CLAIM NO SC/CIV/03/18

IN THE SUPREME COURT OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Town Hall
Ross Road
Stanley
Falkland Islands

Date: 22 October 2018

Before:

JAMES LEWIS QC (CHIEF JUSTICE OF THE FALKLAND ISLANDS)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN (ON THE APPLICATION OF SGF LTD)

Applicant

and

THE DIRECTOR OF FISHERIES OF THE GOVERNMENT OF SOUTH GEORGIA AND THE SOUTH SANDWICH ISLANDS

Respondent

Lawrence Power for the **Applicant**

Dermot Woolgar (instructed by the Attorney General of South Georgia and the South Sandwich Islands) for the **Defendant**

Hearing date: 12 October 2018

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Approved Judgment

I direct that no official shorthand note need be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

James Lewis QC, CJ:

1. This is an application by the Respondent to set aside the leave granted on the 13 April 2018 by the court *ex parte* for the Applicant to move for judicial review. The application is made pursuant to RSC Order 32 rule 6 allowing an *inter partes* hearing for any application granted *ex parte.*

2. I now have the benefit of written and oral submissions from both Mr Woolgar and Mr Power, and there is in addition a lengthy affidavit by the Attorney General ("AG") which was not previously before me at the *ex parte* stage.

Background

3. The Director of Fisheries of the Government of South Georgia and the South Sandwich Islands ("SGSSI") issues licenses to fish for Patagonian toothfish in the Maritime Zone. They are very valuable since the fishing is profitable. They are now issued for a four-year period. In February 2018, six licenses to fishing vessels were issued after an open competition. There were twelve applications. The Applicant in this case applied for a license for the *MV Globalpesca 1* which is a Chilean-flagged vessel. It was unsuccessful and it challenges the decision of the Director to refuse to grant a licence.

The Application process

4. The Director issued guidance for applicants for the 2018 – 2021 Fishing Seasons. The Information for Applicants ("IFA") runs to 17 pages. It sets out the three stages of the application process at [4.5]:

> Stage 1: All applications will be assessed for compliance with certain minimum standards. These are set out at Annex A. The purpose of these minimum standards is to establish a consistent operational baseline for all vessels in the fisheries, and in particular to ensure that appropriate standards of safety and compliance are met. The supporting documentation specified in Annex A must be submitted with the application. Applications which do not meet these minimum standards will be rejected.
>
> Stage 2: All applications that meet the minimum standards will be assessed and scored against four criteria (compliance, welfare and safety, raising fishery standards, and experience) which underpin the management of the fishery. A maximum of 80 points may be awarded. Further details of these criteria can be found at Annex B. The Director of Fisheries may take other relevant information into account.
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> Stage 3: In accordance with his obligations under the FCMO, the Director of Fisheries will consult with the Secretary of State for Foreign and Commonwealth Affairs in London to establish whether there are any implications for foreign policy in connection with the proposed licensing of vessels. The Director of Fisheries is required to act in accordance with any advice received. Ordinarily, all communications between the Director of Fisheries and the Secretary of State are confidential.

5. Annex B of the IFA is important. It sets out the scoring method. It states:

ANNEX B

TOOTHFISH LICENSING CRITERIA

The Director of Fisheries will assess applications against the following criteria. Applicants are advised to set out clearly how they meet these criteria in their applications and should support their statements with relevant documentary evidence.

1) Compliance (maximum score 20):
    - The compliance record in SGSSI, in other Convention Areas, and elsewhere of the applicants, owners, operators, charterers and vessel over the preceding 10 years.
    - Evidence of due diligence having been undertaken in relation to the recruitment of officers and crew who will be on the vessel when in the Maritime Zone.
2) Welfare and safety (maximum score 20):
    - The characteristics of the vessel, including her overall age, condition, and (for Subarea 48.4) her ice classification.
    - Evidence of safety protocols and standards, contingency planning, safety training and equipment on board the vessel.
    - Provision of support for welfare and safety of crew on board the vessel, such as medical provision.
    - Evidence of corporate culture and commitment in respect of welfare and safety beyond the confines of the vessel, such as in relation to social responsibility.
3) Raising fishery standards (maximum score 20):
    - Evidence of previous contributions to fisheries science and the raising of fishery standards in SGSSI, in other Convention Areas, and in other fisheries.
    - Proposals for how the operator intends to contribute to the future raising of standards in the SGSSI fisheries in line with the science priorities set out in the management plan.
    - Proposals for scientific research and/or innovation outside of the science priorities in the management plan that will contribute to the management of the fishery or marine environment.
4) Experience (maximum score 20):
    - Operational experience of the operator or charterer, and associated officers and crew, in SGSSI, other Convention areas, and in similar longline fisheries.
    - Demonstration of how experience is being applied to support the successful operation of the vessel and in furthering the objectives of the Government, CCAMLR and similar longline fisheries.
    - Evidence of past catch effectiveness of target species while ensuring minimisation of by-catch.

6. The IFA in my view is comprehensive and adequately sets out sufficient information for applicants to complete their applications for fishing licenses.

7. Applications had to be received by the 10 December 2017. The Applicant submitted its completed application on the 7 December 2017.

The decision letter

8. The Respondent issued his decision letter on 6 February 2018. In that letter he informed the Applicant that he had been unsuccessful . The Director indicted the scores attributed to the Applicant's application. He said that "the application for the Globalpesca I received an overall score of 46.0 out of 80. This comprised a score for each criterion as follows: compliance: 12.9; welfare and safety: 11.0; raising fishery standards: 9.6; and experience: 12.4."

9. On the same day the Applicant's legal representative wrote to the Director complaining that:

    (1) he had raised questions with the Department prior to the closing date for submissions but received no reply which may have adversely affected making a full application for the Toothfish License;

    (2) he alleged the time frame that was originally given for the review process from December 10 to December 22 was insufficient to carry out a proper review of the applications; and

    (3) he alleged that the score of 9.6 out of 20 given to the Appliacnt for raising fishing standards was manifestly inadequate as he was the only applicant to contact SAHFOS and formulate a proposal to work with SAHFOS to raise fishery standards with particular focus on research into micro-plastics.

10. The Director responded in writing on the 13 February 2018 expanding his reasons in response to the Applicant's letter of 6 February 2018. He reiterated that the assessment process was rigorous and comprehensive, and every application was scored using a consistently applied scoring system against each of the four published criteria. That the Director had sought advice from the Secretary of State for Foreign & Commonwealth Affairs concerning any implications for foreign policy. Advice was duly received and, as referred to in paragraph 4.5(iii) of the IFA, the Director acted in accordance with that advice, as he is required to do under the terms of the relevant Ordinance.

11. The letter went on to say:

> Regrettably, of the 12 applications received, the application in respect of the Global Pesca I achieved the lowest score, with one exception. There is only sufficient quota to grant 6 licences. Licences have been awarded in respect of the 5 highest-scoring applications, and to a 6th vessel as

> a result of foreign policy advice. The application in respect of this 6th vessel was the highest-scoring application in respect of a Chilean-fagged vessel. There were two other such applications. Your client's application was the lowest-scoring of those applications.
>
> …
>
> [3] You refer to the detailed and voluminous material submitted by your client in support of its application, and query whether sufficient time was allowed for a proper assessment of it. Mr Jansen did receive a large amount of documentation from your client. There was sufficient time to consider it fully, and it was duly considered in full. You assert that the content of the material was "substantial, cogent and persuasive". However, it was for Mr Jansen to consider and evaluate the material. His own assessment of it was that, in broad summary, it was not as substantial, cogent and persuasive as you suggest, and the scores achieved against the licensing criteria reflect this.
>
> …
>
> [6]You refer to the advice from the Secretary of State regarding foreign policy implications. As explained above, the Secretary of State advised that for foreign policy reasons, one licence should be allocated to the highest-scoring Chilean-flagged vessel.

12. This letter should be seen as an addendum to the decision letter of 6 February 2018. It is just a few days later so there is no possibility of subsequent rationalisation and is in answer to the challenges made in the Applicant's letter of the 6 February 2018.

13. In short, the Applicant's application was the lowest scoring of the three Chilean-flagged vessel applications and to that extent benefited from the Secretary of State's requirement that for foreign policy reasons at least one of the successful ships should be Chilean-flagged. He moved from 11th place to 8th place, but remained unsuccessful as only the first 6 were awarded licenses.

The legal test to set aside leave

14. The legal test for the grant of leave is not really in dispute. Mr Woolgar adopts the classic approach that the court must be satisfied that the grounds are arguable on public law principles. Mr Power seeks to add the nuance that it is enough if it is arguable that the grounds are fit for further investigation. In *R v Secretary of State for the Home Department ex p Begum* [1990] COD 107 the Court of Appeal said on an appeal from the set aside of leave:

> (i) The Judge should grant leave if it is clear that there is a point of fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on law.
>
> (ii) If the Judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

15. Mr Power points out in his written argument that applications to set aside must be clear on the facts and not require evidence from the Respondent. He correctly points out that as McGowan J said in *Begum* "this is a jurisdiction that should be very sparingly exercised".

This is supported by dicta that says "…..legal profession should pause long and hard before making such applications".

16. I accept that the power to set aside should be used sparingly, but it is a power to aid the due administration of justice. It follows if I am satisfied that the grounds disclose no arguable case I should set aside the grant of leave. If I am not so satisfied of course the grant of leave will remain.

Delay

17. The Applicant submits that this application to set aside the grant of leave is made too late. He submits it should have been much earlier given the substantive hearing is now fixed for next month and costs have been involved in preparation for that hearing. In the circumstances the court should not entertain the application to set aside leave. There is force in his submissions.

18. The Respondent indicated as early as 16 May 2018 that having read the papers he would be applying to set aside the grant of leave. No application to set aside leave was made until the 27 September 2018. However, the Respondent says the delay should be seen only from 10 August 2018 when I granted the Applicant's summons to extend time for service of the notice of motion to 26 June 2018. He submits that until the service point was settled he did not want to expend time and resources on the set aside application.

19. I disagree. The Respondent should have made the application to set aside more timeously. There was no good reason for not making it at the same time as the applications dealing with service. The Respondent was in a position to make the set aside application and should have done so. However, I am not persuaded that in the circumstances mere delay should result in the dismissal of this summons. I have heard full argument and it would not be productive to 'punish' the Respondent simply because of a failure to make a timely application by not adjudicating on the application. The matter may adequately be reflected in any decision on costs.

The Grounds

20. The Applicant advances 12 or 13 grounds of challenge. There is some overlap but I will follow the grounds in the number and order I have noted them for clarity of decision.

Ground 1

21. The Applicant's first ground is in paragraph 5) i. of the Applicant's Form 86A. It reads: "*The Director of Fisheries unlawfully failed to consult on the changes to the applicable decision-making procedures for the 2018-2021 season. This should have taken place during the Annex B examination and investigation, which instead was supposedly conducted in a mere 9 days for all the applications*."

22. The changes complained of are not particularised in the grounds or in the affidavit of Mr Street for the Applicant. The AG in his affidavit served in support of the set aside application states in terms that there were no such changes: "GSGSSI's decision-making procedures for the 2018-2021 season were no different from those that were followed the last time GSGSSI ran a toothfish licensing competition, which was in December 2015". At the leave stage the court may have presumed that there had been changes and a failure to consult. In the light of the evidence of the AG it is clear this is not the case. Therefore, this ground is not arguable.

Grounds 2 & 9

23. The Applicant's second ground is in paragraph 5) ii. 1) of the Form 86A. It reads: "[The decision] *Was unlawful in so far as the Director misapplied the advice given to him by the Secretary of State forward [sic] and failed to take proper account of this advice. This point may be developed or fall away upon receipt of disclosure."*

24. At ground 9 the Applicant said that there was the imposition of a new policy by a secondary decision maker, namely the Secretary of State, and that there were therefore two decision makers.

25. It seems to me these grounds are somewhat mutually exclusive. Either there was a failure to take account of the Secretary of State' advice, or alternatively there were two decision makers with the Secretary of State making the wrong decsion.

26. Mr Woolgar submits that the legal position is quite clear. There is but one decision maker, however, by primary legislation the Director shall take into account foreign policy advice given to him by the Secretary of State. This I accept is correct. By section 5(10A) of the Fisheries (Conservation and Management) Ordinance 2000, before licensing any vessel the Respondent was obliged to consult the Secretary of State on whether there would be any implications for foreign policy and he was obliged to act in accordance with the advice that he received. The provision reads:

> "Notwithstanding any direction by the Commissioner under section 4(2), the Director of Fisheries, shall before issuing, varying suspending or revoking a license under any provision of this Ordinance, consult the Secretary of State on whether there would be any implications for foreign policy and shall act in accordance with such advice as he may receive form the Secretary of State." [Emphasis added]

27. This provision was added into the Ordinance consequential upon the decision of the House of Lords in *Regina v. Secretary of State for Foreign and Commonwealth Affairs (Appellant) ex parte Quark Fishing Limited* [2005] UKHL 57 which quashed the Secretary of State's direction in that case.

28. The Ordinance as amended is primary legislation and therefore this court has no jurisdiction to consider it other than if a constitutional motion were before it alleging that the provision was unconstitutional. In oral argument Mr Power accepted there was no challenge to the Ordinance and accordingly the Director was bound to accept the foreign policy advice of the Secretary of State.

29. We have seen from the letter of 13 February 2018 the gist of the advice given by the Secretary of State, namely that at least one Chilean-flagged vessel should be granted a licence. There are not two decision makers, only one, the Director of Fisheries. Moreover, it is clear he followed the Secretary of State's advice. In fact the Applicant benefitted from this advice. There is no arguable ground of review here.

Ground 3

30. The next ground is in paragraph 5) ii. 2) of the Form 86A. It reads: *"Breached the Applicant's legitimate expectation due account will be taken of this nationality & benefit to the United Kingdom".*

31. This ground takes account of paragraph [4.8] of the IFA. The paragraph reads:

> "The Director reserves the right to give preference in the granting of licences to vessels that are flagged to the United Kingdom or to the Overseas Territories of the UK (UKOTs)."

32. For a legitimate expectation to arise there must be a promise or adopted practice by the public authority. It is founded on a reasonable expectation that the citizen will be dealt with in a particular way. A procedural legitimate expectation requires a clear and unambiguous representation made by a person with ostensible authority to make it. See Stuart-Smith LJ in *R v Devon CC ex parte Baker* [1995] 1 All ER 73 at 88d.

33. This statement at [4.8] of the IFA is only a reservation that the Director makes. It does not create a legitimate expectation. Moreover, the representation is not engaged by the

Applicant in this case as his vessel is Chilean-flagged and there is no indication on the papers before me that the Director did exercise the right he reserved. This ground is not arguable.

Ground 4

34. The fifth ground is in paragraph 5) ii. 3) of the Applicant's Form 86A. It reads: "*Was unreasonable in so far as the Director did not give reasons in the decision for the awarding of points based on the criterion set out in the Information for Applicants – Annex B included".*

35. Whilst this is a mixture of a reasons and an irrationality challenge I take it to mean at its heart the complaint by the Applicant is that he does not know the scoring method used by the Director in each category. Mr Woolgar says it is not necessary for the Director to set out in every detail how he awards weight in each category to achieve the score he awards. It is a matter of judgement for the decision maker.

36. Mr Power says it is in the interests of transparency and fairness that the Director set out in detail his methodology in awarding scores.

37. A public official does not have to give every detail of his methodology when giving reasons. What is required is a recital of the relevant findings the Respondent took into account, reference to the evidence or information on which those findings were made, and the reasons why the Respondent was satisfied on those findings. This was done in this case and more to the extent the scores were given. It is not the function of a public law challenge for the court to take the decision again. The legislation empowers the director to give such weight as he thinks fit, within the bounds of rationality, to the categories he has set out in the IFA. He has done that and set out adequate reasons. This ground is also unarguable.

Ground 5 to 6

38. The Applicant complains that the scores given to the Applicant were too low in each category. Mr Woolgar points out that only the score in relation to fishing standards was raised in the Applicant's letter of 6 February 2018 and therefore only that category was comprehensively dealt with in the addendum decision letter of 13 February 2018. There is force in that point. This is really another way of putting the above ground and again

there is no material before me that starts to show the Director acted unreasonably in giving the scores he did.

39. The fact he took 9 working days to consider complex information is to my mind not information on which a safe inference could ever be made that the Director did not consider carefully or considered irrationally the material before him in the application. The application was made on the 7 December 12018 and the decision letter given on the 6 February 2018. The Director stated in his letter of the 13 February 2018 that he carefully considered all the material. There is no reason to doubt he is telling the truth. Again these grounds are not arguable.

Ground 7

40. The seventh ground is in paragraph 5) ii. 8) of the Applicant's Form 86A. It reads: *"Was based on a mistake of facts placed or omitted before the decision maker by the other applicants"*. The Form 86A does not identify the erroneous facts which other applicants are alleged to have included in their licence applications, or which they are alleged to have communicated by other means to the Respondent. It does not explain how the Respondent is supposed to have discovered the erroneous nature of the facts, nor does it say what he should have done differently having discovered their erroneous nature.

41. In the absence of material to support this assertion it is clear this ground is also unarguable.

Ground 8

42. The eighth ground is in paragraph 5) ii. 9) of the Applicant's Form 86A. It reads: "There was bias in the awarding of 4 licences to companies all controlled by one entity".

43. This is a very strong allegation to make and should only be made if supported by cogent evidence. The evidence that the Applicant says shows bias is that four of the six licences were awarded to companies owned or controlled by Ervik Havfiske and that this fact alone suggests that the process that has been undertaken does not appear to be a fair or impartial process but one that was biased.

44. That is a hopeless argument. The fact that one person scores the most points with four of his vessels is nothing to the point of supporting an allegation of bias. The AG in his affidavit says in relation to this point:

> [42] ..If this assertion were correctly made, then it would be impossible ever to award licences to four vessels operated by one company, or owned by one company, without each award being open

> to challenge by way of judicial review on the grounds of the appearance of bias. In an open competition in which every application is scored individually against published criteria, and in which applications are made, among others, in respect of four vessels owned and/or operated by one company, there is nothing inherently suggestive of bias if, in the result, four of the six available licences are awarded to those four vessels.

45. I agree with that statement of principle. However, the Applicant also states that Respondent met employees of Ervik Havfiske at a meeting of the British Antarctic Survey Marine Protected Area Cambridge Working group and that Ervik Havfiske had a "favourable relationship with GSGSSI". This, without more, cannot support an allegation of actual bias.

46. The question when considering an allegation of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased (*Porter v Magill* [2002] 2 AC 357, paragraph 103 *per* Lord Hope). In this context, bias means partiality or prejudice which prevents the decision-maker from making an objective determination of the issues that have to be resolved (*Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, paragraphs 37-38 *per* Lord Phillips MR).

47. The qualities to be attributed to the fair-minded and informed observer are not in dispute and are well-known. The fair-minded observer does not take the complainant's view but an objective view (*Porter v Magill*, paragraph 104 *per* Lord Hope). He or she takes a balanced approach and always reserves judgment on every point until he or she has seen and fully understood both sides of the argument (*Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, paragraph 2 *per* Lord Hope). The fair-minded observer is not unduly sensitive or suspicious, but neither is he or she naïve or complacent (*Helow*, paragraph 2 *per* Lord Hope; *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, paragraph 17 *per* Lord Hope, paragraph 39 *per* Baroness Hale). The fair-minded observer is not an insider (e.g. a member of a decision-making body) (*Gillies*, paragraph 39 *per* Baroness Hale). He or she is able to distinguish between what is relevant and irrelevant and is able, when exercising his or her judgement, to decide what weight should be given to the facts that are relevant (*Gillies*, paragraph 17 *per* Lord Hope). The informed observer has access to all the facts that are capable of being known to the public generally (*Gillies*, paragraph 17).

48. I have no doubt that the simple fact that the Respondent met employees of Ervik Havfiske at a meeting of the British Antarctic Survey Marine Protected Area Cambridge Working

group cannot begin to make the fair-minded and informed observer conclude that there was a real possibility that the decision-maker was biased. It follows this ground on bias is not arguable.

Ground 10

49. This challenge by the Applicant concerns the fact he requested guidance and consultation before the submission of his application. It does not allege, as Mr Woolgar points out any error of public law.

50. However, the request was by the Applicant to the Secretary of State for guidance on 'flag' state preference. It has nothing to do with the present Respondent. Factually there is some dispute as to whether advice or guidance was given or replies made to Mr Street by the FCO, but so far as this application is concerned Mr Woolgar is right to say this has nothing to do with the Director. Accordingly, this ground is not arguable.

Grounds 11 to 12

51. These grounds are in effect sweep up grounds in that it is alleged there was a failure to give proper consideration to the Applicant's application and it was irrational to make the decision he did.

52. It is clear from the foregoing I am satisfied there is no arguable public law challenge that the Respondent failed to give proper consideration to the Applicant's application. The threshold for an irrationality challenge is a high one. Under the irrationality challenge it appears the Applicant attacks the decision to award a licence to *Antartic Bay*. The AG in his affidavit in support of this application states:

> [66] …Mr Street attacks the decision to award a licence to the Antarctic Bay. This ground suffers, therefore, from the same problem as Ground 8: it is an attack not upon the decision to refuse a licence to the Global Pesca I, but upon another decision for which the Applicant has neither sought nor obtained leave.
>
> In paragraph 95 of his affidavit, Mr Street says that there appears to be "a concerning level of irrationality in the selection of the Antarctic Bay". The suggestion that the Respondent acted irrationally in awarding a licence to the Antarctic Bay appears to rest on three assertions:
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> > The Antarctic Bay was formerly owned by Pesca Chile, a Chilean subsidiary of Pescanova, a Spanish company; among Pescanova's many subsidiaries was an Argentinian subsidiary called Argenova; at some point she was acquired by Antarctic Sea Fisheries SA; and until 2015 or 2016 Antarctic Sea Fisheries SA was "ultimately owned by Pescanova".
> >
> > Antarctic Sea Fisheries SA is now "100% indirectly owned" by a Uruguayan national named Ignacio Arocenu.
> >
> > Mr Arocenu "has no experience running a vessel".

53. The threshold for an accusation of irrationality is very high, and these assertions do not raise an arguable case of irrationality. The fact that the Antarctic Bay, until 2015 or 2016, might have been owned by a company which belonged to a group of companies among which was a company incorporated in Argentina self-evidently does not make the Respondent's decision in 2018 to award the vessel with a licence irrational. The fact that her owner is now indirectly owned itself by a Uruguayan national self-evidently does not render the Respondent's decision irrational. And the fact that her ultimate owner is said to have no experience running a vessel cannot, even if true, be said to have rendered the Respondent's decision irrational. Mr Street has taken no account of the identity and experience of the vessel's operators and/or charterers.

54. I agree that the decision to award a licence to *Antartic Bay* is not under challenge in these proceedings. In any event the three points the Applicant makes in support of his irrationality ground do not start to have traction. The margin of appreciation given to the decision maker is wide. Even if the court disagrees with the decision of the Director a public law challenge would not lie unless it was a decision no reasonable Director of Fisheries could make. This is not the case here. Again, this ground is not arguable.

Conclusions

55. Mr Power for the Applicant puts a request for discovery and a request for details of the methodology of the Director in awarding the scores on the applications before him at the front of his challenge. The purpose of judicial review is not to embark on discovery to see if there are any discernable public law challenges that arise from discovery. Mr Woolgar told me in open court the Respondent was well aware of his duty of candour and that it had been complied with.

56. I have carefully scrutinised if this matter should proceed to a full hearing. In the light of the oral submissions and the affidavit of the AG I have now come to the clear conclusion that the grounds advanced are unarguable. The application to set aside leave is granted and I vacate the fixture for the hearing in Stanley at the end of November 2018.