it may be that the failure of the applicants to establish a "strong case" means that the Court should not proceed to the next stage of the analysis at all. However, by reason of the caveat I mentioned above, I think it is necessary to consider where the greatest risk of injustice would lie, notwithstanding my conclusion that the applicants have not established the 'strong case' necessary for a mandatory injunction. I will therefore proceed to the next stage of the analysis.

The second issue: Where does the greatest risk of injustice lie?

75. According to the decision in *Okunade*, the second matter to be considered by the court, assuming an applicant has established an arguable/strong case (depending on the nature of the injunction sought), is whether the greatest risk of injustice would lie in granting or not granting the interlocutory reliefs sought. The Supreme Court, as has been noted, referred to a number of factors, including the public interest in the orderly operation of a particular scheme, and also whether damages would be available or be an adequate remedy.

The public interest in the orderly operation of the fishing quota regime

76. In *Okunade*, Clarke J, delivering the judgment of the Supreme Court, considered that the public interest in the orderly operation of a particular regime or scheme was an important factor to which the court should have regard, saying as follows (at paras 91-92): -

> "However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are *prima facie* valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases… [He referred to the decision in Campus Oil itself and continued]. An order or measure which is at least *prima facie* valid (even if arguable grounds are put forward for suggesting invalidity)

should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience."

77. Clarke J. went on to say, at para 93, that it was appropriate to take into account the importance to be attached to the operation of the "particular scheme concerned" or the facts of the individual case in question which may place added weight on the need for the relevant measure to be enforced unless and until it is found to be unlawful.

78. It seems to me that this factor is of considerable weight in the present context. The Minister's decisions and the Authority's duties are carried out not only in a context of a set of domestic legal obligations but also a complex web of EU duties and principles. Further, if the State authorities are compelled to limit themselves to a methodology which results in figures being submitted to the EU Commission which are ultimately deemed to be inaccurate, this could render the State as a whole vulnerable to adverse measures from the EU.

Whether damages would be an adequate remedy

79. As has been seen above, the applicants claim that if they are prevented from fishing FU16 for Nephrops, they are at risk of being put out of business entirely. At a factual level, the respondents dispute this *inter alia* on the basis that they applicants have alternative fishing opportunities in other locations. They point to the fact that the first applicant did not fish for Nephrops in FU 16 for the first six months of 2017 at all; and they dispute the figures put forward on behalf of the second applicant. I do not think that the evidence placed before the Court to date could be described as sufficient to establish that the applicants would both be likely to become insolvent if the interlocutory relief is not granted. I think it would more properly be described as a situation where damages would constitute an adequate remedy, and if this were a private case between individuals, that would be the view I would take.

80. The question of financial loss and damages as compensation is not as straightforward where an injunction is sought in public law case as it would be in a dispute between, for example, two private individuals or commercial entities. There is a discussion of this precise issue, from para. 87 onwards, in the judgment of Clarke J. in the *Okunade* case. The discussion commences with an explanation of the rationale for the traditional principle in injunction proceedings that if a plaintiff can be adequately compensated in damages, no real injustice is risked by requiring him to wait for the trial of the action. Clarke J. considers this in the context of judicial review proceedings where the harm in question is non-financial, and said that this seems to be more a question of the balance of the risk of injustice rather than suggesting that there is irreparable damage that might be caused. He says that requiring a party to comply with an arguably unlawful measure gives rise to a situation where damages will not be an adequate remedy "except, perhaps, in the limited circumstances where the judicial review may be commercial contractual or property-oriented in the first place and where the consequences of complying with the measure under challenge may, in those unusual and limited circumstances, be capable of being adequately compensated in damages." I pause to note that the present case could be characterised as a case of that type and that damages are indeed one of the reliefs claimed in the present proceedings. However, Clarke J. then went on to say that even in such cases damages may not be recoverable because of the restrictive principles governing the obtaining of damages in judicial review cases, citing *Kennedy v. Law Society of Ireland* (No. 4) [2005] IESC 23, [2005] 3 IR 228 and *Glencar Exploration PLC v. Mayo County Council* [2001] IESC 64. He said that it followed that in many cases a successful applicant for judicial review who succeeds in having a relevant order or measure quashed or proposed action prohibited will not obtain damages at all. Against this backdrop, Clarke J. at para. 90 concludes as follows: -

> "It, therefore, seems to me that the question of the adequacy or otherwise of damages is unlikely to be a significant feature in reaching an assessment as to how best to minimise the risk of injustice in the context of an interlocutory application pending trial of judicial review proceedings."

81. In *Dowling v. Minister for Finance*, [2013] 4 IR at p. 620, Clarke J. returned to the question of damages. He referred back to his own judgment in *Okunade*, which I have summarised above, and continued at para 92. to say as follows: -

> "If, therefore, in accordance with the test in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, damages are truly an adequate remedy then it is hard to see how any irreparable damage, in the sense in which that term is used in *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollampt Paderborn* (Joined Cases C-143/88 & C-92/89) [1991] E.C.R. I-415 can arise. As the ECJ itself pointed out, at para. 29 in *Zuckerfabrik*, it is a well-established principle of European Union law that purely financial damage cannot be regarded, in principle, as irreparable. Whatever European Union law rights are asserted can, in such cases, if they be established when the court has had a full opportunity to examine the merits of the case, be fully compensated in damages, in a way which will vindicate the person whose rights have been infringed. It is, perhaps, hardly surprising that there is such a similarity between the test identified by the ECJ and the test which applies in many national systems such as the Irish one. The problem is the same in all cases. It is that which this court analysed in *Okunade v. Minister for Justice*. There is an inevitable risk of injustice in either granting or refusing interim measures. If the matters are purely financial then, at least in most cases, there will be no risk of serious injustice, for a party who wins can be properly compensated in damages."

82. I am not entirely sure how the Court is to address the question of damages in the present case in light of the comments in those judgments. On one interpretation, the Court at the interlocutory stage should not place much weight on the issue of damages because an applicant in a public law case, even in a case clearly involving potential damage to commercial or financial interests, is unlikely ultimately to be able to recover damages in any event because of the legal restrictions in Irish law. An alternative interpretation is that it depends on the case, and that perhaps in an appropriate case, the fact that an applicant may not ultimately be able to recover damages because of the legal obstacles to this should weigh in favour of an injunction as he would otherwise find himself in a "Catch-22" situation whereby the State can prevent him getting an injunction on the basis that he can ultimately obtain damages, but can then argue at the damages stage of proceedings that he is not entitled to any damages by reason of the legal obstacles to this presented by such cases as *Glencar*.

83. I was also referred to two particular decisions in the fisheries area concerning damages and injunctions. The first is the judgment in *Meade v. Minister for Agriculture, Fisheries and Food* [2010] IEHC 105. This was a case which involved a challenge to a decision made by the Minister concerning the mackerel quota for the year 2010 and the applicant's authorisation in respect of his boat, the "Buddy M". The applicant was allocated 32 tonnes by way of a quota but asserted that he was entitled to 263 tonnes as a vessel over 65 feet. In the course of her judgment, Laffoy J. discussed the issue of whether damages would be adequate. She noted at para. 21 that counsel for the defendant had submitted that the loss which the plaintiff contends he would incur was readily quantifiable in damages and would be clearly and exclusively a commercial loss. Counsel for the plaintiff pointed to the plaintiff's averment that he would be facing economic ruin. At para. 22, Laffoy J. said: -

> "Where there is a risk that a commercial enterprise, whether conducted by an individual or a company, will be tipped over

> the edge into insolvency if an interlocutory injunction is not granted, provided there is appropriate evidence to support the existence of that risk, which would normally require up to date and precise financial data averred to by an accountant, in my view, it is open to the Court to conclude that damages would not be an adequate remedy, if the interlocutory injunction were not granted. I have so held in the past. However, in this case, even if the first hurdle had been surmounted, on the evidence now before the Court, one could not conclude that damages would not be an adequate remedy."

84. When considering the balance of convenience, Laffoy J. noted that counsel on behalf of the plaintiff had argued that the consequences for him would be of great impact in that his livelihood would be affected, his responsibilities to his crew would be affected, with repercussions for the community in Castletownbere, the port from which he operated. It was also argued that the defendant had the capacity to meet the plaintiff's claim because it would mean that the Minister need not interfere with the quota entitlement in relation to other vessels in the fleet if an interlocutory injunction were granted. Laffoy J. held that the balance of convenience favoured refusing the injunction and that the fact that the defendant had capacity to meet the plaintiffs' demand was irrelevant. She said: -

> "Judicial interference with the scheme which the defendant has put in place for the allocation of national quota would, to use a colloquial phrase, "upset the applecart". In other words, it would disturb the status quo, rather than preserve it, as counsel for the plaintiff contended."

85. The *Meade* case had been commenced by plenary summons rather than by way of judicial review. Further, it pre-dates the *Okunade* case. To that extent, it is of limited assistance to me in the present context in deciding how the damages issue should be factored into the analysis, but it does again reflect the importance of the value referred to by Clarke J. in *Okunade*, namely the public interest in the order implementation of State schemes.

86. The applicants also relied on the decision in *Minihane v. Skellig Fish Limited*, [2017] IEHC 150, an ex tempore judgment of Twomey J. delivered on the 27th February, 2017. However, this seems to me to be quite a different situation because it involves a private contract between a vendor and a purchaser. The plaintiff issued a plenary summons against the defendant company for the specific performance of a contract described as the "Capacity Sale Agreement" which provided for the purchase of fishing capacity of 324 gross tonnes and 709 kilowatts. The agreement had been signed by a director of the company. There were certain indications that the company was not prepared to carry through with the contract and the plaintiff sought an injunction to restrain the company from alienating the fishing capacity before the hearing of the action. The plaintiff had taken steps to have a fishing vessel constructed for the sum of €6M and received funding from AIB in an amount of almost €5M. *Inter alia*, the court found that damages would not be an adequate remedy for the plaintiff on the basis that if the company were to alienate the fishing capacity before the trial, he could be left with a €6M vessel without fishing capacity and in breach of his obligations to AIB. As regards the balance of convenience, the court took into account that fishing capacity was a relatively scarce commodity so that if the company were to win a trial, it would have no difficulty in selling fishing capacity to some other party. Conversely, the plaintiff might not be able to source fishing capacity from elsewhere. However, as I have noted, this arose in the context of a private commercial arrangement between two parties and did not involve questions of public law turning on ministerial discretion in the context of a regime to implement the Common Fisheries Policy under European Union law.

87. As I have said, it is not entirely clear to me what the correct approach is to damages in a public law case such as the present one, in which the precise damage alleged to have caused by the alleged acts of State authorities is damage of a financial nature. However, I have reached the following conclusions: (a) While I accept that fishing for Nephrops in FU16 is a valuable part of the business of each of the applicants and that its continuing loss would represent a serious blow to them, it does not seem to me that the evidence furnished on behalf of the applicants goes so far as to establish that the applicants would be likely to become insolvent if I do not grant the interlocutory relief at this time, as the situation is one involving a number of factors, variables and hypotheticals as to what might happen in 2018; (b) Damages would be an adequate remedy in the future; and (c) The Court cannot simply assume at this stage that the applicants would not be entitled to recover damages if they were ultimately successful in their judicial review proceedings, particularly as the claim involves alleged rights under EU law.

The question of an Article 267 reference and the balance of convenience

88. It was argued on behalf of the applicants that the case would require a reference under Article 267 of the Treaty on the Function of the European Union seeking clarification from the CJEU as to whether the method by which the Authority had arrived at its figures in relation to the quota for Nephrops is permitted by the regime established by the Control Regulation and associated Regulations. It was further argued that this would inevitably lead to further delays before a final result is achieved and that this should be factored into an assessment as to the risk of injustice to the applicants. While the applicants initially appeared to be asking the Court to make an Article 267 reference at this stage, this was not pressed in argument and it would seem premature to me in any event, as all that is required at this stage is a provisional assessment of the strength of the applicants' case, not an actual decision on the merits. A definitive answer from the CJEU is therefore not necessary at this point in time, even if one assumes that it may be required in the future.

89. As regards the length of the potential delay between proceedings and outcome, it does not seem to me to be a matter which should be put in the balance; the authorities have clearly discussed the factors which should be considered, and the actual length of time between the interlocutory application and a decision on the merits (for whatever reason) is not a self-standing factor to be put in the balance. If anything, it argues rather for the expediting of the hearing of the action in appropriate cases.

Decision

90. In light of all of the above, I have reached the conclusion that more injustice would be done to the respondents if the injunctions were granted than would be done, on the balance of probabilities and having regard to the evidence adduced, to the applicants if it were refused. Accordingly, it seems to me that in this case, both the 'strong case' test and the 'risk of injustice' test point in the same direction and I refuse to grant the interlocutory reliefs sought.

91. By way of final comment, I should say that counsel for the applicant strayed in oral argument into the area of potential criminal investigations and prosecution of the applicants, and submitted that it would be highly unfair for data to be used in any such prosecutions if it arose from the methodology used by the Authority. I express no comment on this whatsoever as the issue is simply not before me as part of this judicial review; and indeed, any such application for judicial review would be premature as it is not even clear whether or not the applicants are the subject of any criminal investigation at this stage.