IN THE SUPREME COURT OF THE FALKLAND ISLANDS **SC/CIV/8/06**

BEFORE HIS HONOUR JUDGE HICKINBOTTOM

SITTING AS AN ACTING JUDGE OF THE SUPREME COURT

THE QUEEN

(on the application of ISLA ALEGRANZA SA)

Applicant

-and-

THE DIRECTOR OF FISHERIES

OF THE GOVERNMENT OF SOUTH GEORGIA

AND THE SOUTH SANDWICH ISLANDS

Respondent

APPROVED JUDGMENT

18 DECEMBER 2006

FERGUS RANDOLPH of Counsel (instructed by Thomas Cooper & Stubbard and Kilmartin Marlor) appeared for the Applicant.

DERMOT WOOLGAR of Counsel (instructed by the Attorney General of South Georgia and the South Sandwich Islands) appeared for the Respondent.

THE SUPREME COURT, THE TOWN HALL, ROSS ROAD, STANLEY,

FALKLAND ISLANDS

Introduction

1. In this action the Applicant Isla Alegranza SA seeks judicial review of a decision of the Director of Fisheries of the Government of South Georgia and the South Sandwich Islands ("the Director") made on 6 March 2006 not to award the Isla Alegranza (a motor fishing vessel owned or chartered by the Applicant) a licence to fish for toothfish in the waters of South Georgia and the South Sandwich Islands ("SGSSI") in the 2006 season. It is brought with the leave of Wood CJ given on 22 August 2006.

2. The Applicant relied upon a short affidavit of Stephen John Swabey sworn 1 August 2006, which confirmed the factual contents of the application. On 6 November, the Respondent served and filed two affidavits in response: one sworn that day by Gordon Malcolm Liddle (the Government of SGSSI's Operations Manager), and the second an affidavit of the Director herself (Harriet Hall) signed on 4 November 2006. The Director was out of the jurisdiction at the relevant time, and later swore the affidavit in identical form. On 10 November, the Applicant filed and served a further affidavit of Mr Swabey sworn that day. An application for permission to rely upon this affidavit was made at the hearing itself (see Paragraphs 58 and following below). In response, further affidavits of the Director and Mr Liddle were prepared and filed on 20 November. In this judgment, I shall refer to these affidavits as simply Mr Swabey's, Miss Hall's and Mr Liddle's First and Second Affidavits respectively.

3. This is the second recent refusal of a fishing licence by the Government of SGSSI to be the subject of judicial review proceedings. The Director's decision to refuse a licence to the MFV Jacqueline in 2001 was the subject of three sets of proceedings, namely:

(i) judicial review of the Director's refusal of the licence, issued in the Supreme Court of the Falkland Islands: R (Quark Fishing Ltd) v The Director of Fisheries of South Georgia and the South Sandwich Islands (Wood CJ, Unreported, 8 June 2001):

(ii) judicial review of the Secretary of State's later direction to the Director to refuse the licence, issued in the High Court of Justice of England & Wales: R (Quark Fishing Ltd) v The Secretary of State for Foreign and Commonwealth Affairs (Scott Baker J ([2001] EWHC Admin 1174); and the Court of Appeal (Aldous, Laws and Jonathan Parker LJJ) ([2002] EWCA Civ 1409): and

(iii) a claim for damages against the Secretary of State, also issued in the High Court of Justice of England & Wales: R (Quark Fishing Ltd) v The Secretary of State for Foreign and Commonwealth Affairs (Andrew Collins J ([2003] EWHC Admin 1743); the Court of Appeal (Pill, Thomas and Jacob LJJ) ([2004] EWCA Civ 527); and the House of Lords ([2005] UKHL 57).

For ease of reference, in this judgment I shall refer to these three pieces of litigation as Quark No 1, Quark No 2, and Quark No 3 respectively.

The Relevant Statutory Provisions etc: Introduction

4. SGSSI lies between approximately 1,400 and 2,400 kms south-east of the Falkland Islands, close to the Antarctic Circle and within the waters of Scotia Sea. On any view, these islands are remote and inhospitable. They have no indigenous population, being inhabited by a transient population of about a dozen mainly scientists.

5. SGSSI was acquired by the Crown by way of settlement, her government being established under the British Settlements Acts 1887 and 1945. Before 1985, she was a British Dependent Territory and a Dependency of the Falkland Islands: but, after the Falklands Conflict, there was further consideration of her status and, on 18 April 1985, by virtue of Section 1 of the Falklands Order 1985 and Section 3 of the South Georgia and South Sandwich Islands Order 1985 (SI 1985 No 449, "the 1985 Order"), SGSSI became a discrete British Dependent Territory later becoming a British Overseas

Territory under the British Overseas Territory Act 2002. As such she is a separate legal entity - a discrete country - in respect of which Her Majesty the Queen is Sovereign, and which is responsible for her own internal government. However, because of her status as an Dependent and later Overseas Territory, the United Kingdom has been and is responsible for her external affairs and her international and diplomatic relations, including responsibility for ensuring that SGSSI complies with any international obligations which apply to her. The government of SGSSI therefore has two albeit interrelated aspects - that concerning her internal affairs (subject to local government) and that relating to her external affairs (subject to government from the United Kingdom).

The Relevant Statutory Provisions etc: Internal Government

6. The constitution of SGSSI is effectively contained in the 1985 Order as amended. Section 4 provides for the government to be in the hands of a Commissioner (or Acting Commissioner, when the post of Governor is vacant) appointed by and acting on behalf of Her Majesty the Queen. In practice, the Governor of the Falkland Islands from time to time has been appointed Commissioner

7. The Commissioner's powers are set out in Section 5, and are to be executed "according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State". Section 7 gives the Commissioner the power to "constitute such offices for the territories as may lawfully be constituted by Her Majesty and… subject to such instructions as may from time to time be given to him by Her Majesty through a Secretary of State, the Commissioner may likewise:

> (a) make appointments, to be held during Her Majesty's pleasure, to any office so constituted."

Section 9 empowers the Commissioner "to make laws for the peace, order and good government of the territories". Wide-ranging as these powers may be, in matters where

there is an international perspective their exercise is curtailed - the Commissioner's exercise of his powers in these circumstances being subject to instructions from the United Kingdom Government usually in the form of a Secretary of State.

8. On 7 May 1993, by Proclamation No 1 of that year, the Commissioner declared there to be a 200 nautical mile maritime zone around SGSSI, over which the Government of SGSSI has exclusive jurisdiction in respect of fisheries. Such zones are governed as to public international law by the United Nations Convention on the Law of the Sea, Article 62(1) of which provides that the coastal state shall promote the objective of optimum utilisation of the living resources in the zone and Article 62(2) that the coastal state shall determine its capacity to harvest the living resources of the zone. The regulation of fishing in the zone around SGSSI is therefore a matter for the Government of SGSSI, subject to interrelated international obligations with which I deal below (see Paragraphs 12 and following).

9. So far as domestic provisions are concerned, in 2000 the Acting Commissioner (acting under Section 9 of the 1985 Order) made the Fisheries (Conservation and Management) Ordinance 2000 (No 2 of 2000, "the Fisheries Ordinance"), which came into force on 1 January 2001. It repealed and replaced the Fisheries (Conservation and Management) Ordinance 1993 (No 3 of 1993), which for the purposes of this application was in exactly similar terms. Section 4 requires the Commissioner to appoint a Director of Fisheries ("the Director"), who amongst other things is responsible for "the issue, variation, suspension and revocation of licences for fishing and fishing-related operations" (Section 4(1)(f)): and also for "the conservation of fish", and "the development and management of fisheries" (Section 4(1)(a) and (c)). By Section 4(5), in performing these functions, the Director has to have regard to international obligations, notably "the provisions of Convention for the Conservation of Antarctic Marine Living Resources as amended from time to time, which includes… any decision or measure which is for the time being in force adopted pursuant to that Convention by the Commission to that Convention but the question as to whether [the Director]… has done

so in any particular instance shall not be enquired into in any court". I shall return to the provisions of this Convention shortly (see Paragraphs 12 and following below).

10. By Section 5 of the Fisheries Ordinance, the Commissioner is enabled by Order to provide that fishing is prohibited in any designated waters unless it is authorised by a licence granted by the Director. Section 5(7) enables such a licence to be subject to conditions. Section 5(9) provides:

> "The licencing powers conferred by this section may be exercised so as to limit the number of fishing boats, or any class of fishing boats, engaged in fishing in any area, or fishing in any area for any description of fish in any manner which appears to [the Director] to be expedient or necessary for the regulation of fishing."

By Section 5(4), a fee may be authorised in respect of any licence. It is a decision of the Director under these powers - not to grant a licence to the Applicant's vessel - that is challenged in this application.

11. By virtue of Section 5(10A) of the Fisheries Ordinance, before issuing any fishing licence, the Director must consult the United Kingdom Government 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 from the Secretary of State". This is because fishing in the region has international and diplomatic aspects which, for the reasons I have given, are the province of United Kingdom Government. It is to those I now turn.

The Relevant Statutory Provisions etc: International Obligations

12. As a matter of international relations, fishing in the Antarctic and sub-Antarctic waters is regulated by the Convention on the Conservation of Antarctic Marine Living Resources made in Canberra on 20 May 1980 as amended from time to time ("CCAMLR"). It forms part of a complex of international treaties, conventions and other agreements relating to the Antarctic (including the Southern Ocean) commencing with

the Antarctic Treaty signed in Washington in 1959, which comprise what is known as the Antarctic Treaty System. CCAMLR seeks to address sensitive ecological issues in the context of equally sensitive diplomatic issues, several areas within the geographical scope of the Convention being the subject of territorial claims by more than one country. SGSSI itself is the subject of such a claim by Argentina.

13. CCAMLR was established in response to particular concerns about the stability of the krill population - krill being the staple food of many marine species, and consequently an essential lynchpin of the food web and ecosystem of the Southern Ocean - and also to address the threat of exploitation of fin fish in these seas. It was adopted in May 1980, coming into force two years later. Its Secretariat is based in Hobart, Tasmania, where every year in October/November its executive arm (the CCAMLR Commission, comprising 23 states including the United Kingdom together with the European Union) meets. The annual meeting reviews and imposes conservation measures, to which I will refer in more detail shortly. The Commission is assisted by a Scientific Committee, provided for by the Convention itself. It is for member states to implement CCAMLR measures: states are legally responsible for and have jurisdiction over their own flagged ships as well as all vessels (whatever flag) in any exclusive maritime zone for which they are responsible. SGSSI is not a signatory to CCAMLR but, as the United Kingdom is a signatory and is responsible for international relations in respect of SGSSI, the United Kingdom Government is responsible for ensuring that SGSSI complies with convention obligations in respect of the SGSSI maritime exclusion zone.

14. Article II of CCAMLR sets out the objectives and principles on which the Commission is run, as follows:

> (1) The objective of this Convention is the conservation of Antarctic marine living resources.
>
> (2) For the purposes of this Convention, the term "conservation" includes rational use.

(3) Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:

(a) prevention of decrease in the size of any harvested population to the levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest annual increment;

(b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above; and

(c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking account of the available knowledge of the direct and indirect impact of harvesting… with the aim of making possible the sustained conservation of Antarctic marine living resources."

15. The fourth recital to the Convention indicates that "it is essential to increase knowledge of the Antarctic ecosystem and its components so as to be able to base decisions on harvesting on sound scientific information".

16. CCAMLR therefore recognises (i) that harvesting of living resources is not incompatible with conservation - indeed, "conservation" by definition includes "rational use": and (ii) the importance of increasing knowledge to enable properly informed decisions with regard to such harvesting to be made.

17. Article IX provides:

"(1) The function of the Commission shall be to give effect to the objective and principles set out in Article II of this Convention. To this end, it shall:

…

(f) formulate, adopt and revise conservation measures on the basis of the best scientific evidence available…

(2) The conservation measures referred to in paragraph 1(f) above include the following:

(a) the designation of the quantity of any species which may be harvested in the area to which the Convention applies;
(b) the designation of regions and sub-regions…;
(c) the designation of the quantity which may be harvested from the populations of regions and sub-regions;
(d) the designation of protected species;
(e) …
(f) the designation of open and closed seasons for harvesting;
(g) …
(h) …
(i) the taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations."

18. At its annual meetings, the Commission adopts conservation measures pursuant to these provisions, taking account of advice from the Scientific Committee. These include imposing conditions as to (e.g.) the opening and closing of fishing seasons, fishing gear,

and a limit on the quantity that may be taken of any particular species in any defined fishery in the forthcoming season (the total allowable catch, or "TAC"). In uncontentious evidence, the Director said (Miss Hall's First Affidavit, Paragraph 10):

> "The Commission and its Scientific Committee were pioneers in the development of what has become known as the "ecosystem approach" to the regulation of fisheries. This approach means that, when considering how to regulate the harvesting of a particular species of fish in a particular area, account is taken of the impact that such harvesting is likely to have not only on the species fished, but also on dependent and related species of fish and other animals in the Antarctic marine ecosystem. Assessments of the Antarctic marine ecosystem, its status and health, are thus required. Marine ecosystems are highly complex, and the science involved is in turn complex and difficult, and sometimes uncertain because of the limits of scientific knowledge and understanding."

19. Subject to a period of grace (irrelevant for the purposes of this application), measures thus adopted by the Commission are binding on members. For the reasons given above, the United Kingdom is bound to enforce such measures in the SGSSI 200 mile maritime zone.

20. To assist with enforcement, CCAMLR provides for systems of observation and inspection on board vessels, the purpose of which is at least in part to verify compliance with the adopted conservation measures. Within the SGSSI maritime zone, these systems are financed by the Government of SGSSI which in addition carries out patrols and surveillance throughout the zone by way of a patrol vessel. The costs of these essential checks are borne by the Government, out of income derived from fishing licences. This again reflects that, far from harvesting being inconsistent with conservation, the latter is dependent on the former. If fin fish were overfished, that would have a devastating knock-on effect on the whole ecosystem of the region. Given the value of these fish (toothfish being called "white gold" by some in the fishing fraternity), the only way of conserving the marine ecosystem of the Southern Ocean is to allow fishing, ensuring that

all fishing that takes place is responsible and strictly regulated, and that monies generated by licencing such fishing are used to prevent irresponsible fishing (that might result in upsetting the relevant ecosystem) taking place.

21. CCAMLR's area of application is divided into areas and sub-areas. SGSSI falls within Area 48 (South Atlantic): and the sub-area with which this application is particularly concerned is Sub-Area 48.3 (South Georgia).

The Relevant Statutory Provisions etc: Interplay between Domestic and International Elements

22. How do these domestic SGSSI and international elements work together in practice?

23. In granting licences, the United Kingdom has a clear legitimate interest, in its role in respect of SGSSI's external affairs. As the Director put it (Miss Hall's First Affidavit, Paragraph 17):

> "There is significant international interest in the licencing and operation of the SGSSI fisheries. A number of CCAMLR State contracting parties watch the licencing and operation of the fishery closely. The applicants for our licences are usually resident or domiciled in CCAMLR States, and their vessels must be flagged in CCAMLR States. CCAMLR States take a keen interest in whether their applicants and their vessels are awarded licences. There is an obvious risk that a CCAMLR State may take umbrage if it considers that it has been treated unfairly. The degree of sensitivity shown by CCAMLR States varies from State to State, and from year to year, and can easily be influenced by bilateral or international issues which may be only tangentially related, or even quite unrelated, to CCAMLR matters. If the award of licences is insensitive to these matters, the consequences and ramifications can be serious indeed. For example, it may be more difficult to obtain consensus in the negotiations that take place at Commission meetings, such

as the negotiations that take place every year to fix the TAC for toothfish for Sub-Area 48.3. This could imperil the toothfish fishery, and hence the prosperity of SGSSI, which is a matter not only of direct concern to SGSSI, but also to [the United Kingdom Government] too. Disharmony among CCAMLR States could disrupt the proper operation of CCAMLR, even to the extent of causing the collapse of the cooperative system on which it depends, which would serve the interests of both SGSSI and the UK very poorly indeed. Argentina asserts sovereignty in respect of both SGSSI and the Falkland Islands, and there is the risk of it exploiting any sense of grievance that CCAMLR States might nurse towards SGSSI and the UK, not only so as to frustrate the UK's objectives within the CCAMLR regime, but also so as to advance its assertions of sovereignty. These examples are intended only as a flavour of the sorts of difficulties which might be encountered. In short, the award of licences is a matter of international concern, with international implications, and which calls for diplomatic sensitivity. Accordingly, the Government of SGSSI takes, and follows, the advice of [the Foreign and Commonwealth Office] in London before awarding any licences…"

24. Therefore, once the CCAMLR Commission has fixed the TAC for Sub-Area 48.3 for the following season, the Director decides upon the number of licences she is minded to grant in respect of that potential catch. Whilst a greater number of licences allows more flexibility, it is vital that the catch allowed by each individual licence is sufficient to make the licence commercially viable for the operator.

25. Once the number or range of numbers has been ascertained by the Director, she seeks advice from the United Kingdom Government under Section 5(10A) of the Fisheries Ordinance, in practice given in the form of a letter from Dr Mike Richardson who is Head of the Polar Regions Unit of the Overseas Territories Department of the Foreign and Commonwealth Office, Head of the United Kingdom Delegations to Antarctic Treaty Consultative Meetings and the United Kingdom Permanent Representative to the CCAMLR Commission. Before me, it is common ground that:

(i) The functions of the Secretary of State under Section 5(10A) may be properly delegated to a permanent official (such as Dr Richardson) to exercise on his behalf (see Carltona Ltd v Commissioner for Works [1943] 2 All ER 560 at page 563: and Quark No 1 (Wood CJ, 8 June 2001, Transcript pages 33-4).

(ii) By virtue of Section 5(10A), unless the advice given is itself unlawful, the Director is bound to follow it.

26. On the evidence before me, it appears that the advice from Dr Richardson is usually in the form of the number of ships registered or flagged in each CCAMLR state that ought to be given a licence. That was certainly the form of the advice in respect of the 2005 and 2006 fishing seasons.

27. Otherwise, applications are dealt with by the Director in accordance with a written "Fisheries Licencing Policy" and certain other provisions which feature in the letter sent out to all applicants with the application form and policy document. The Fisheries Licencing Policy provides as follows (in the document itself the paragraphs are not numbered, but I number them here for ease of reference in this judgment):

"(1) The principal objective of the fisheries regime within the maritime zone of [SGSSI] is to regulate fishing in such a way so as to conserve fish stocks and other marine living resources in line with Article II of [CCAMLR] and to maintain a sustainable fishery….

(3) In respect of each fishing season, the Director will determine the number of licences to be made available. The number of licences may vary from one year to the next.

(4) Licence applications will be considered according to the procedure and criteria set out herein. Applications will only be considered if they comply with the

procedure set out herein. Licences will only be granted in respect of applications which satisfy the criteria set out herein.

(5) Applicants must also provide any further information or other assistance as the director may reasonably require. In the absence of any such further information or assistance the Director shall be entitled to disregard the application….

(7) Applications for licences from operators to fish in the maritime zone will only be considered if they meet the conditions set out in the accompanying documents.

(8) [The Government of SGSSI] will not licence vessels which have been involved in [Illegal Unreported and Unregulated] ("IUU") fishing, or vessels operated by a company which is, or has been, involved in IUU fishing. As part of the assessment process [the Government of SGSSI] may consider and take into account, inter alia, data provided by CCAMLR, or its Contracting Parties, including, but not limited to, the list of vessels involved in IUU fishing agreed by the Commission.

(9) The Government of SGSSI will also take into account the compliance record of the vessel and operator as measured by published CCAMLR tables, CCAMLR scientific observer reports, CCAMLR inspection reports, and any other relevant information. Operators will be given an opportunity to comment where [the Government of SGSSI] is minded to refuse a licence application on the grounds of compliance record of the vessel and/or its operator.

(10) [The Government of SGSSI] will also take into account the following criteria in deciding the allocation of licences:

the historical involvement of the operator in the fishery

the degree to which the operator has been engaged in relevant fisheries research within the maritime zone

the degree to which the operator proposes to engage actively in new or experimental methods of fishing or mitigation methods during the season

(11) **The onus is on the applicant to satisfy the Director that each of the relevant criteria is met** [emphasis in the original]**.** In the absence of sufficient evidence in relation to any particular criterion, the Director will be disposed to regard it as not having been met.

(12) The Government of SGSSI reserves the right to give preferences in the allocation of licences to UK and UKOT [i.e. United Kingdom Overseas Territory]-flagged vessels. In deciding the degree of preference to be given to UK and UKOT-flagged vessels, and in allocating licences to non-UK or non-UKOT-flagged vessels, the Government of SGSSI will also take into account any considerations of foreign policy communicated to it by the Secretary of State.

(13) In granting a licence, the Director may impose such conditions as she considers expedient for the purpose of promoting the principal objective."

28. In the covering letter for the 2006 season, it was provided that:

(i) Applications could be made to fish by either long-line or pot (Paragraph 3(a)).

(ii) There would be a seasonal restriction on long-line fishing of 1 May to 31 August: but no such restriction on pot fishing (Paragraph 5).

(iii) For vessels which fished on SGSSI waters in 2005, Vessel Monitoring System records had to be submitted for that season in SGSSI waters: for other vessels, such records had to be provided for the whole period from 1 January 2005 (Paragraph 12).

(iv) All vessels were required to submit all catch records for the 2004 and 2005 seasons from Sub-Area 48.3 (Additional Information Paragraph (a)).

Patagonian Toothfish

29. SGSSI is part of a broken ridge called the Scotia Arc formed at the edge of two tectonic plates, which extends from the tip of South America into the South Atlantic before curving back again to the Antarctic Peninsula. The ridge is surrounded by very deep water of up to 5,000m in depth. These geological features - coupled with the extremely dynamic oceanography of the region, which results from the Antarctic Circumpolar Current being constricted through the narrow gap between the southern tip of Southern America and the Antarctic Peninsula (Drake's Passage) - mean that, although the islands themselves are inhospitable for all but the most doughty of scientists, the ecosystems around SGSSI are uniquely abundant in some types of marine life, including the fish *Dissostichus eleginoides* commonly known as the Patagonian toothfish.

30. Toothfish are (as the name suggests) fierce- and frankly unattractive-looking sea beasts, which can grow to over 2m long. However, because of their consumer potential (especially in the Japanese market), they are commercially very attractive and valuable, selling on quay for up to US$17,500 per tonne: being sold as "mero" in Japan, as "Chilean sea bass" in the United States and as "merluza negra" (literally "black hake") in Argentina and Uruguay. They are long-lived and benthopelagic, i.e. they live close to the sea floor. They are traditionally caught by the use of long-lines (of up to 13km) and baited hooks, although there have been attempts to fish using pots to which I shall return in due course.

31. Long-line fishing has a number of potential adverse ecological consequences. For example, sea birds are attracted to the baited hooks as they float in the water during setting, and can become caught and dragged down with the hooks when they are sunk. For this reason, the long-line season is restricted (by CCAMLR) to 1 May to 31 August, i.e. the austral winter when birds are unlikely to be in the vicinity of the South Georgia

fishing grounds. CCAMLR also requires other steps to be taken to mitigate bird by-catch, e.g. requiring lines to be set at night only, prohibiting the dumping of offal while long-lines are operational and requiring the use of a streamer line to deter birds.

32. Toothfish fishing in the 200 mile maritime zone around SGSSI is the subject of strict licencing administered by the Government of SGSSI in accordance with the Fisheries Ordinance (see Paragraphs 9-11). Because the black market price is not much less than the on-quay price of fish caught under licence, IUU fishing is a major national and international concern. In addition to national enforcement within maritime zones of coastal states, operators fishing legally also publicise vessels believed to be involved in IUU fishing. Amongst other means, this they do through various cooperative ventures such as "the Coalition of Legal Toothfish Operators" ("COLTO").

The Isla Alegranza 2005 Licence Application

33. The Isla Alegranza is a Uruguayan-flagged vessel, the main activity of which is to fish for toothfish. It had the benefit of a licence and fished in SGSSI waters annually from 2001. This case concerns the failure of the Applicant's application for a licence for the 2006 season. However, the previous year the Applicant made an (unsuccessful) application in respect of the Isla Alegranza, to which I should briefly refer.

34. The vessel was granted a licence for each of the four years to 2004. On 7 January 2005, the SGSSI Government sent out an invitation to the Applicant in respect of a licence for the 2005 season, and an application was made for a licence to fish for 500 tonnes.

35. The TAC is fixed by the CCAMLR Commission in its meeting in the November before the annual season, in accordance with advice received from its Scientific Committee (see Paragraphs 17-18 above). However, at the November 2004 meeting, there were difficulties (as described in Miss Hall's First Affidavit, Paragraph 21: her

Second Affidavit, Paragraph 3: and Mr Liddle's Second Affidavit, Paragraph 3). Unusually, at that meeting there was significant dispute amongst members of the Scientific Committee as to the appropriate TAC for toothfish for Sub-Area 48.3 for the following season, to which I shall have to return (see Paragraphs 77-78 below). However, in short (i) the United Kingdom scientists supported a scientific model and parameters that would have given a yield higher than that eventually fixed, and in that they were particularly supported by the Chilean delegation: and (ii) at the meetings, the Commission fixed the TAC at 3,050 tonnes for 2005. This was a significant reduction from the 2004 season.

36. The TAC having been set, in the usual way the Director decided how many licences she should grant, namely eight - and she provisionally considered that the grant should be four to United Kingdom or United Kingdom Overseas Territory ["UKOT"]-flagged vessels and four to other vessels. In accordance with Section 5(10A) of the Fisheries Ordinance, she then sought Dr Richardson's advice which was given in a letter dated 25 February 2005, as follows:

> "[On the basis that there will be licences to four non-United Kingdom or UKOT-flagged vessels], I would propose that two licences be awarded to Chilean vessels, in recognition of the significant role Chile played in leading discussions in the small group [i.e. at the November 2004 meetings, to which I have referred above]. This is a reduction of 50% in the number she was awarded last year and will no doubt be disappointing to the Chileans but we will still be able to present a case that Chile remains the most significant foreign partner in the fishery. In line with this argument, and again to reflect the reduction in TAC, you should reduce the number of licences awarded to Spanish vessels to one. The remaining available licence you should award to the South African-flagged vessel. As there is Japanese interests in this vessel, such an award would keep two CCAMLR members onside. The state which loses out most as a result of this division is Korea…. Uruguay will also lose out. But Uruguay's track record as a CCAMLR member on non-compliance and enforcement of CCAMLR Conservation Measures is such that I have no

reservations about excluding the Uruguayan vessel [i.e. the Isla Alegranza] from the fishery."

37. Pursuant to Section 5(10A), the Director followed that advice, and granted licences to two Chilean-flagged vessels, and one each to Spain and South Africa.

38. The Isla Alegranza's application was consequently refused. The Applicant sought to judicially review that refusal, but leave was refused by Wood CJ and matters were not taken further.

The Isla Alegranza 2006 Licence Application and the Grounds of Review

39. Letters of invitation were sent out in respect of the 2006 season on 2 December 2005. The November meeting of the CCAMLR Commission had increased the TAC for toothfish in Sub-Area 48.3 from 3,050 to 3,556 tonnes. The Applicant made an application again seeking a licence for 500 tonnes which it proposed to catch by way of long-line. I deal with the details of the 2006 application process below in the context of the specific grounds of review relied upon (see Paragraph 65 and following), but briefly the advice from Dr Richardson was to grant one licence to a Uruguayan-flagged vessel. The Director had received applications in respect of three such vessels: the Isla Alegranza, the Punta Ballena and a third vessel. The Punta Ballena was granted a licence, the Isla Alegranza's application being refused as was that for the third vessel. It is against that refusal of a licence for the Isla Alegranza that the Applicant now seeks judicial review.

40. Although there are sub-grounds, the Applicant relies upon two main grounds of review, as follows:

1. **The advice given to the Director on behalf of the Secretary of State was unlawful.**

Insofar as the allocation was made to reward states that supported the United Kingdom in its attempt to increase the TAC for Sub-Area 48.3 for the 2005 season, the advice given to the Director by Dr Richardson (on behalf of the Secretary of State) was unlawful and consequently the Director's decision based upon that advice - not to grant a licence to the Applicant - was equally unlawful (Paragraph 20 of the Grounds of Review). It is common ground that, following Quark No 2, the lawfulness of the advice is justiciable in this Court.

2. **The Director's decision was made contrary to the Government of the SGSSI's own written Fisheries Licensing Policy in three respects.**

(i) Insofar as licences were given to vessels of flag states which supported the United Kingdom's attempt to increase TAC for the 2005 season, that conflicted with the express objective of the policy of conserving fish stocks (Paragraph 24 of the Grounds). This ground reflects the ground in Paragraph 20, referred to above: and has the same factual foundation.

(ii) The Uruguayan vessel in respect of which a licence was granted (the Punta Ballena) had operated IUU fishing in 2003. It was contrary to the terms of the policy to grant such a vessel a licence (Paragraph 23 of the Grounds).

(iii) The Director promoted one criterion (engaging experimental fishing methods) above all others, not giving any or any proper weight to other criteria - notably the compliance record of the Isla Alegranza. She gave that one criterion of engaging experimental fishing methods either determinative or alternatively improper weight. In any event, the promotion of that criterion was without reasonable foundation. (Paragraphs 25, 26 and 27 of the Grounds).

In this judgment, I shall refer to these as Grounds 1, 2(i), 2(ii) and 2(iii) respectively.

41. Other grounds set out in the original application were not pursued. For example, it was originally claimed that, insofar as the advice of Dr Richardson was based upon the poor compliance record of Uruguay, it was unlawful (Paragraph 21 of the Grounds). This ground was not pursued at the hearing. Similarly, the ground based upon legitimate expectation (Paragraph 28 of the Grounds) was also not actively pursued, on the basis that that ground could not succeed unless the Applicant was successful on other grounds that were actively pursued. I consider these concessions by the Applicant well made.

42. I will deal with the grounds that were pursued in turn (see Paragraph 65 and following). However, before I do, I should deal with one last preliminary matter.

Interlocutory Applications

43. Immediately before the start of the substantive hearing, the Applicant made two applications in respect of Ground 2(ii). I refused both and, written reasons being required for any decision in this jurisdiction, I indicated that I would give my reasons for those decisions as part of this judgment.

44. As indicated above, for the 2006 season, as usual, the Director received more applications for toothfish fishing licences than could be accommodated. She sought advice from Dr Richardson, which was to the effect that a licence should be granted to only one flag vessel from Uruguay. Of the three applications in respect of such vessels, a licence was granted for the Punta Ballena, and refused for the Isla Alegranza. The application of the third vessel was also refused: this vessel has no relevance in these proceedings, and I shall not refer to it further.

45. Paragraph 8 of the Fisheries Licencing Policy provides:

> "[The Government of SGSSI] will not licence vessels which have been involved in [IUU] fishing, or vessels operated by a company which is, or has been, involved in IUU fishing. As part of the assessment process [the Government of SGSSI] may

consider and take into account, inter alia, data provided by CCAMLR, or its Contracting Parties, including, but not limited to, the list of vessels involved in IUU fishing agreed by the Commission."

46. In Paragraph 25 of the Grounds for Review, the Applicant relied upon the following ground:

> "[T]he decision to refuse the application by the Isla Alegranza was contrary to … the [Fisheries Licencing Policy], in that it had failed to give proper weight to the fact that the said vessels had been one of the best vessels on the fishery in 2004 in terms of compliance, whilst the vessel chosen to replace it [i.e. the Punta Ballena] was operating illegally in 2003. By authorizing the other Uruguayan vessel, the SGSSI authorities were… acting in breach of their own licencing policy, which forbids the licencing of vessels which have been involved in [IUU] fishing. Accordingly, the said decision was unlawful."

47. There are two discrete sub-grounds reflected within this paragraph, i.e. those which I have labeled Grounds 2(ii) and 2(iii). I deal with the suggestion that insufficient weight was given to the compliance record of the Isla Alegranza below (see Paragraphs 105-122). The interlocutory applications related only to Ground 2(ii), i.e. that, because the Punta Ballena "was operating illegally in 2003", the Director breached the Fisheries Licencing Policy by granting it a licence.

48. The only evidence for this assertion accompanying the application was an extract from the Uruguayan newspaper "El Observador" dated 8 May 2006. The relevant article is in Spanish, but the Applicant provided an English translation. It seems to refer prospectively to these judicial review proceedings, and the substance of the article appears to have been given to the newspaper by a Mr Barros who has an interest in the Applicant. The only reference to the Punta Ballena and 2003 is found in the final paragraph:

> "The Punta Ballena appears on the [COLTO] blacklist ["fichero de delincuentes"] 2003, of vessels illegally fishing Black Hake ["merluza negra", or toothfish]".

On their website, COLTO keep a "watchlist" of toothfish vessels that have caused concern in respect of possible IUU fishing.

49. The application for judicial review was filed on 31 July 2006. The Chief Justice gave leave on 22 August, ex parte and of course on the basis of only the evidence filed by the Applicant. The Director was not served with any of the papers until after leave had been granted.

50. When served, the suggestion that the Punta Ballena was on the COLTO watchlist as having been associated with IUU fishing of toothfish in 2003 was understandably of concern to the Director, bearing in mind the terms of the Fisheries Licencing Policy referred to above and the fact that she had granted that vessel a licence for 2006.

51. On 24 October, Crown Counsel wrote to the Applicant's Solicitor (Mr Swabey) as follows:

> "… [O]n a substantive matter, the Applicant's grounds refer to a newspaper article dated 8 May 2006. That article states that Uruguayan vessel Punta Ballena appeared on [COLTO's] blacklist of 2003, allegedly in respect of the vessel illegally fishing black hake. [The Director] asks that you produce that list with the name of Punta Ballena highlighted."

52. The reply was dated 25 October. It said:

> "I attach the COLTO list of rogue operators, which list includes the only Uruguayan vessel granted an SGSSI licence [i.e. the Punta Ballena], as requested."

Attached, however, was not a copy of the COLTO watchlist, but a brochure dated October 2003 under the COLTO logo suggesting that the Punta Ballena was operated by Spaniards who were "thought to be members of the Galician Syndicate", a mutual society who cooperated to plan toothfish poaching. The "main players" in the syndicate were said to include a Mr Vidal and his son who owned or controlled a number of named companies including Iliad SRL. At the end of the article it said that the brochure was "a summary report on the boats, people, companies and governments currently understood to be involved in toothfish poaching".

53. Mr Dermot Woolgar (Counsel for the Respondent) suggested that it was simply untrue to represent this to be the COLTO blacklist. Mr Fergus Randolph (Counsel for the Applicant) accepted that the article did not support at all the ground that the Punta Ballena was itself involved in illegal fishing in 2003. Whatever the force of Mr Woolgar's suggestion, Mr Randolph's concession was clearly properly made. This article provides no support for the specific ground relied upon by the Applicant, namely that the Punta Ballena was involved in illegal fishing in 2003.

54. As indicated above (Paragraph 2), the Respondent's formal response to the Applicant's evidence was filed and served on 6 November in the form of Miss Hall's and Mr Liddle's First Affidavits. Having indicated that she equated the "blacklist" referred to in the translated newspaper article with COLTO's "watchlist" (Paragraph 24), Miss Hall dealt with the substance of the Applicant's evidence in relation to this matter in Paragraph 26 of her affidavit:

> "I was not aware when I took the decision to award a licence to the Punta Ballena that it had been on the COLTO watchlist in 2003, and when I learned of this accusation I was somewhat sceptical about it, since I usually keep myself well-informed about what vessels are on the list and I have no recollection of ever seeing the Punta Ballena on the list. In addition I checked the list which is maintained on the COLTO website whilst considering the applications for licences to fish in 2006 and the Punta Ballena was not on it, even in the "History" section. I have recently

re-examined the list on the COLTO website, and the Punta Ballena is still not named there, even in the "History" section."

55. That evidence is accepted by the Applicant, i.e. it accepts that the Punta Ballena was not on the COLTO watchlist in 2003 - neither has it ever been on such list.

56. With regard to the COLTO article referred to above, in terms of the support it gave for the ground of review relied upon by the Applicant, the Director was appropriately dismissive for the reasons I have given above. She said (Paragraph 26 of her Affidavit):

"I would have been quite unable to accept [the article] as sufficient evidence that the Punta Ballena had been involved in IUU fishing".

.

57. The concessions made on behalf of the Applicant that (i) there was no evidence that the Punta Ballena was on the COLTO watchlist in 2003 or at any other time and (ii) the only evidence put forward by the Applicant does not support the ground relied upon (namely that the Punta Ballena was involved in IUU fishing in 2003) prompted two applications on its behalf.

58. First, on Sunday 19 November 2006 (the day before the substantive hearing was to begin), the Applicant made an application to rely upon further evidence in the form Mr Swabey's Second Affidavit. The content of this can be divided into three categories:

(i) A substantial proportion of the affidavit consisted of submissions rather than evidence which, Mr Randolph accepted, should not properly form part of an affidavit and he did not seek to rely upon them. He was right not to do so. The inclusion of submissions in an affidavit is procedurally improper (RSC Order 5(1)), and almost always entirely unhelpful in practice. Where it is appropriate to make submissions in writing, this can be done in the form of a skeleton as relied upon by each party in this case. This is not the only

jurisdiction where this unhelpful confusion between evidence and submissions abounds. It is not to be condoned.

(ii) Evidence in response to that of Mr Liddle concerning the activities of the CCAMLR Commission and its Scientific Committee which, by agreement, was allowed to stand.

(iii) Evidence that the Punta Ballena had been involved in IUU fishing.

59. This last category was the only one about which there was controversy between the parties. The evidence was to the effect that the Punta Ballena had been twice named on "the Antarctic and Southern Ocean Coalition ("ASOC") IUU Vessel Red List", in November 2003 and February 2004. Although Mr Swabey does not explain the nature or status of ASOC in his affidavit, I understand ASOC is another coalition of legal toothfish fishing operators: and its "Red List" purports to "serve as a source of information on some of the vessels engaged in the toothfish fishery in the Southern Ocean that may be or may have been involved in [IUU] fishing activities over the course of the last two years". In respect of the Punta Ballena, the schedule that comprises the list does not give any details of the owner or vessel history, but in the "Notes" section it says: "Permitted to fish High Seas, excluding CCAMLR Convention Area by Uruguay. Request Compliance with CCAMLR 10-03 (2002) and verify VMS records with CCAMLR Secretariat before permitting vessel to offload." The Respondent objected to reliance on this new evidence.

60. I refused the Applicant leave to rely upon this evidence (sought under RSC Order 53 Rule 6(2)), for the following reasons.

(i) The Director granted a licence to the Punta Ballena on that basis that it had not been involved in IUU fishing. There was no suggestion that the Director in fact had this information concerning the ASOC Red List (or indeed any evidence of such involvement) actually before her when she granted that licence. The Punta Ballena's application for a licence indicated that it complied with all licence

requirements, including that it had not been involved in IUU fishing. However, the Applicant submitted that this list - available on the internet - was at least available to her at the time of her decision. The evidence sought to be relied upon was not therefore "fresh evidence" as that term is normally applied, i.e. evidence not before or available to the decision-maker at the time of the impugned decision (see "Judicial Review Handbook", Fordham, 4th Edition (2004) at Paragraph 17.2). Cases to which I was referred concerning fresh evidence (e.g. R (Powis) v Secretary of State for the Environment [1981] 1 WLR 584) were therefore of limited assistance in relation to the issue before me.

(ii) However, it is incumbent upon an applicant to make clear at the earliest stage - usually at the time of the application - the full extent of the evidence upon which it seeks to rely. Despite requests, the Applicant had not given any explanation as to why this additional evidence was not disclosed earlier. It could have been disclosed with the application. It was not disclosed until over 3 months later, when the hearing was but about a week away.

(iii) The Applicant relied upon the terms of the Practice Direction (Crown Office List: Preparation for Hearings) issued by Lord Taylor LCJ on 25 October 1994 ([1994] 1 WLR 1551), noted at RSC 53/14/73. This requires 5 clear working days' notice of any intention to rely upon any new evidence in judicial review proceedings in the Administrative Court of the High Court of Justice of England & Wales. Notice of Mr Swabey's Second Affidavit was given on 10 November, by my calculation exactly 5 clear working days before the warned date of 20 November 2006. Given that the context of practice in the Falklands is very different from that in the Administrative Court in London, it seems to me by no means clear that the practice direction relied upon is or should be applicable to this jurisdiction. But, even if it were, it sets a date beyond which the Court will not usually even entertain an application for new evidence. Its intention is not to encourage or condone late service, nor to suggest that all available evidence upon which the Applicant wishes to rely ought not to be served with the application itself.

Of course, there may be many reasons why an applicant should be allowed to rely upon evidence that is filed late. For example, evidence might reasonably have been unavailable to the applicant at that time, or be required to rebut evidence filed by the respondent. However, generally an applicant should file all evidence upon which it relies with its application or otherwise at the earliest possible opportunity. That is not simply so that the Court can properly consider, ex parte, the application for leave. It is to ensure the orderly conduct of proceedings, which is just as important - possibly, more important - in this Court than in jurisdictions where legal and judicial facilities are more readily available.

(iv) Mr Randolph also relied upon the letter from the Applicant's Solicitor to the Court on 19 October, in which provision was made in the timetable for "service of Applicant's responsive evidence" (by 8 November); and his letter to the Crown Counsel on 25 October indicating that the Applicant intended to make an application to file "additional evidence": but these gave no substantial support to the application. The evidence sought to be relied upon was not "responsive" in the sense of "rebutting": it was only responsive in the sense that the evidence of the Respondent had made it abundantly clear that the Applicant's evidence did not support the alleged ground at all, and the Applicant thereafter sought to introduce new evidence that was available (but not relied upon) at the date of the application. The letter of 25 October gave no indication of the nature of the evidence sought to be relied upon.

(v) The application has to be seen in the proper context of these proceedings and specifically the ground to which the evidence might go. The suggestion by Mr Randolph that the Applicant did not know until the service of the Respondent's evidence on 6 November that the Punta Ballena's IUU fishing activities in 2003 would be in issue was, with respect, naïve. Under the terms of the Fisheries Licensing Policy the Director could not properly have given a licence to the vessel had she considered it had been involved in IUU fishing. The Applicant conceded that, in respect of this ground, the only evidence in fact relied upon in the

application (i.e. the newspaper article) did not support the proposition that the Punta Ballena had been involved in IUU fishing at all. On the basis of the evidence prior to this application, there was no evidential issue between the parties. By this application, the Applicant did not seek to adduce evidence in reply (i.e. rebuttal) or even evidence to support other evidence already served, but rather evidence to shore up a ground which (the Applicant conceded) had to that time no evidential basis whatsoever.

(vi) Had this true position been known, leave to bring the judicial review on this ground would not have been given. In granting leave, the Chief Justice said: "The Applicant alleges that [the Punta Ballena] has a history of illegal fishing. I have been referred to a translation of a newspaper report to that effect." But now the Applicant accepts that, contrary to the impression given in the application for judicial review, the newspaper report is not supportive of the allegation that that vessel has a history of illegal fishing. The Court was, unfortunately, misled.

(vii) In any event, the ASOC Red List sought to be relied upon is far from unequivocal evidence that the Punta Ballena was engaged in IUU fishing. The list purports to set out vessels that may or may not have been engaged. It describes itself as not being authoritative. Although it suggests that Uruguay may have imposed some form of condition on the Punta Ballena, there is no evidence as to why that was imposed. At the very least, this evidence requires some considerable investigation. The lateness of the application for leave to rely upon this evidence is therefore inevitably prejudicial to the Respondent. Although the Respondent said that, if required, some form of answer could be prepared, to expect a fully considered and informed response in the available time (whether regarded as the Sunday hours before the warned date after the hearing of this application, or the time that elapsed from the date the new evidence was first served on the Respondent) is unreasonably to expect too much.

Therefore, in summary, the Applicant's attempt to rely upon this new evidence to shore up a ground of review lacking any evidential foundation whatsoever would have resulted in prejudice to the Respondent and was too late. In addition, the conduct of the applicant in relation to this issue was procedurally not beyond reproach.

61. For these reasons, in the exercise of my discretion under RSC Order 53 Rule 6(2) I refused the applicant's application to rely upon the ASOC evidence set out in Mr Swabey's Second Affidavit.

62. However, that refusal prompted a second application, made the following day (the first day of the substantive hearing), to amend the grounds of review to include a new sub-ground, namely that the Director had breached the Fisheries Licencing Policy by granting the Punta Ballena a licence in circumstances in which the operator of that vessel had been involved in IUU fishing. The exact proposed amendment (to Paragraph 25 of the Grounds) was as follows (the proposed additions being in italics):

> "[T]he decision to refuse the application by the Isla Alegranza was contrary to the other aspects of the [Fisheries Licencing Policy], in that it had failed to give proper weight to the fact that the said vessels had been one of the best vessels on the fishery in 2004 in terms of compliance, whilst the vessel chosen to replace it [i.e. the Punta Ballena] was operating illegally in 2003 *and/or vessels operated by a company which is, or has been, involved in IUU fishing*.
>
> *The evidence relied on in support of this additional ground is as follows:*
>
> *(i) The Punta Ballena is mentioned in an article by COLTO dated October 2003 as belonging to a syndicate involved in IUU fishing the main players of which are inter alia Mr Vidal and his son;*
> *(ii) The same article states that one of Mr Vidal's companies is Iliad SRL;*

(iii) in the application form for the licence for the Punta Ballena dated 6 January 2006, Pioneer Seafoods Ltd states that the vessel is operated inter alia by Iliad SRL;

(iv) In the report of the 24th CCAMLR meeting held between October and November 2005, it is noted that vessels reportedly owned by Mr Vidal were now included on the IUU vessel lists.

By authorizing the other Uruguayan vessel, the SGSSI authorities were… acting in breach of their own licencing policy, which forbids the licencing of vessels which have been involved in [IUU] fishing. Accordingly, the said decision was unlawful."

63. I refused the Applicant leave to make this amendment for the following reasons.

(i) The Respondent accepted that this matter could not have been raised by the Applicant before the service of Mr Liddle's First Affidavit on 10 November. That affidavit disclosed (as Exhibit GML 9) the licence application in relation to the Punta Ballena, which indicated that the vessel was operated by two companies, one being Iliad SRL, a company identified by the October 2003 COLTO article referred to above as being part of the Galician Syndicate which (the article suggested) was involved in toothfish poaching. On the evidence before me, this was the first time this particular link had been made known to the Applicant.

(ii) However, it was again incumbent on the Applicant to make its application within a reasonable time. In the context of the timetable for this judicial review, this effectively meant as soon as practically could have been expected. In the event, no application was made until the first day of the hearing (20 November), even (a) given the Applicant had every opportunity to raise the issue in its skeleton submissions served on 13 November: (b) in the face of the Respondent's skeleton submissions served on 15 November which made clear that no amendments to the grounds would be considered without a formal application for leave to amend: and (c) given the Applicant had a further opportunity to make an application on 19

November at the hearing at which the application to rely upon additional evidence was considered. The application was made as late as it possibly could have been. No explanation was given as to why it was not made earlier. Even given that it could not have been made until after 10 November, the proposed amendment could and should have been properly formulated and the application made considerably earlier.

(iii) The proposed amendment did not seek merely to clarify the issues in dispute - but sought to add an entirely new claim for the first time. For obvious reasons, that is relevant to the exercise of discretion for giving leave (see Ketteman v Hansel Properties Ltd [1987] AC 189 at page 220).

(iv) If the amendment had been allowed, then, introducing an entirely new ground as it did, again it would require some considerable investigation by the Respondent. As at the first day of the trial, there was no reason for that investigation to have commenced. The extreme lateness of the application for leave to rely upon this evidence was not only undoubtedly prejudicial to the Respondent but, in order to accommodate that potential unfairness, may have prejudiced the hearing itself.

(v) As proposed, the amendment alleged that the operator of the Punta Ballena was involved in IUU fishing, but it failed to formulate an error of public law. Whilst this could no doubt have been remedied by a re-formulation, it is a further reflection of the lateness and ill-preparedness of this application.

Whilst the matters raised by the proposed amendment may be ones which the Director will wish to take into account as and when a future application for a licence is made on behalf of the Punta Ballena, for these reasons I refused the Applicant leave to amend the Grounds of Review as sought.

64. I now turn to deal with the substantive application.

Grounds 1 and 2(i): The advice given to the Director on behalf of the Secretary of State was inherently unlawful and was contrary to the Fisheries Licensing Policy.

65. The main ground of the application in the original application was in the form of a challenge to the legality of the advice received by the Director from Dr Richardson. It was submitted that, insofar as the allocation was made to reward states that supported the United Kingdom in its attempt to increase the TAC for Sub-Area 48.3 for the 2005 season, the advice was unlawful in that it was inconsistent with the CCAMLR objectives which the United Kingdom and SGSSI were bound to further. Consequently, the Director's decision based upon that advice - not to grant a licence to the Applicant - was equally unlawful (Ground 1).

66. There is a second ground based upon the same advice (Ground 2(i)). Insofar as the Director's decision was based upon advice that was inconsistent with the CCAMLR objectives, it was made contrary to the Fisheries Licensing Policy which states that the principal objective of the SGSSI fisheries regime is to regulate fishing "in line with Article II of CCAMLR…".

67. These grounds are founded upon the same assumed factual matrix, including the premise that Dr Richardson's advice - that two Chilean-flagged vessels ought to be awarded licences for 2006 - was based upon Chile's support for the United Kingdom's stance at the 2004 CCAMLR meetings of the Scientific Committee and its working group.

68. Dr Richardson's advice was sought by Miss Hall in respect of the 2006 season in a letter of 11 January 2006, in which she indicated that there were 25 applications for licences for Sub-Area 48.3 for the 2006 season, including 7 for Chilean-flagged vessels, 3 Uruguayan and 3 Korean. She said that she proposed to issue 9 or 10 licences (dependent upon catching ability and the size of the successful vessels), and asked for advice in particular on the proportion of foreign flagged vessels that ought to be granted licences: as to whether, on foreign policy grounds, any flags should or should not receive a licence

on foreign policy grounds; and whether any foreign flags should receive more than one licence.

69. Dr Richardson responded on 24 January. In respect of the specific matters raised by Miss Hall, he indicated that these had been dealt with in an annex which:

(i) indicated that none of the flag states' vessels could be excluded from the fishery on foreign policy grounds;

(ii) recommended that flag state vessels from the United Kingdom, Spain, Chile and South Africa be accommodated: and any additional licences over and above the number granted for 2005, be allocated to Korea and Uruguay in that preferential order;

(iii) recommended that "Chile, in view of its long-standing historical involvement in the fishery, should receive two licences as it did in 2005"; and

(iv) suggested that the proportion of foreign flag vessels should be at least around 60%.

70. The covering letter went on (in Paragraph 4):

"The vessels licensed last year were as a result of advice (my letter of 25 February 2005). We remain of the view that, in the absence of factors dictating otherwise, that (sic) composition should retained for the 2006 season, viz four UK, one Spanish, one South African (with Japanese ownership), and two Chilean vessels. On foreign policy grounds we see no need to vary this composition. This leads us to the matter of any possible additional licences (over and above the eight allocated last season). Here, we recommend that you should, if practically possible, reinstate the fishery vessels from Korea and Uruguay. These are flag-states that have historically fished in this fishery and we see political virtue in them returning to this

fishery. If access for both flag-States is not possible, then from a foreign policy point of view, we would recommend that you license a Korean vessel in preference to a Uruguayan, given the previous history of Uruguay in IUU fishing. Our preference would however be that both these CCAMLR Parties' vessels be accommodated in the fishery, if possible."

71. Mr Randolph submitted that, on the basis of this letter, it appeared that the allocation of two licences to Chilean-flagged vessels was recommended for 2006 for the same reason as that recommendation had been made for 2005, i.e. to reward Chile for its support at the 2004 CCAMLR meetings.

72. With respect, I cannot accept that submission. I accept that Paragraph 4 of Dr Richardson's letter, if read alone, might be ambivalent. It is not clear whether that paragraph implies that the reason for the same 2006 composition of flagged vessels was the same as in 2005, i.e. to reward the support of various states (including Chile) at the 2004 CCAMLR meetings: or whether it is simply stating that the composition should remain the same without any such implication. Is the "view" that is remaining simply as to the *composition* of the flagged vessels, or is it also as to the *reasons* for that composition? Mr Randolph went no further than to submit that the substance of the paragraph was equivocal. That is as far as he could go.

73. But that part of the letter cannot be read otherwise than in context. The annex to the letter - which was expressly in response to the questions Miss Hall had put, and is referred to at the start of the covering letter as such - is clear. Dr Richardson advised that Chilean-flagged vessels should be awarded two licences "in view of [Chile's] long-standing historical involvement in the fishery". With respect to Mr Randolph's submission to the contrary, this is not inconsistent with the text of the letter. It is explanatory of Paragraph 4 of the letter, resolving the apparent uncertainty or equivocality in it. Read as a whole, it is clear that the advice that Chile should be awarded two licences was based, not upon the support that that country might have given the United Kingdom at CCAMLR meetings in the past, but because of her historical

involvement in the fishery. That is how the Director read the advice (Miss Hall's First Affidavit, Paragraph 20), and she expresses incredulity that any other construction of the advice could be contended for. Whilst I accept Mr Woolgar's submission that such documents ought not to be construed like statutes and ought to be construed benevolently, I do not consider much benevolence is required here. I agree with Miss Hall. I consider the advice, read as a whole, is eminently clear.

74. That being so, Ground 1 is based upon a false premise, and it fails. However, given there was considerable debate before me upon the legality of the advice given in respect of the 2005 season (based as it was upon rewarding Chile for her support at the 2004 CCAMLR meetings), I should comment briefly on that issue.

75. It is common ground that, in giving advice in respect of which flag-states to favour, it is perfectly legitimate for the United Kingdom to prefer those countries which have supported the United Kingdom or are otherwise favoured for reasons of diplomacy given the relevant international context whether flowing from CCAMLR objectives or not. However, it was submitted on behalf of the Applicant that Dr Richardson acted improperly by seeking to favour a country (Chile) for supporting the United Kingdom in the pursuit of a goal (increased TAC) that is incompatible with CCAMLR objectives.

76. In my judgment, this submission is fundamentally flawed. It assumes that, by United Kingdom scientists proposing a model and analysis for TAC that was not adopted in its entirety by the Scientific Committee (which ultimately agreed a TAC below that which would have been derived from the United Kingdom analysis) they were acting improperly or incompatibly with the objectives of the Convention. I do not accept this. It is simplistic to suggest that a lower TAC in itself is more compatible with the conservation objectives of CCAMLR. As indicated above, far from being incompatible with conservation, rational harvesting is part of the definition and a necessary factor in conservation. The models and analyses most appropriate for the pursuit of the objectives of CCAMLR (including optimal yield) are highly complex, and the subject of a variety of reasonable points of view and legitimate debate.

77. At the CCAMLR meetings in November 2004, the Scientific Committee considered two approaches towards setting a TAC for Sub-Area 48.3 for the 2005 season. One approach resulted in a TAC of 1,900 tonnes; the other a TAC of 3,050-3,750 tonnes. By virtue of Article XII of CCAMLR, all substantive decisions are to be by way of consensus. Consensus within the Scientific Committee proved impossible: so the Committee was unable to recommend a specific catch limit, although it expressed reservations on the higher and lower figures provided through the various approaches and parameters (CCAMLR Commission Meeting Minutes, November 2004, Paragraph 10.49). In the event, the matter was referred to the Commission itself which (i) requested the Scientific Committee to undertake further work before the next meeting to address the yield uncertainties and provide agreed advice for yield for Sub-Area 48.3 at the 2005 meeting: and (ii) established a TAC for 2005 for Sub-Area 48.3 of 3,050 tonnes (Minutes, Paragraphs 10.49 and 10.50). On the face of the minutes, whilst taking account of the views of the Scientific Committee, this figure appears to be a simple compromise in the absence of better information. Given that substantive decisions of the Commission have to be by way of consensus, this will inevitably mean that, whatever views are genuinely and reasonably held by scientific delegations, some compromise by delegations away from reasonably held scientific views may well sometimes be required to enable a decision to be made.

78. Within these discussions, before the Scientific Committee the United Kingdom scientific delegation supported the approach giving the higher yield and, within that approach, a yield towards the top end of the range. They were supported by the Chilean delegation. However, when the matter went to the Commission, the United Kingdom signed off on the compromise reached, i.e. with a TAC below the yield level that their scientists considered was properly justifiable.

79. As I have indicated - and as appears from the contemporaneous documents - the science relating to the Antarctic ecosystems is highly complex, and open to more than one reasonably justifiable analysis and scientific opinion. There is clearly a band - a wide

band - of reasonably held and legitimately supported scientific views as to the appropriate TAC to ensure the objectives of CCAMLR are maintained. There is nothing to suggest that the views put forward by the United Kingdom scientists in 2004 were not genuinely or reasonably held by them, or that their views were not within the band of legitimate scientific opinion as to appropriate yield levels to which I have referred. I do not accept the proposition put forward by the Applicant that, simply because the compromise TAC for which consensus was obtained in the Commission was lower than the yield contended for by the United Kingdom scientists before the Scientific Committee, that means that the scientists were acting contrary to or attempting to subvert a CCAMLR objective and therefore acting unlawfully in putting their reasonably held views forward. With respect, that is clearly not the case. Consequently it is not the case that the United Kingdom could have been guilty of acting unlawfully in favouring states which supported them in maintaining that legitimate scientific position.

80. However even if, contrary to my firm view, the United Kingdom scientists' analysis could be regarded as incompatible with the Convention objectives, I would be very reluctant to hold that this disentitled the United Kingdom Government from favouring states which had nevertheless supported its position when deciding upon the allocation of CCAMLR imposed TAC. That aggregate TAC having been imposed in accordance with CCAMLR objectives, it does not seem to me that it would be incompatible *to CCAMLR* to favour as a matter of diplomacy the vessels flagged with states which had supported an unsuccessful attempt by the United Kingdom to act incompatibly with the objectives of the Convention. It is unnecessary for me to decide this issue - and expressly I do not do so - but I should make clear that, even had the Applicant got this far on this ground, it should not be assumed that I would have found in its favour.

81. For these reasons, Ground 1 fails. Ground 2(i) is based upon the same false premise (that Dr Richardson's advice in respect of the 2006 season was based upon favouring Chile as a supporter of the United Kingdom's stance in the CCAMLR 2004 meetings, and consequently unlawful). It too fails.

Ground 2(ii): The Director's decision was made contrary to the Government of the SGSSI's own stated fishing policy in that the Uruguayan vessel in respect of which a licence was granted (the Punta Ballena) had operated IUU fishing in 2003.

82. There is no evidence before me upon which the Director could have found that the Punta Ballena was involved in IUU fishing. In the absence of any supportive evidence, this ground fails.

Ground 2(iii): The Director's decision was made contrary to the Government of the SGSSI's own stated fishing policy in that she unlawfully and irrationally promoted one criterion (engaging experimental fishing methods) above all others.

Introduction

83. In the event this final ground evolved before me into the primary basis for the application. In some respects, this evolution took it a long way from how the matter was put in the original grounds for review.

The Proper Construction of the Fisheries Licensing Policy

84. It was common ground that the likely determinative issue in respect of this ground concerned the proper construction of the Fisheries Licensing Policy. Before the long-running Quark litigation (see Paragraph 3 above), the Government of SGSSI had no written policy with regard to the granting of fishing licences under the 1985 Order. Such a policy was published and instituted in 2001. The relevant parts of that Fisheries Licensing Policy are set out above (Paragraph 27).

85. Paragraph 8 provides that a licence will not be issued to vessels which have been involved in IUU fishing, or vessels operated by a company which has been involved in IUU fishing. It was common ground that this provision did not - indeed, could not - fetter the discretion of the Director and amount to a complete bar. For example, if a

vessel had been confiscated because it had been involved in IUU fishing, and then sold to a new "clean" operator, despite the terms of the policy it must be open to that operator to seek a licence, providing evidence that that company itself had not been involved in the relevant IUU fishing. That application would have to be at least considered by the Director. It is always open to an administrative decision-maker to depart from a policy, if there is good reason so to do and that reason is made clear (Gransden v Secretary of State for the Environment (1985) P & CR 86, at pages 93-4). However, subject to that, Paragraph 8 of the Fisheries Licensing Policy provides a criterion is either satisfied or not satisfied and, if the latter, will lead to a refusal of a licence.

86. Mr Randolph submitted that Paragraphs 9 and 10 set similar hurdles to be satisfied by an applicant. On the true construction of these paragraphs, he submitted that, in relation to each licence applicant and in respect of the four criteria set out in these paragraphs, namely

(i) compliance record of the vessel and operator,
(ii) the historical involvement of the operator in the fishery,
(iii) engagement in relevant fisheries research within the SGSSI maritime zone and
(iv) engagement in new/experimental methods of fishing,

the Director must

(i) consider the available evidence before as to whether each criterion is met and
(ii) allocate a licence to the applicant(s) which has/have positively met most criteria.

Under the policy, each criterion therefore has effectively identical weight, the Director only being able to say whether or not the criterion is met ("yes" or "no") and only being able to allocate licences to those applicants which have met most criteria (i.e. have most "yeses" or "boxes ticked"). For the reasons to which I have already alluded (the inability to fetter her own discretion), she may depart from this policy - but, if she is minded to

allocate a licence to an applicant which has not satisfied more criteria than another applicant to which she is not minded to grant a licence (i.e. if she is minded to weight any of the criteria relative to any others), she must give the proposed unsuccessful applicant an opportunity to make representations, making clear to that applicant the relevant criteria involved and the weight she intends to give them, before allocating the licence.

87. Applying this construction, in relation to the "competition" between the Isla Alegranza and the Punta Ballena, Mr Randolph submitted in respect of each criterion in turn:

(i) Compliance record of the vessel and operator: There is no evidence that the Director refused the Isla Alegranza a licence because of an adverse compliance record: and indeed it is not in dispute that the vessel had an exemplary compliance record. Because the Punta Ballena did not have any history of fishing in SGSSI waters, it had no compliance record upon which it could rely. In respect of this criterion, the Isla Alegranza satisfied it: and the Punta Ballena either failed to satisfy it or the point was neutral in respect of that vessel.

(ii) The historical involvement of the operator in the fishery: The Isla Alegranza fished in SGSSI waters from 2001 to 2004. The Punta Ballena had never fished in these waters.

(iii) Engagement in relevant fisheries research within the SGSSI maritime zone: Neither vessel had ever participated in any such research.

(iv) Engagement in new/experimental methods of fishing: The Punta Ballena proposed experimental pot fishing. The Isla Alegranza proposed no such new/experimental methods, and had never been involved or interested in such methods.

88. Therefore, in terms of "boxes ticked", Mr Randolph submitted that, dependent upon how (i) was viewed, either the Isla Alegranza had more positive criteria than the Punta Ballena, or at worst they were equal. In either event, he submitted that the Director could not award the Punta Ballena a licence without first consulting the Applicant with an indication of the "score" and the weight she intended to give to each criterion, especially (iv). For the purposes of this application, I am prepared to assume that, without the proposal for pot fishing, the Punta Ballena would not have been awarded the licence for a Uruguayan-flag vessel over the Isla Alegranza: in other words, that the weight in fact given to that criterion effectively tipped the balance in favour of the Punta Ballena.

89. This suggested construction is certainly ingenious - and novel, not being put forward in these terms until the hearing of the application before me. Before then, the ground was put on the perhaps more conventional basis that the Director simply gave determinative or alternatively improper weight to one of the criteria, namely new/experimental fishing methods. I shall return to that alternative way of putting this ground in due course (see Paragraphs 105-122 below): but deal first specifically with the construction of the Fisheries Licensing Policy put forward on behalf of the Applicant

90. The application in respect of the Punta Ballena proposed to fish primarily by way of pots, which method has significant potential (the Applicant would say "hypothetical") ecological benefits over long-line fishing. In her letter to the Applicant dated 1 May 2006 (in which she gave her reasons for not granting the Isla Alegranza a licence) and in her First Affidavit, the Director indicated that, in allocating licences, she took into account all the criteria in the Fisheries Licensing Policy giving each (including the Punta Ballena's intended experiment in pot fishing) the weight she considered to be appropriate, and "the balance came down firmly in consequence in favour of the Punta Ballena" (Miss Hall's First Affidavit, Paragraph 28). If the construction of the policy suggested on behalf of the Applicant is correct, then there is no doubt that the Director erred in her approach.

91. However, I do not accept that that construction is correct.

92. It is trite law that, whilst relevance of a particular criterion is a question of law for the Court to decide, it is generally for the administrative decision-maker to attribute such weight to that criterion as he or she thinks fit and the Court will not interfere unless the decision-maker has acted unreasonably in the Wednesbury sense (see, for example, Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 764G-H per Lord Keith). This lies at the very heart of the distinction between matters which the legislature has reserved to an administrative decision-maker, and those in respect of which the Court can interfere. Generally, "The assessment of the facts and the weighing of the considerations [are left] in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations" (City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 at page 1458G-H per Lord Clyde). The question is whether the Fisheries Licensing Policy excludes this usual function from the Director's ambit so far as the grant of fishing licences is concerned, as the Applicant contends.

93. Initial impressions may of course be misleading, but at first blush the construction suggested by the Applicant seems inherently unlikely. The potential results of it were described as "bizarre" by Mr Woolgar for the Respondent. They are certainly curious. For example, if two applications were equal in every other respect, but one proposed a meritorious and well-thought out experiment in a method of fishing that would (if successful) have significant ecological advantages whilst the other proposed long-line fishing for all but one day of the season when it proposed to put a few pots on the sea floor to see what happened, then, under the policy, the Director could not give more weight to the former than the latter. They would each have "ticked" criterion (iv). She would be bound to seek representations from at least the latter, and possibly both parties, before issuing a licence. Similarly, if (everything else being equal) one party had an appalling compliance record whilst another had only one minor breach of the compliance regulations, each would have failed to "tick" criterion (i) - and again consultation would be required. The construction also begs the question as to why the decision-maker is

such a senior Government officer, if the element of judgment in the allocation of licences is so small. I shall return to this later (see Paragraph 97).

94. The proper starting point must be the terms of the Fisheries Licensing Policy themselves.

95. I accept that some of the wording in the policy suggests that the criteria set out in paragraphs 9 and 10 are effectively simple hurdles to be overcome by applicants. Paragraph 4 refers to licences only being granted in respect of "applications which satisfy the criteria set out herein". Paragraph 11 refers to the onus being "on the applicant to satisfy the Director that each of the relevant criteria is met": and that "in the absence of sufficient evidence in relation to any particular criterion, the Director will be disposed to regard it as not having been met".

96. However, as I have already indicated, such documents as this policy document should not be approached as if they were statutes: and phrases should not be taken in isolation but construed within the context of the document as a whole. Whilst Paragraph 8 of the Fisheries Licensing Policy (requiring no previous history of IUU fishing activities) is put in the form of a criterion specifically to be satisfied - a hurdle or potential bar - those in Paragraphs 9 and 10 are on the whole not so phrased. Both refer to the Government of SGSSI (i.e. the Director on its behalf) "taking into account" the criteria to which reference is made: and, in respect of both engagement in research and proposals for new/experimental methods of fishing, she is required to take into account *the degree to which* there has been or will be such engagement. Overall, this is not language suggesting a number of criteria to be met or hurdles to be overcome. This language clearly suggests that the Director will take into account the various criteria set out, giving those criteria appropriate weight, i.e. exercising the usual function of an administrative decision-maker referred to above. Whilst those parts of Paragraphs 4 and 11 to which I have referred (see Paragraph 95 above) are not perhaps as well phrased as they might me, in my view they fall very far short of suggesting that, looked at as a whole, the Fisheries Licensing Policy should be construed as submitted by Mr Randolph.

So far as the "onus" being upon the applicant is concerned (Paragraph 11), this suggests to me only that there is an evidential burden on the applicant to put forward such evidence as it considers necessary to enable the Director to come to an informed decision based on the stated criteria.

97. I said that I would return to the issue of the necessary element of judgment in the Director as decision-maker in respect of the grants of licences. I do so now, because I consider that this betrays a substantial flaw in the Applicant's submission. Mr Randolph appropriately conceded that, even if the construction he proposed were correct, after counting the number of criteria satisfied - the number of boxes "ticked" - by each licence applicant, properly to exercise her discretion and avoid the implication that by slavishly following the policy she had improperly fettered her discretion, the Director would still have to consider whether there were any grounds for not following the policy. In other words, she would be bound to consider what the result of the competition would be if she *were* able to give weight to the criteria to enable her to take a view as to whether she should depart from the policy. Even on the Applicant's construction, this element of judgment - of giving each criterion for each applicant appropriate weight - cannot be avoided. In practice, the only difference between the construction proposed by the Applicant and that proposed by the Respondent is that in some cases (based upon whether one applicant has "ticked" more criterion boxes than another) there is a duty to seek representations. However, in context, given that appropriately weighted criteria should ultimately govern the granting of licences, whether one party has ticked more boxes than another is a entirely arbitrary test for whether there should be consultation or not. This conclusion is contra-indicative of the construction proposed by Mr Randolph.

98. Mr Randolph submitted that Quark Nos 1 and 2 were generally analogous to this case, and specifically supported his contentions in respect of the correct approach to criteria on a non-weighted basis.

99. Although Quark No 1 concerned the refusal of a licence to fish for toothfish in SGSSI waters, the circumstances of that case were very different to those in the action before me. The background to Quark No 1 was complex, but in brief in Quark No 1:

(i) The decision under review was one of Dr Richardson who, in that case, gave a direction to the Director (i.e. Miss Hall's predecessor) as to which vessels licences should be granted.

(ii) At the time of the relevant licence, the Government of SGSSI had no written fisheries policy.

(iii) The criteria for allocating licenses were not identified to applicants at the time of the licence round.

(iv) Unknown to the applicants, as between non-United Kingdom/UKOT vessels, the Director had decided prospectively that the criterion to be used for selection was that of degree of compliance with CCAMLR criteria.

(v) Again unknown to applicants, the Director decided that this degree of compliance was to be assessed only by reference to two tables in a CCAMLR working group report (i.e. Tables 54 and 55 in the Report of the CCAMLR Working Group on Fish Stock Assessment).

100. In Quark No 2 Scott Baker J found, inter alia:

(i) The tables relied upon did not reflect CCAMLR compliance, because there were various errors in them. The decision-maker therefore worked on a false factual basis. More than that, following comments of Wood CJ in Quark No 1 the decision-maker knew that the tables were unreliable and it would be irrational to base his decision upon them.

(ii) The decision-maker gave no prior indication of the basis on which selection would be made, i.e. on the basis of CCAMLR compliance: nor did he make it known that loyalty to the fishery (which the applicant had been led to believe would be an important factor) would not be taken into account.

(iii) The applicant's supposed compliance deficiencies were never drawn to its attention as failures that required to be remedied. Scott Baker J held that, if a decision-maker were minded to hold something against an applicant (e.g. its compliance record) then fairness dictated that the decision-maker should give the applicant an opportunity to comment.

101. That brief summary does justice neither to the issues involved in Quark No 2, nor to Scott Baker J's comprehensive judgment in respect of them which was effectively upheld in the Court of Appeal: but it is hopefully sufficient to indicate that Quark No 1 was a very different case from that before me, in which:

(i) There was as a written Fisheries Licensing Policy identifying the criteria upon which licence applications were to be determined.

(ii) The Applicant accepts that the Director did not prospectively decide the weight she proposed to give to various factors: nor did she ever entirely fail to take into account any of the published criteria which were to determine which vessel was to be granted a licence.

(iii) Even on its own case, the Applicant was not refused a licence because of any failure on its part - but rather because the Punta Ballena proposed to use pot fishing methods which it did not. The Applicant never had any intention of pot fishing.

102. The context and circumstances of Quark Nos 1 and 2 were therefore very different from that of the Applicant's case: and, generally, the cases are simply not analogous.

103. In respect of the specific matter relied upon by Mr Randolph, he submitted that the various judgments in these two cases supported his contention with regard to ranking candidates in a competitive competition for fishing licences by way of aggregating positive scores in respect of a series of criteria which might be positively satisfied (the "tick box" approach). In that Dr Richardson in that case appears to have relied upon a CCAMLR table that required such a general approach, and this approach was not condemned by the various courts, that is true. But it is beyond doubt that a policy may make such an approach lawful - subject to the caveat that the decision-maker can depart from the policy in appropriate cases for good and communicated reason. With respect, authority is not required for that proposition. The question in the case before me is whether, in the circumstances of this case, the policy properly construed requires such an approach. What the Quark cases do, in my judgment, is to illustrate the potential difficulties of that approach. But, either way, in my view the case is not of any substantial assistance to me in determining the true construction of the Fisheries Licensing Policy.

104. In all of the circumstances, I am quite satisfied that the proper construction of the Fisheries Licensing Policy is not as contended for by the Applicant. Under this policy, the Director was bound to consider each application taking in account the matters set out in Paragraphs 9 and 10 of the policy, giving each of those matters the weight she considered appropriate.

The Director's Decision

105. This brings me back to the Applicant's case on breach of the Fisheries Licensing Policy initially made in the Grounds of Review. There it was alleged that the Director promoted one criterion (engaging experimental fishing methods) above all others, not giving any or any proper weight to other criteria - notably the compliance record of the Isla Alegranza. She gave that one criterion of engaging experimental fishing methods

either determinative or alternatively improper weight. In any event, it was alleged that the promotion of that criterion was without reasonable foundation.

106. The Director set out her reasons for refusing the Isla Alegranza a licence in her letter to the Applicant dated 1 May 2006. She said:

> "All licence applications are considered by the Government of [SGSSI] according to the criteria set out in its Fisheries Licensing Policy, a copy of which you were sent with the Application Pack.
>
> In the allocation of licences proper account was taken of foreign policy considerations communicated by the Secretary of State and of all the criteria in the Fisheries Licensing Policy.
>
> You will appreciate that there was a limited amount of quota available this year, which had been increased only slightly from the previous year. Taking into account the foreign policy considerations, as a consequence of which I was only in a position to licence one Uruguayan vessel, and of all the criteria in the Fisheries Licensing Policy, the licence was awarded to the applicant which most closely met the policy criteria, in particular "the degree to which the operator proposed to engage actively in new or experimental methods of fishing or mitigation methods during the season". The successful applicant will be conducting an experiment in pot fishing."

107. In relation to the decision to award the licence for a Uruguayan-flag vessel to the Punta Ballena rather than the Isla Alegranza:

> (i) There is no evidence that a licence was refused to the Isla Alegranza because of its compliance record. Indeed, the Director readily accepts that the vessel had an exemplary record and she made her decision on that basis.

(ii) There is no evidence that the Director prospectively determined that any criterion would be determinative or that certain criteria would be weighted above others. The Applicant did not pursue its case on this basis.

(iii) There is no evidence that the Director took into account any irrelevant matter.

(iv) On the basis of the construction of the Fisheries Licensing Policy as I have found it, it was for the Director to take into account relevant factors (notably those set out in Paragraphs 9 and 10 of the policy), giving them the weight she considered appropriate. There is no evidence that she failed to take into account any relevant matter - she emphasised in her letter of 1 May that she *did* take into account all of the published criteria - but the Applicant contends that, in preferring the Punta Ballena's application to that of the Isla Alegranza, she gave the latter's proposal in respect of pot fishing improper weight.

108. As I have indicated above (Paragraph 92), the question of weight given to relevant criteria is essentially a matter for the decision-maker. For the position to be otherwise, the Court would enter into consideration of the merits or correctness of the decision, rather than the decision-making process or legality of the decision. That is not the Court's role. As Lord Brightman put it in Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 at page 1173F:

"Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power".

109. The Court has jurisdiction to become involved in merits only "in the rare case where it can be characterized as so obviously and grossly wrong as to be irrational, in the lawyers' sense of the word, and hence a symptom that there must have been something wrong with the decision-making process" (R (Fire Brigades' Union) v Secretary of State

for the Home Department [1995] 2 AC 513 at pages 560H-561A, per Lord Mustill). In connection with weight given to relevant criteria, this general principle has been encapsulated by Silber J as follows: "Courts have… been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration" (R (BT3G Ltd) v Secretary of State for Trade and Industry [2001] EuLR 325 at [187]). Although put in a variety of ways, the Applicant's submissions in relation to this part of its case turned on whether it could persuade me that the Director had given the criterion in respect of new/experimental fishing methods manifestly excessive weight sufficient to render her decision irrational and unlawful. The Applicant failed in this task: indeed, it fell very short.

110. Miss Hall and Mr Liddle gave evidence of the several actual and potential advantages for pot fishing over long-lines, both ecological and non-ecological (Miss Hall's First Affidavit, Paragraph 29: and Mr Liddle's First Affidavit, Paragraph 11), as follows:

(i) Long-lining has associated with it substantial fish losses through cetacean predation, i.e. whales eat the fish off line as they are being raised. Analysis suggests the loss could be 5%. It is possible that this loss will at some stage be taken into account when TACs are being set, with potential loss in licensing revenues.

(ii) Pot fishing may result in the catch of larger and consequently older fish, again considered ecologically beneficial.

(iii) Long-lining has a greater incidence of sea bird mortality, resulting from birds attempting to eat the bait on hooks before the hooks are sunk and when they are hauled in. Although bird by-catch on long-lines has been limited by a number of steps required by CCAMLR, it is still perceived as a problem by CCAMLR with the result that the long-line season is limited to the winter (when fewer birds will be in the fishing grounds).

(iv) Because pot fishing can be performed all year round, this has several potential benefits, e.g. (a) cash-flow advantages to the Government of SGSSI, because licence revenues might be spread throughout the year, matching better expenditure on fishery management and (b) better fishery management, because licensed vessels would be in the fishery all year round, actively detecting and discouraging IUU fishing.

111. As I have said, these perceived advantages include not only overt ecological benefits, but also the commercial benefit for the Government of SGSSI in that annual income (although not increased) might be better spread throughout the year. Mr Randolph submitted that it was improper for the Director to have taken into account non-ecological factors when giving appropriate weight to the experimental fishing method criteria. I disagree.

112. First, with regard to SGSSI, it is difficult to differentiate between fishery policy and other matters, e.g. financial and commercial. The vast majority of the income of the SGSSI comes from fishing licences, and the vast majority of expenditure is upon management of the fishing grounds in accordance with CCAMLR objectives. The particular matter in hand is an example. The spreading of fisheries income throughout the year would assist the Government of SGSSI in that it would assist in cash-flow to match better the expenditure it incurs throughout the year in fisheries management. The Government of SGSSI is entirely dependent upon fishing licence income to manage the fishery (Mr Liddle's Second Affidavit, Paragraph 4). The commercial and financial aspects of government are inextricably bound up with the management of the fishery. And that management is firmly based on ecological objectives. Consequently, I do not accept that there are any perceived benefits of pot fishing that are entirely divorced from ecological concerns.

113. But even if there were, although no doubt the primary reason for engagement in new and experimental fishing methods being a criterion is ecological - the potential

ecological benefits of other forms of fishing than long-lining being behind it - that does not mean that it is improper for the Director to take into account other facets. Paragraph 10 of the Fisheries Licensing Policy does not restrict the consideration of benefits of non-long-lining methods of fishing to the ecological. It merely indicates that one of the criteria that she will take into account in allocation of licences is the degree to which an operator proposes to engage in new or experimental fishing methods. Subject to the overriding primary objective in Paragraph 1 of the Fisheries Licensing Policy, this does not exclude her taking into account incidental non-ecological benefits.

114. Pot fishing in SGSSI waters has not been commercially successful. Prior to 2006, there had been four attempts at pot fishing in those waters since 1993. None had been commercially successful. However, trials in the Falklands and South America have been successful: and, at the CCAMLR 2005 meeting, results were tabled by South Africa from pot fishing in Sub-Area 58.7, which "demonstrated that pot fishing could produce larger (and therefore older) fish, no cetacean predation and no bird mortality" (Miss Hall's First Affidavit, Paragraph 32).

115. Therefore, although not expecting any applications involving pot fishing, when the application in respect of the Punta Ballena proposed that method of fishing as an experiment, given these perceived advantages of that method, it was of interest to the Director.

116. The Punta Ballena application sought a licence for 390 tonnes of toothfish, 150 tonnes to be caught by long-line and 240 tonnes by pot fishing. In addition to the completed application form, the covering letter comprised 7 narrative pages in support. The pot fishing was described in the application as "experimental": and the application did not underplay the commercial risks involved.

117. Miss Hall's evidence was that she considered this proposal carefully, and considered it a serious one:

(i) The generally held view was that pot fishing in the waters of SGSSI had been unsuccessful because spiny crabs had entered the pots, which (perhaps understandably) discouraged toothfish from doing so. Miss Hall said (First Affidavit, Paragraph 30): "The Punta Ballena, conscious of this problem, proposed to reduce the presence of crabs in the pots by putting the pots on stilts." This struck Miss Hall as an attractive, simple and sensible idea.

(ii) Miss Hall was also impressed by the fact that the Punta Ballena had planned to carry out progressive fishing from the High Seas, through the Falklands zone, and on into the SGSSI maritime zone. In the event, this could not be arranged, but to her mind, it demonstrated that the Punta Ballena was taking its attempt at pot-fishing seriously (First Affidavit, Paragraph 31).

(iii) In addition to the advantages of pot fishing to which I refer above (Paragraph 110), the application indicated that (a) fish taken in pots were less likely to be damaged, compared with the damage hooks and gaffes could do to fish caught on long-line; (b) live fishing gave a potential to farm toothfish; and (c) all by catch could be returned live to the sea (Punta Ballena Application, Paragraphs 4, 5 and 6).

(iv) The Punta Ballena proposal was detailed, and apparently carefully thought through. It did not baulk at the commercial risk of the pot fishing - the whole project was described as "experimental" and "a high risk project" for the operators of the vessel - the risk to an extent was to be set off by the 150 tonnes it proposed be fished by long-line at the beginning of the season. The captain of the vessel was to be a person with knowledge of the SGSSI fisheries, with 6 years of pot fishing, described in the application as "probably the most experienced person in this field". It was also intended to have a Uruguayan captain on board who had also previously fished in South Georgia and was knowledgeable of the area.

118. The Applicant's submission that the weight given to this proposal by the Director was manifestly gross and irrational was based upon the fact that the potential advantages

for pot fishing were theoretical or hypothetical, and certainly unproved in a commercial context. There had not been commercially successful fishing by pots in SGSSI previously and there was no evidence that the Punta Ballena was in the event any more successful in 2006 than previous attempts had been. No evidence is available as to the results of the Punta Ballena's attempts at pot fishing this year.

119. With respect, the basis of this submission is not sound. As I indicate above (Paragraph 16), one of the premises upon which CCAMLR itself is based is the importance of increasing knowledge to ensure that its objectives are best attained. Knowledge as to methods of fishing must be one element of this. The Fisheries Licensing Policy makes clear that the "degree to which the operator proposes to engage actively in new or experimental methods of fishing" will be one matter that the Director will take into account in assessing an application. The Applicant did not suggest that that was an irrelevant factor. It clearly is not. The weight to be given to that factor, relative to other relevant factors, was a matter for the Director. Given the potential benefits of pot fishing - and the nature of the Punta Ballena proposal - it cannot be said that she manifestly gave this factor undue weight. Neither the fact that earlier attempts at such fishing in SGSSI waters had not been commercially successful, nor (if it be the case) that the Punta Ballena's attempts in 2006 were not commercially successful, detract from that. Even if not financially successful, the Punta Ballena's attempts at pot fishing may have helpfully added to the knowledge of fishing methods in the area: indeed, a lack of success and problems encountered may themselves have usefully added to the sum of knowledge. But considering the results of exercise would be to have hindsight that the Director could not have had when coming to her decision.

120. Just as there is no evidence that the Director gave manifestly too much weight to the proposal of the Punta Ballena for experimental pot fishing, equally there is no evidence that she gave manifestly too little weight to the exemplary compliance record of the Isla Alegranza.

121. As Scott Baker said in Quark No 2 (at [98]):

> "The grant or refusal of fishing licences to fish in the waters of SGSSI is of such importance to the applicants that the principles on which they are granted and the criteria for granting them should be clear, transparent and made known to the applicants at the time of the application

In this case, through the Fisheries Licensing Policy, the applicants *did* know the criteria that the Director would take into account. What they did not of course know was the weight that she would attach to each of these. But that was properly in her hands.

122. In the circumstances, I do not consider this Court can possibly criticise the Director for the weight she gave to the proposal relative to the weight she gave to other factors, such as the positively good compliance record of the Isla Alegranza.

The Duty to Seek Further Representations

123. Mr Randolph submitted that the Director had a duty to give the Applicant an opportunity to make representations before refusing it a licence and granting a licence to the Punta Ballena on the basis that the proposal in respect of pot fishing was the factor which tipped the balance in favour of the Punta Ballena's application. This was intimately bound up with his submission in respect of the construction of the Fishing Licence Policy - in that he submitted that a departure from the policy as he construed it could only be done after giving the potentially unsuccessful applicant an opportunity to make representations. Insofar as this submission went, I might agree with it - but I have of course found that that is not the proper construction of the policy.

124. However, as I am unsure if any case was made by the Applicant in relation to the duty to seek representations in any event, I shall briefly deal with that issue.

125. Scott Baker J in Quark No 2 referred to the well-known classification of cases where a claimant is seeking to obtain a benefit of some kind rather than prevent

something he already has from being taken away, as set out by Megarry J in McInnes v Onslow Fane [1978] 1 WLR 1520, as follows (at [66]):

> (i) "forfeiture" or deprivation cases where a vested interest (such as a licence to trade) has been withdrawn;
>
> (ii) "application" cases, where no interest yet exists, but is merely being sought (such as an application for a licence, passport or a council house); and
>
> (iii) "expectation" cases where there is a reasonable expectation of a continuation of an existing benefit which falls short of a right.

126. Scott Baker J went on (at [67]):

> "The present case falls most naturally into the second category which, it was suggested, would not qualify for a fair hearing, whereas the other two categories would. As it is pointed out in de Smith Woolf and Jowell on Judicial Review of Administrative Justice 8-1007 this analysis would, if strictly applied, lead to anomalies and injustice. De Smith points out at 8-1009 that there are in general practical reasons why a hearing cannot be given to every applicant for a licence but that situations can be imagined where unfairness of the summary refusal of a licence, or the summary award of a licence to a competitor will be so manifestly unfair that it would be right for a court to hold that a deciding body is under a duty to give the applicant an opportunity to make representations (whether in writing or orally) and of being appraised of all information on which the decision is founded."

127. On this analysis (with which I respectfully agree), Scott Baker J found in that case that there was a duty to seek representations before the decision-maker refused a licence on the basis of the applicant's poor CCAMLR compliance record.

128. However, he did not suggest that there is a general duty to seek representations from an applicant for one of a finite number of commercial licences simply because, the decision-maker having properly considered and given appropriate weight to relevant matters, that applicant is to be unsuccessful. There is no such duty. Nor was there any circumstance in this case that required the Director to seek further representations from the Applicant after receiving and considering the respective applications from the Applicant and the operator of the Punta Ballena. Even if such representations had been sought and supplied - no doubt substantively in the form of the concerns about pot fishing put forward in this application - there is not any shadow of doubt but that the Director's decision to award the single licence to the Punta Ballena would have been the same.

Potential Relief

130. I understand that the Applicant was heavily disappointed not to be granted a fishing licence for the 2006 season. However, understandable as that is, the Applicant has not has shown any way in which the decision-making process that led to that refusal was unfair to it or otherwise unlawful.

131. For these reasons, I find that the decision under review was lawful. However, even had I found it unlawful, it should not be assumed that I would have been bound to have granted the Applicant any relief.

132. In its initial application, the Applicant sought damages in respect of the allegedly unlawful decision: but it dropped this claim as the result of the ultimate outcome of Quark No 3. In respect of other relief, as Mr Woolgar pointed out in his skeleton submissions, the challenge to the Director's decision was effectively two-fold: a challenge to the decision not to award the licence to the Applicant, *and* a challenge to award the licence to the operator of the Punta Ballena. Given the circumstances of the licence process, these decisions are not sensibly severable. There would therefore be at least two difficulties in giving the Applicant any relief in the form of an order of mandamus (quashing the decision not to grant the Isla Alegranza a licence) or even a

declaration that the decision under review was unlawful, namely (i) the 2006 fishing season is past, and the Punta Ballena has made its catch: there is a difficulty in giving any order now making that catch in some manner unlawful: and (ii) the operator of the Punta Ballena would in any event be concerned with any such order, but has played no part in these proceedings and may well be entirely unaware of them.

133. In the circumstances, Mr Randolph did not pursue an order of mandamus, and frankly recognised the unfairness to the operator of the Punta Ballena even if relief were restricted to a declaration that the decision to refuse a licence to the Isla Alegranza was unlawful. In judicial review, remedies are discretionary. I accept that the Applicant may have had an interest in whether the decision in respect of its 2006 licence application was unlawful; because (although the Director denied this) it might possibly affect any application it may make in the future. However, even had I found the Director's decision unlawful, bearing in mind the futility of any relief and the potential unfairness of any relief upon a third party (namely the operators of the Punta Ballena), I would have it noted that I would not even then have granted the Applicant any relief.

Conclusion

134. However, for the reasons I have given, in my judgment the decision of the Director made on 6 March 2006 not to award the Isla Alegranza a licence to fish for toothfish in the waters of SGSSI in the 2006 season was lawful. I dismiss the application.

135. With regard to subsidiary matters:

(i) Unless submissions are made to the contrary, I shall order the Applicant to pay the Respondent's costs of the application. Any submissions should be made in writing by 4pm on 19 January 2007, with written submissions in response being made by 4pm on 2 February 2007. I would propose to deal with any issue as to costs on the basis of these written submissions alone, subject to any representations from the parties.

(ii) I shall extend time for serving a Notice of Appeal in respect of any part of this judgment under RSC Order 59 Rules 3(5) and 4 to 4pm on 19 January 2007.

Coda

136. Finally, may I thank both Counsel for the manner in which they presented their respective cases and for the assistance which they unfailingly gave me. In this judgment, I have made it clear that in my view the merits in respect of various issues fell clearly in favour of the Respondent. However, nothing I have said reflects adversely upon the manner in which Mr Fergus Randolph put the case for the Applicant. That case could not have been put more forcefully, compellingly or courteously.

His Honour Judge Gary Hickinbottom

18 December 2006