



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 1

P414/20

OPINION OF LADY POOLE

In the cause

THE SCOTTISH CREEL FISHERMEN'S FEDERATION

Petitioner

against

THE SCOTTISH MINISTERS

Respondent

Pursuer: Upton; Gillespie MacAndrew

Defender: Reid; Scottish Government Legal Directorate

8 January 2021

Introduction

[1] The petitioner, the Scottish Creel Fishermen's Federation ("SCFF"), challenges a decision of the Scottish Ministers affecting fisheries in the Inner Sound of Skye (the "**Inner Sound**"). The Scottish Ministers exercise powers of management of inshore sea fisheries through Marine Scotland, a directorate within the Scottish Government. On 26 February 2020, Marine Scotland published a document entitled "Inshore Fisheries Report: Inner Sound of Skye Consultation Outcome Report" (the "**2020 Outcome Report**"). The 2020 Outcome Report concerned a proposal for an inshore fisheries pilot scheme (the "**New**

Proposal”). The 2020 Outcome Report intimated the decision of Marine Scotland not to take forward the New Proposal in its entirety. SCFF seeks to overturn that decision.

Factual background

[2] In 2015 Marine Scotland published a Scottish Inshore Fisheries strategy. Among other things, the strategy objectives included improving the evidence basis for inshore fisheries and the participation of fishers in policy making. In accordance with this strategy, Marine Scotland set up an Inshore Fisheries Pilots initiative. On 25 May 2017, Marine Scotland announced that it was inviting proposals from fishers on sites to pilot alternative systems of fisheries management. It issued a document headed up “Marine Scotland – Inshore Fisheries Pilots – Proposal Form – Guidance” (the “**Guidance**”). The Guidance expressed the intention that pilot projects would investigate a localised approach to fisheries management, where fishing interests would be involved in developing distinct local arrangements. Also to be investigated in the pilots was “the impact of separating different methods of fishing, such as creeling (eg static gear and mobile gear) within specified areas”. Mobile gear fishing refers, for example, to fishing by trawling or dredging. Static gear fishing includes creeling. The Guidance contained the following passage in a section headed “Notes on Proposals”:

“Proposals will be considered on the basis of:

- How consistent is it with the Inshore Fisheries Strategy 2015, in particular the focus on:
 - Improving the existing evidence base
 - Improving governance
 - Integrating with wider marine management
- The clarity of the objectives – does the proposal clearly identify issues and the means of addressing them?
- What improvements will be achieved and consideration of how improvements will be monitored.

- The proposal being industry lead and developed by those involved in commercial fishing in the area.
- The practicality of the proposal and how achievable it is, taking into account:
 1. International and national obligations
 2. The current quota system
 3. Control mechanisms (Legislation and Licensing)
 4. Financial implications
 5. Enforcement implications

After setting out these 5 criteria, the Guidance gave additional information. It mentioned data collection and the need to fill in a form so that Marine Scotland could evaluate each proposal on a case-by-case basis. It stated that future consultation may be necessary depending on the impact and extent of proposed measures. The Guidance set out 19 specific questions for proposers of pilots to address. The closing date for proposals was 30 September 2017.

[3] A proposal was submitted by some of SCFF's member organisations (the "**Original Proposal**"), by the closing date. The Original Proposal suggested extending an existing prohibition of mobile fishing in parts of the Inner Sound for six months of the year from October to the end of March. Under the Original Proposal, fishing with mobile gear would be prohibited all year round in defined areas, for the duration of the pilot. The Original Proposal was put out for consultation together with other proposals. In a document entitled "Consultation on Proposed Sites to Host Inshore Fisheries Pilots 2017 Outcome Report" issued in June 2018 (the "**2018 Outcome Report**"), Marine Scotland analysed proposals it had received against the criteria in the Guidance set out in the previous paragraph. Marine Scotland's views on each proposal in the light of the criteria were then provided. Marine Scotland decided to take forward some proposals and not others. The Original Proposal relating to the Inner Sound was not taken forward. Reasons were given in a section of the

2018 Outcome Report headed up “Conclusion”. These included: the effect on viability of the mobile fishing industry; the impact of displacement of fishing vessels both in terms of health and safety and increasing fishing in other areas; and questions about monitoring of the proposal.

[4] After further representations were made, Marine Scotland agreed to accept a revised proposal which sought to address the reasons given for the rejection of the Original Proposal. The New Proposal was submitted by three of SCFF’s member associations. The New Proposal was different from the Original Proposal. In summary, it was proposed that there would be a designated trawl only fishing area within the Inner Sound where mobile gear fishing could be carried out for 6 months of the year. There would be other areas of the Inner Sound from which mobile gear fishing would be excluded, and static gear fishing only would be permitted. (By implication, in some other areas of the Inner Sound, particularly parts further north, both mobile and static fishing would be permitted). There would be other measures such as limits on the number of creel vessels and creels, quotas, minimum landing sizes of nephrops, and the establishment of an Inner Sound Advisory Group made up of representatives of those who fished in the Inner Sound area.

[5] In January 2019, Marine Scotland issued a consultation document on the New Proposal entitled “Inshore Fisheries Pilot: Inner Sound of Skye – A Consultation” (the “**2019 Consultation**”). It invited consultation responses by 11 April 2019. The 2019 Consultation commenced with a background and introduction section. It narrated the history, starting from the launch of the Inshore Fisheries Pilots initiative in 2017 described above, then detailing the proposals received in response in 2017, and the analysis of those proposals by Marine Scotland. In a section headed 2018 developments, Marine Scotland stated that it had “agreed to revisit the original proposal to establish if there were any unique learning

opportunities to be explored around testing local fisheries management measures associated with the Nephrops fishery in the Inner Sound". The 2019 Consultation contained a summary of the New Proposal, and a list of 9 consultation questions. The 2019 Consultation did not say that the Guidance issued by Marine Scotland no longer applied. An email invitation announcing the 2019 Consultation was sent on behalf of the Scottish Government on 17 January 2019. It referred to the results of the 2018 Outcome Report and "a revised proposal" which "has the potential to offer some unique learning opportunities and to help inform our future fisheries strategy", and encouraged recipients to respond to the consultation.

[6] On 26 February 2020, almost exactly a year after the closing date for consultation responses, Marine Scotland published the 2020 Outcome Report. After again placing the document in the context of the Inshore Fisheries Pilots initiative, and referring back to the 2017 Consultation, it said "Marine Scotland agreed to revisit the proposal to establish if there were any unique learning opportunities to be explored. A revised proposal was then developed by local fishing associations that sought to address the issues highlighted". The 2020 Outcome Report stated that it presented a summary of the consultation responses, and the conclusion and next steps the Scottish Government proposed to take forward. The next three pages summarised consultation responses on questions. A conclusion followed which stated "The responses to the consultation make it clear that there is continuing opposition to the proposed inshore fisheries pilot in the Inner Sound of Skye. While some of the management measures were well supported....the majority of the proposed measures set out in the consultation were strongly opposed by respondents". The 2020 Outcome Report went on to identify four strands of work that would be taken forward to deliver improvements, including improving monitoring, management, knowledge base and

communication, and mentioned establishing a management advisory group. The 2020 Outcome Report neither directly addressed the criteria listed in the Guidance, nor said that Marine Scotland had decided to depart from the Guidance. In a statement to the Scottish Parliament on 26 February 2020, the Cabinet Secretary referred to the Inshore Fisheries Pilots initiative, and announced that he was establishing the Inner Sound local fisheries management advisory group mentioned in the 2020 Outcome Report, to open up dialogue.

The arguments of the parties

[7] SCFF argues that the decision not to proceed with the New Proposal was unlawful. There are in essence three complaints. First, Marine Scotland should have assessed the New Proposal against the criteria published in the Guidance. Second, if it was the case that the criteria had been replaced by the reference to “unique learning opportunities” in the 2019 Consultation, Marine Scotland had also failed to assess the New Proposal against that criterion. Third, the proposal had been assessed against a criterion of the opposition to it, which was not a criterion published by Marine Scotland in advance. These complaints are expressed in different ways: failures to take into account relevant considerations and taking into account irrelevant considerations, breaching a legitimate expectation that the New Proposal would be assessed against published criteria, acting unfairly, inconsistently and unreasonably, and failing to give adequate reasons for the decision about the New Proposal.

[8] The Scottish Ministers argue in summary that the 2019 Consultation was not a reopening of the 2017 Consultation, but was a new consultation. There was no legitimate expectation that criteria in the Guidance would be used exclusively to assess the New Proposal. The criteria were just to assess what would go forward for consultation. Nor was there any legitimate expectation that opposition would not be taken into account, and

opposition might be seen as part of some of the criteria. There was compliance with the minimum standards of a lawful consultation, and the extent of any expectation must be that responses to a consultation would be taken into account. The Scottish Ministers were obliged to have regard to responses to consultation. The purpose of the process was to inform future strategy. The 2020 Outcome Report explained some aspects of the New Proposal that would be taken forward, and proposed an Inner Sound Management Advisory Group. The reasons for the conclusion reached in the 2020 Outcome Report were clear when that document was read in full and in context. Even if any of the challenges are well-founded, remedies should still be refused, because the 2020 Outcome Report was not the final word on fisheries management in the Inner Sound of Skye, and because it was now some time after 2017 when pilot proposals had initially been invited.

Governing law

[9] The law under which the Scottish Ministers were exercising powers to regulate fishing in Scottish inshore waters at the relevant times is not in dispute. Section 1 of the Inshore Fishing (Scotland) Act 1984 confers powers on the Scottish Ministers to make orders regulating fishing for sea fish in Scottish inshore waters. Orders may prohibit all or some fishing, fishing by a specified method or description of equipment, within specified areas. Orders may specify the period during which a prohibition is to apply, and other matters. It is a criminal offence not to comply with such orders (section 4). The Sea Fish (Conservation) Act 1967 and the Sea Fisheries Act 1968 contain provisions empowering the Scottish Ministers to regulate fishing and operate a licensing system for sea fishing. These further statutes contain provisions relevant to enforcement, such as the creation of offences and sea-fishery officers. There are a number of orders made under these various statutory powers,

such as the Sea Fish Licensing Order 1992/2633 (which provides that it is an offence to fish without a relevant licence) and the Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Scotland) Order 2015 (which contains certain prohibitions relating to the Inner Sound). The Fisheries Act 2020 will amend this statutory framework in various respects, but was not in force at the relevant times.

[10] The Scottish Ministers are given important powers under this legislative framework. The Scottish Ministers have an element of discretion in the exercise of the general power to make orders regulating sea fishing within Scottish inshore waters in section 1 of the Inshore Fishing (Scotland) Act 1984. Nevertheless, the law imposes requirements on the Scottish Ministers in relation to the exercise of their powers. There may be a duty to keep the question of exercise of powers under review (*R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3). Further, where a discretionary power is being exercised, that discretion has limits (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). General principles of administrative law require statutory powers such as those being exercised by the Scottish Ministers in this case to be exercised lawfully, reasonably and procedurally fairly.

Decision

[11] All of the grounds of challenge turned on the issue of whether the decision intimated in the 2020 Outcome Report complied with the requirements of administrative law. The question at the heart of this case was whether Marine Scotland should have assessed the New Proposal against the criteria in the Guidance set out in paragraph [2] above. I have come to the conclusion that Marine Scotland should have done so, for the following reasons.

[12] The 2020 Outcome Report was part of the Inshore Fisheries Pilots initiative (2019 Consultation page 1, 2020 Outcome Report page 1, and the announcement by the Cabinet Secretary in the Scottish Parliament on 23 February 2020). The consultations carried out in 2017-18 and 2019-20 are properly seen as two separate consultations, both of which were part of the Inshore Fisheries Pilots initiative. The Guidance was a document issued at the outset of the Inshore Fisheries Pilots initiative to govern proposals submitted as part of that initiative. There is nothing in the documents before me to indicate the Guidance covered only some and not all proposals submitted under the Inshore Fisheries Pilots initiative. Nor is there anything to establish that the Guidance had been withdrawn at the time Marine Scotland agreed to accept the New Proposal for consideration, or when it put the New Proposal out for consultation (*Devon County Council v Secretary of State for Communities and Local Government* [2010] EWHC 1456 paragraphs 75-101). The Guidance is fairly understood as the guidance document for all proposals submitted under the Inshore Fisheries Pilots initiative, including the New Proposal. Guidance is not law, but it is expected that public authorities will follow their own guidance, depart from it only where there is good reason to do so, and justify any departures. The Scottish Ministers did not argue that any good reason to depart from the Guidance existed in this case: rather it was argued that the Guidance could not be read as containing criteria against which the New Proposal should have been assessed. It was suggested that the New Proposal had itself not addressed all of the questions set out in the Guidance. In my opinion that did not absolve the Scottish Ministers from the requirement to consider the New Proposal against the criteria in the Guidance when making a decision about it. Marine Scotland chose to accept the New Proposal, and did not request it be modified to answer questions more fully. It chose to put the New Proposal out for public consultation, and elicit responses. The principles of administrative

law invoked by SCFF in this case are about controls on the exercise of power by those holding it. When exercising their statutory powers and making a decision about the New Proposal, the Scottish Ministers (acting through Marine Scotland) were bound to act lawfully, fairly and reasonably and in accordance with criteria they themselves had published.

[13] Parties accepted that the question of construction of the Guidance, and any requirements it might impose on Marine Scotland, was a matter for the court. Construction of the Guidance is an objective exercise in which the starting point is to find the natural and ordinary meaning of the words used, viewed in their particular context and in the light of common sense (*Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* 2019 UKSC 33 at paragraphs 15-19). The plain, natural and common sense meaning of the Guidance is that proposals submitted under the Inshore Fisheries Pilots initiative would be considered on the basis of the list of criteria set out in paragraph [2] above. The questions which followed the criteria in the Guidance were to try to guide proposals so that they addressed the criteria. The criteria were set out in the context of invitations to proposers to assist Marine Scotland investigate a localised approach to fisheries management, and the impact of separating different types of fishing (such as static and mobile gear). The criteria in the Guidance provided a structured and sensible approach to evaluation of proposals. The criteria included factors such as achievability in the light of international and national obligations, thereby including considerations of compliance with the law. The criteria were capable of being applied whether or not there was further consultation, which was left as an option in the Guidance. If there was consultation, then consultation responses would be taken into account, but as part of the exercise of considering the criteria and deciding whether a pilot should proceed (as was done in the

2018 Outcome Report). I reject the suggestion that the criteria in the Guidance were only there to decide which proposals should go forward for consultation, rather than which proposals should result in pilots going forward. That is not what the Guidance says, when fairly read. The criteria against which Marine Scotland said proposals would be considered were the criteria in the Guidance. The reference in the 2019 Consultation document to “unique learning opportunities” does not change this. Both consultations proceeded on the common basis of the Guidance issued at the start of the Inshore Fisheries Pilots initiative.

[14] The 2020 Outcome Report makes no reference to the criteria in the Guidance, and makes no express attempt to assess the New Proposal against them. This is in marked contrast to the approach taken in the 2018 Outcome Report to all other proposals put out for consultation under the Inshore Fisheries Pilots initiative. The 2018 Outcome Report summarised “feedback to questions posed in the consultation”, and provided Marine Scotland’s response to each proposal, “taking into account consistency with the criteria set out in the Guidance, consultation feedback and wider considerations” (page 4 and the rest of the document). The 2020 Outcome Report stated that it gave “a summary of the consultation responses, highlighting the main issues that emerged, and presents the conclusion and next steps the Scottish Government proposes to take forward” (page 1). The impression from the 2020 Outcome Report is that the criteria in the Guidance were simply overlooked by Marine Scotland. The consistency of the New Proposal with all of those criteria was not analysed anywhere in the 2020 Outcome Report. The conclusion of the 2020 Outcome report was that there was continuing opposition to the proposed inshore fisheries pilot in the Inner Sound of Skye. It was evident from what was said that the key parts of the New Proposal restricting types of fishing would not be taken forward. It is true that Marine Scotland said they would take steps to improve monitoring, management, knowledge base,

and set up the Inner Sound management advisory group suggested in the New Proposal. However, those matters were ancillary to the main thrust of the New Proposal, which was for separation of certain fishing areas, something expressly invited in page 1 of the Guidance as part of the Inshore Fisheries Pilots initiative. The decision of Marine Scotland on these key parts of the New Proposal was that they would not happen.

[15] I accept the submission of SCFF that the reason Marine Scotland gave in the 2020 Outcome Report for not proceeding with the key parts of the New Proposal is fairly read as the extent of opposition. The three pages preceding the conclusion section of the 2020 Outcome Report set out a summary of consultation responses, including whether there was majority agreement or disagreement to particular questions, and some of the criticisms of respondents. But that is all those pages do. They do not go on to give Marine Scotland's own views on the criteria in the light of everything before it, although the powers to regulate and license sea fishing was in the hands of the Scottish Ministers and not consultation respondents. The only indication of Marine Scotland's views was in the conclusion section of the 2020 Outcome Report. (I reject the suggestion that reasons given in the 2018 Outcome Report about the Original Proposal can be used to justify rejecting the key parts of the New Proposal; that was a report on different proposals). Nothing more is said on the substance of the New Proposal. The justification given for not proceeding with the New Proposal, of the extent of opposition, is open to criticism from the perspective of administrative law principles of rationality. It would be stultifying to good government if any opposition to a proposed measure was a bar to its adoption. In this particular case, proposals were expressly invited in the Guidance for pilots investigating the impact of separating different methods of fishing. It was an inevitable consequence of separating different methods of fishing that certain types of fishing might be excluded from particular areas during the

period of the pilot. A degree of opposition from interests adversely affected might be expected. That did not absolve Marine Scotland from assessing the New Proposal against criteria it had itself published for consideration of proposals. In assessing proposals against the criteria, Marine Scotland was obliged to take into account consultation responses, including those which opposed the New Proposal. But that was not simply to decide whether they were broadly in favour or against aspects of the New Proposal. Consultation responses should have been considered for what bearing on the published criteria they might have. It was suggested in submission (not in the 2020 Outcome Report) that the fact of opposition from some quarters might bear on some of the criteria, such as enforcement, financial considerations, or possibly monitoring. Exactly how was not clearly articulated. The governing legislation already makes provision for offences and sea-fishery officers by way of enforcement. If what was meant was that monitoring, or reporting on fishers breaching any regulations, required the co-operation of local fisheries, then I accept SCFF's point that more analysis was required of consultation responses rather than the simple analysis given in the 2020 Outcome Report of which individuals and organisations agreed or disagreed with particular questions posed. It is evident from the list of respondents to the consultation that they came from all over Scotland and not only the Inner Sound. There was no attempt in the 2020 Outcome Report to analyse support or otherwise from respondents who actually fished in the Inner Sound. The extent of opposition was not in any event a ground which could have encompassed analysis of all of the published criteria.

[16] The Scottish Ministers sought (at paragraph 45 of an affidavit of Mr Watson of Marine Scotland lodged with the court) to justify the refusal to proceed with key parts of the New Proposal on grounds not published in the 2020 Outcome Report. The justification proffered still does not directly address the criteria, but gives some additional reasons for

not proceeding with the pilot. I accept the submission of SCFF, made under reference to De Smith, *Judicial Review* 8th ed at paragraph 7-116, that it is well established the courts should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision, but were only expressed later. The court should treat reasons provided after the commencement of proceedings especially carefully. By this stage, rather than approaching a matter with an open mind before any decision has been taken, a different exercise is being undertaken, of trying to justify a decision which is being impugned in an action. I do not accept that Mr Watson's explanation is any substitute for an open minded consideration of the New Proposal in the light of the published criteria.

[17] I turn now to the individual grounds of challenge, in the light of the findings I have made. As often happens in administrative law, the grounds of challenge overlapped to some extent. There was no real disagreement between the parties as to the content of the relevant principles. The dispute was how they should be applied in this case. In my opinion, Marine Scotland erred in the following ways.

[18] Marine Scotland did not act in accordance with procedural fairness. As was said by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 68:

“Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise of practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public... The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances”.

Marine Scotland issued Guidance explaining how it would assess proposals which were made as part of the Inshore Fisheries Pilots initiative. The Guidance contained a list of criteria which it expressly stated proposals would be considered against. The proposals being submitted concerned large inshore areas, and fishing by many people in those areas. Putting together proposals was a significant undertaking for the bodies submitting them. Those submitting a proposal in response to Marine Scotland's invitation were entitled to have their proposals assessed in the way Marine Scotland had said it would. It was unfair for Marine Scotland to adopt a different procedure, and not to assess the New Proposal against the criteria it had specified. As was said in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at paragraph 35:

“The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by statute”.

Although the cases differ on the facts, I consider this statement of general principle applies in the present case. Marine Scotland issued the Guidance in exercise of discretion conferred by statutory powers to regulate and licence of sea fishing. Proposals which were part of the Inner Sound pilots initiative should have been considered under the policy set out in the Guidance, of assessment against specified criteria. It was unfair not to do so.

[19] Marine Scotland did not act in accordance with legitimate expectations. Parties were agreed that what was in issue was whether there was a procedural legitimate expectation (the second of the three types of legitimate expectation identified in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at paragraphs 57-58). In *R v IRC ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569H, Lord Justice Bingham stated:

“If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the

expectation, particularly if he acted on it...The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen...on facts such as the present, [it would not be] fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation”.

The Guidance stated “Proposals will be considered on the basis of” and set out a list of criteria. In my opinion, this was a clear, unambiguous and unqualified representation. It was legitimate to expect that the New Proposal would be assessed against the criteria in the Guidance. The fact that the Guidance gave further information saying that proposals might be put out to consultation did not detract from that. The same criteria can be used for assessment of proposals whether or not put out to consultation. If there was consultation, any consultation responses would be taken into account by Marine Scotland when the criteria were being considered to determine whether the pilot should proceed (as was in fact done in the 2018 Outcome Report). I do not accept that it was lawful to frustrate this legitimate expectation by failing to consider the New Proposal against these criteria. The Scottish Ministers rely first on a justification given in paragraphs 103 to 107 of an affidavit of Mr MacLeod of Marine Scotland, but this affidavit is about the Original Proposal. The New Proposal was different. Reasons for rejecting the Original Proposal are not a justification for frustrating the legitimate expectation which arose in relation to the New Proposal. The Scottish Ministers also relied on paragraph 59 of the affidavit given by Mr Watson of Marine Scotland. This gives information that Marine Scotland are continuing to modernise inshore fisheries through deployment of appropriate tracking and monitoring across the fleet, and in 2020 and 2021 are introducing tracking systems across the inshore fleet. I am unable to find that this affidavit provides a justification for the Scottish Ministers having departed from a legitimate expectation that the New Proposal would be considered against the criteria

published in the Guidance. I consider that frustrating the legitimate expectation I have found to exist is a misuse of the Scottish Ministers' powers.

[20] Marine Scotland also reached a decision that was irrational. First, it failed to take into account material considerations. Marine Scotland did not consider the New Proposal against the criteria in the Guidance it had published. I do not accept that the criteria fell within any category of considerations a decision maker may choose for themselves whether to take into account (*R (Hurst) v London Northern District Coroner* 2007 2 AC 189 at paragraph 57). They were published criteria against which Marine Scotland had said proposals would be considered. In my opinion, they were material considerations Marine Scotland was obliged to take into account. I accept that the law makes a distinction between what is a material consideration and the weight which should be given to it (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780F-G. The weight to attach to the material considerations was ultimately for Marine Scotland. Nevertheless, as a matter of law, the criteria as material considerations had to be taken into account, and were not. Second, the rejection of the key parts of the New Proposal on the basis of the extent of opposition alone was a conclusion so unreasonable that no reasonable authority could have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). I refer back to my findings in paragraph [15] above. The 2020 Outcome Report assessed opposition in a particular way. It did not link opposition to any particular criterion. No reasonable decision maker would have considered the extent of opposition assessed in the way it was in the 2020 Outcome Report as determinative of whether the pilot should proceed.

[21] Marine Scotland also failed to provide adequate reasons for its decision not to take forward key aspects of the New Proposal. There was no express duty incumbent on the

Scottish Ministers to provide reasons, but where reasons have been given (as they were in the 2020 Outcome Report) in general they should comply with legal standards of reasons for decisions. In *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at page 348 the court stated that the decision maker “must give proper and adequate reasons for [the] decision which deal with the substantial questions in an intelligible way”. The test therefore requires the “substantial questions” to be dealt with. In this case, the substantial questions included how the New Proposal measured up to the criteria in the Guidance (or possibly, if Marine Scotland had decided to depart from the criteria in the Guidance, why it had done so). The 2020 Outcome Report said nothing about these matters. The reasons given in it were not proper and adequate to explain why Marine Scotland decided not to take forward the key elements of the New Proposal.

[22] I did not consider that the ground of challenge of consistency added anything to the other grounds. In the light of the opinion I have formed of the grounds of challenge above, it is not necessary to consider other grounds any further.

Remedies

[23] The Scottish Ministers argued that even if Marine Scotland was found to have acted unlawfully, remedies should be withheld under the public law discretion to withhold remedies. Matters had moved on, there could be further dialogue through the Inner Sound Management Advisory Group when it was formed, and this was not the final stage in inshore fisheries management. I am not prepared to withhold remedies. I consider that SCFF is entitled to expect that the New Proposal is properly considered with an open mind against the criteria published by Marine Scotland, taking into account consultation responses. It is true that it is some time since the Inshore Fisheries Pilots initiative was first

launched in 2017. But Marine Scotland accepted the New Proposal as part of the Inshore Fisheries Pilot initiative a few months after its initial decisions in the 2018 Outcome Report, and put the New Proposal out for consultation in January 2019. Despite the 2019 Consultation suggesting it was intended the pilot would be operational by 1 April 2019 if it went ahead, Marine Scotland took until 26 February 2020 to make and intimate a decision about the New Proposal. The petition was brought timeously challenging the decision of Marine Scotland on the New Proposal. Sea fish and fishers continue in existence, as do the legislative powers of licensing and regulating sea fishing conferred on the Scottish Ministers. It would not be equitable for Marine Scotland to be excused from complying with its own Guidance, when a significant amount of the time which has elapsed is due to Marine Scotland's delays.

[24] In the light of the findings which I have made, parties are encouraged to seek to agree which orders in statement 4 of the petition the court should be invited to make. The case will be put out by order for discussion of the remedies to be granted.