IN THE FALKLAND ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. SC/CIV/03/18
CIVIL APPLICATION NO: 3 OF 2018

London

Date: 27 June 2019

Before:

SIR JOHN SAUNDERS QC, TIMOTHY STRAKER QC, BELINDA BUCKNALL QC

BETWEEN:

THE QUEEN (on the application of SGF Limited)

APPELLANT

and

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

RESPONDENT

Paul Bowen QC and Lawrence Power for the **Appellant**
Dermot Woolgar for the **Respondent**

Hearing date: 6 June 2019

Approved Judgment

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

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JUDGMENT OF THE COURT OF APPEAL:

1. On the 16th January 2019 this Court, of its own motion, ordered, amongst other things, that the application (made in March 2018) for leave to move for judicial review made by SGF Ltd against the Director of Fisheries should be listed first out of several matters otherwise before the Court. It is apparent that this order and the associated orders were made so as to reduce or eliminate certain procedural matters, which might otherwise have delayed determination of the application or proved unnecessary to be heard.

2. I refer briefly to these procedural matters later in this judgment.

3. The application for leave to apply for judicial review records the applicant as being SGF Limited of Stanley in the Falkland Islands. The decision in respect of which relief was sought was that taken by the Director of Fisheries for South Georgia and the South Sandwich Islands. It is dated 6 February 2018 and refused the application made by SGF Ltd for the grant of a licence (for Globalpesca 1) to fish for toothfish in the SG SS1 Maritime Zone A8.3 for the 2018-2021 seasons.

4. The application for leave to move for judicial review was dated 19 March 2018, granted on 13 April 2018 and set aside on 22 October 2018. On 16 November 2018 SGF Ltd sought to do two things namely appeal to the Court of Appeal against the order of the Chief Justice setting aside leave and renew, before the Court of Appeal the application for leave to move for judicial review.

5. The renewed application is in exactly the same terms as the original application and ends with a prayer that the impugned decision be declared unlawful and quashed. The prospective appeal is based, substantively, on exactly the same proposition as the application, namely that there is an arguable error of law sufficient to found an

application for judicial review and the Chief Justice (who set aside leave) ought so to have held.

6. There is no doubt but that fishing for toothfish in the relevant maritime zone can be a profitable exercise. In consequence of the need for maritime conservation and other reasons such fishing is subject to licensing. There is no doubt that such licensing is potentially subject to the supervisory jurisdiction of the Court, which is exercised by way of judicial review. An inevitable consequence of need for conservation is a likelihood that the number of licences granted is less than the number sought.

7. It is worth remembering that judicial review is not an appeal on the merits but rather, putting the matter compendiously, a review as to whether or not there has been a prejudicial error of law. Such an error may find expression in one or other of the ways mentioned by Lord Diplock (illegality, irrationality and impropriety) in *CCSU v. Minister for Civil Service* [1985] AC 374 at 410. Further, one should not forget that these grounds along with proportionality have since been developed in the jurisprudence relating to judicial review.

8. By a document dated November 2017 (pages 130-146 of the Court Bundle) information was given to (potential) applicants for a licence to fish for toothfish in the South Georgia and South Sandwich Islands Maritime Zone for the years 2018-2021. The applicants came to include SGF Ltd.

9. The document said, amongst other things:

> 1.2 There are two toothfish fisheries in the Maritime Zone. The principal fishery is the South Georgia fishery for Patagonian toothfish (*Dissostichus eleginoldes*). There is a second, smaller fishery for Patagonian toothfish and Antarctic toothfish (*Dissostichus mawsoni*) in the South Sandwich Islands. Both are within the area covered by the Convention of the Conservation of Antarctic Marine Living Resources, to which the United Kingdom is a contracting party. The Government of South Georgia & the

South Sandwich Islands manages the fisheries in accordance with the United Kingdom's obligations under the Convention.

1.3 The Government's principal fisheries management objectives are to regulate fishing in its Maritime Zone so as to conserve fish stocks and other marine living resources in line with Article 11 of the Convention, and to maintain safe and sustainable fisheries. As part of these objectives the Government is committed to maintaining, and raising, the standards of management, research and operation in the fisheries.

1.4 The Government takes an ecosystem-based precautionary management approach to the fisheries, underpinned by scientific research and robust monitoring and enforcement.

1.5 The South Georgia fishery is certified by the Marine Stewardship Council and operates within Convention Subarea 48.3. It is usually open from 1 May until 31 August each year. For the 2018 and 2019 seasons, there is a provisional earlier opening date of 16 April[1]. The South Sandwich Islands fishery operates within Convention Subarea 48.4. This fishery will be open from 1 February until 30 November in 2018 and 2019.

1.6 The fisheries operate within a sustainable use Marine Protected Area (MPA) which was established in February 2012.

1.7 A management plan for the fisheries is available with this documentation. This plan provides further information relevant to the application process including management objectives and research priorities.

1.8 The main legislation governing the management of the fisheries in the Maritime Zone is the Fisheries (Conservation and Management) Ordinance 2000 as amended (FCMO), which is available on the Government's website: www.gov.gs. Updates and amendments to the FCMO and a new compliance and enforcement framework applicable to all fisheries within the Maritime Zone are being developed for consultation, with implementation planned in the final quarter of 2018, i.e. following the conclusion of the 2018 fishing season.

10. Paragraph 2, which was subdivided, dealt with licences, quota and fees and paragraph 3 with by-catch limits.

11. Paragraph 4 (also subdivided) made it plain that not all applications would be successful and, at 4.5, indicated the application process constituted three stages. These were:

[1] Spatial, or other, management measures may apply during the first two weeks of the season in order to mitigate against the risk of bird by-catch.

(i) Stage 1: All applications will be assessed for compliance with certain minimum standards. These are set out at Annex A. The purpose of these minimum standards is to establish a consistent operational baseline for all vessels in the fisheries, and in particular to ensure that appropriate standards of safety and compliance are met. The supporting documentation specified in Annex A must be submitted with the application. Applications which do not meet these minimum standards will be rejected.

(ii) Stage 2: All applications that meet the minimum standards will be assessed and scored against four criteria (compliance, welfare and safety, raising fishery standards, and experience) which underpin the management of the fishery. A maximum of 80 points may be awarded. Further details of these criteria can be found at Annex B. The Director of Fisheries may take other relevant information into account.

(iii) Stage 3: In accordance with his obligations under the FCMO, the Director of Fisheries will consult with the Secretary of State for Foreign and Commonwealth Affairs in London to establish whether there are any implications for foreign policy in connection with the proposed licensing of vessels. The Director of Fisheries is required to act in accordance with any advice received. Ordinarily, all communications between the Director of Fisheries and the Secretary of State are confidential.

At paragraph 4.8, the Director, i.e. the Respondent, reserved the right to give preference in the granting of licences to vessels that are flagged to the UK or to Overseas Territories of the UK. The language was clear and made it plain there was a reservation to give such preference.

12. The application form (at pages 148-156) consisted of a series of boxes to be completed followed by a declaration at 8 and a beneficial owner declaration at Annex A. This form provided for a summary, vessel information (including flag state and previous flag state), recent fishing history, fishing master and crew, operations, owners, charterers, beneficial owners and agents.

13. Box 6 asked for all relevant information and evidence setting out fully how an applicant met the criteria in Annex B of the Licensing Information, to which reference was made earlier in this judgment. The box indicated that there were a number of items to be

scored. These were compliance, welfare and safety, raising fishery standards and experience. It is worth explaining that Annex B both identified those criteria and by a series of bullet points relating to each, drew attention to the matters falling within the respective headings. Under compliance, for example, reference was made to the compliance record over the preceding 10 years and also to evidence of due diligence in respect of recruitment. I have not fully recited the text but it is apparent that anyone considering such criteria would have to weigh and assess various matters. I should here note that it is axiomatic, that the weight to be given to material considerations (here the information) is always a matter for the decision maker.

14. Box 7 gives details of the application documents required (electronically) at the time of application. Box 8, as indicated, was a declaration indicating amongst other things that the information in Toothfish Licensing Information for Applicants for the 2018-2021 Fishing Seasons had been read and understood. In this case that declaration was signed by Mr. Street.

15. By letter dated 6 February 2018 (page 81), i.e. the letter recording the decision sought to be challenged in these proceedings, Mr. Street of SGF was thanked for his application. The letter advised him that 12 applications had been timeously received and assessed against the minimum standards and licensing criteria as set out in the Information for Applicants. The Director of Fisheries, who was the author of the letter, stated that, as required by the Fisheries (Conservation and Management) Ordinance 2000, as amended, he had consulted the Secretary of State on whether there were any foreign policy implications and had acted in accordance with his advice.

16. He went on to say that the application had not been successful. The application, it was said, did not score sufficiently highly to merit the award of a licence having acted in accordance with foreign policy advice. The scores were then recited.

17. SGF seek to argue that they had been told that vessels did not need to be flagged as UK or UKOT vessels, that Mr. Street believed he did not need to re-flag but otherwise would have done so and that the decision making process was, therefore, neither sufficiently clear nor transparent. The same circumstance is relied upon to suggest a breach of a legitimate expectation. This matter is said to be the most egregious of the matters arising and is supported by the assertion that the duty of candour has been broken by the Director.

18. It is undoubtedly the case that respondents and potential respondents in judicial reviews are under an obligation to be full and frank about the decision-making process. This has been described as ensuring all the cards are on the table. As was observed by Mr. Woolgar for the Director of Fisheries, the Director and the administration in the Falklands Islands are alive to the duty, having sustained (in my words not Mr. Woolgar's) a bloody nose in *The Secretary of State v. Quark Fishing* [2002] EWCA Civ. 1409.

19. At that time there was no particular policy at all as to the award of licences for fishing toothfish with no reasoned letters being sent either to successful or unsuccessful applicants; indeed the process then seems shrouded in a degree of mystery. The Court of Appeal in *Quark* was concerned about disclosure and considered (paragraph 55 of the judgment) that the Secretary of State had fallen short of the high standards of candour.

20. It is apparent that Laws LJ (with whom the other members of the Court agreed) considered that a notification of the prospective basis for the decision was required as a matter of fairness, that in the circumstances of the case an invitation to make representations was similarly required and that loyalty to the fishery was a relevant consideration: paragraph 61 of the judgment.

21. I should also note that Laws LJ was explicit (paragraph 57) that there was no entitlement to make representations at all on matters of judgment in the field of foreign policy. Public law principles do not impose a requirement of representation on foreign policy issues.

22. The process in this matter has been very different from that which obtained at the time of *Quark*. In this case information was given, criteria were stated, the decision-making process described, full ability to submit material with the application was given and the foreign policy element of the process made plain.

23. Nonetheless Mr. Bowen QC, who appeared with Mr Power, maintains there was a breach of the duty of candour. However, Mr. Woolgar – equally powerfully – maintains there was no such breach. I confess I do not consider one should speedily jump to a conclusion there has been a breach of the duty of candour especially when it is apparent there has been a considerable change in procedure since *Quark*. Further, I asked what cards had not been placed on the table. Mr. Bowen indicated this was a hypothetical question. However, I consider the inability to describe the character of the 'cards' about which there has been – so it is alleged – a lack of candour is telling.

24. Reference was made to *Ex P Doody* [1994] 1 AC 531 as quoted by Lord Carnwath JSC in *R (CPRE) v. Dover DC* [2017] UKSC 79. The passage quoted referred to the importance of there being an effective means of detecting the kind of error which would entitle the court to intervene. *Doody* was, of course, a very different case. It related to a serving prisoner and the fixing by the Secretary of State of his minimum term of imprisonment. Reasons for such a term should refer to the observations of the trial judge and if a recommendation (in such observations) was not being followed why such was the case. In this case the suggestion is that the scores given could not be seen to be justified. The scoring system is sought to be checked. However, I do not consider this, or any of the

other matters relied on, support the proposition that there has been a breach of duty of candour.

25. I consider that the cards which, in effect, SGF Ltd seek to have placed upon the table i.e. details about scoring (inevitably involving scoring sheets[2]) would simply disclose, what is already apparent, namely that the Director had to assess, weigh and gauge the material supplied in order to arrive at the scores given. To have these cards would not be a means of detecting error because, as stated, the weight to be given to any material consideration is for the decision-maker not the court. (This has been made clear in countless cases of which a well known illustration is the speech of Lord Hoffmann in *Tesco v. Secretary of State* [1995] 1 WLR 759).

26. As to legitimate expectation I consider we should proceed on the footing as to what Mr. Street contemporaneously (as per his declaration) understood in December 2017. This was that he had read the information and thus appreciated that the Director reserved the right to give preference to vessels that were flagged to the UK or to UK Overseas Territories. In any event the material before the Court does not lead to the proposition that the Director or anyone on his behalf had said anything to undermine what was said in the information or to give rise to an expectation of the kind now contended for by SGF Ltd. The most material statement on this issue is the statement that the choice of flag was a commercial matter for an operator and not an issue for the Director, i.e. he does not concern himself in that commercial matter. But this does not undermine the information which Mr. Street had read and understood.

27. In those circumstances I do not see it as arguable that a legitimate expectation was created, let alone breached. The decision-making process was both clear and transparent.

[2] Mr. Bowen wanted both a breakdown of his own scores and the scores of the other applicants.

There was a reservation of a right to give preference to vessels flagged in a particular way. This was so stated and expressly stated to be understood.

28. Mr. Bowen opened the case by drawing attention to correspondence which preceded the making of the application to which he attached considerable importance. I should note, before considering it, that inevitably an applicant has to take some steps before seeking a licence, which steps are capable of having commercial consequences. It is apparent here, for example, that SGF Limited, through a bare boat charterparty, chartered the vessel in respect of which the licence was to be sought.

29. By email dated 21 November 2017 (page 104 of the bundle) Mr. Street (as director of SGF Ltd) wrote to James Jansen (on behalf of the Director) that he (Mr. Street) was seeking some clarity on the flagging of vessels. He said he had entered into a bare boat charter with an option to buy a respected and reliable Chilean vessel, which was 'now' contracted to his Falkland Islands company, with the intention to re-flag in the future.

30. He went on to say that some craft appear to have operated under what seemed like a separate ownership or dual flag umbrella. Reference was made to the operation of multi-jurisdictional strategies. This was presumed (it was said) to be done to maximize ability to apply for both the SGSSI toothfish fishery as well as rely on previous fishing arrangements. The question was would such "*owner/flagging precedent be open for other UK/Falklands' companies*".

31. It is said that the answer given was misleading. I do not consider that to be correct. The answer (given on 21 November 2017) was that where an operator chose to flag a vessel was a commercial matter for the operator and not an issue in which the Director got involved. The next sentence said that applications were assessed against the criteria

before seeking foreign policy advice from the Secretary of State. It was also suggested that part of the rationale for changes of flag might relate to where else the operator fished.

32. Mr. Jansen had also suggested that Mr. Street could seek more information as to foreign policy advice from an officer in the Foreign and Commonwealth Office (Jane Rumble). Mr. Street sent a further email on 22 November 2017 (pages 109-110). This email drew attention to multiple changes in flagging and said that if flagging were the criteria then choice of a Chilean vessel would put him at an inappropriate disadvantage. He referred to Chile having strict restrictions on changing flags. (To change the flag of the charterered vessel required consent from both the owner and the Chilean authorities).

33. Mr. Jansen replied by saying the query had been passed on to Jane Rumble and another (Kylie Banford) at the Foreign Office. Two further observations about the emails can be made. First, between them they convey no impression that there was or was to be a departure from the reservation of right to give preference to vessels flagged to the UK or to UK Overseas Territories. Second, Mr. Street was alive to that reservation of such a right and sought, initially, to see if that preference could be secured by indicating an intention to re-flag. No such indication was given and thus the point was more about ownership than flagging and whether that could generate a preference. This was a matter for the Foreign Office.

34. By letter dated 7 December 2017 (page 114) the application was, in fact, submitted. Attention was drawn to the fact that the letter said the only concern was that Mr. Street had not received a response from the Foreign Office to the email of 22 November 2017. He was, it was said, basing the application on the information available, which may be incomplete.

35. I do not consider it can be maintained that Mr. Street was materially misled about the application and the application process or that there was any such mis-statement by the Director as contended for by SGF Ltd. The Director had stated the criteria that were published were the basis of assessment. Mr. Street said he based his application on the information available. He had what he regarded as an outstanding query with the Foreign Office but had made it plain (by the declaration in the application) that he had read and understood the information that had been provided. This included a clear reservation to the Director as to the possibility of preference to UK or UK Overseas Territories flagged vessels.

36. SGF complain that the Secretary of State gave advice as to the number of licences to be awarded to Chilean flagged vessels. Mr. Street understood, as stated in the information at 4.5(iii), that the Director, at stage 3 of the process, would consult with the Secretary of State in connection with the proposed licensing of vessels and would act in accordance with advice received.

37. It is apparent that the Secretary of State's advice was taken towards the end of rather than in the early stages of the treatment of the application. It is also apparent, given we are concerned with (as the information says) the Secretary of State for Foreign and Commonwealth Affairs in London that his advice was likely to be concerned with relations with other states. It seems obvious that this may bear on the states to which vessels are flagged; indeed this is so stated on behalf of the Director.

38. Ultimately, as it seems to me, it was understood that flagging could be of significance. Why else does the information reserve the right to the Director to give preference to UK and UKOT vessels? Unless it is said – which it is not – that such preference could not be shown, flagging was never an irrelevancy; the fact the Director did not concern himself with the commercial attributes of flagging is neither here nor there. The advice about

giving a licence to one Chilean vessel came at the end of the process and in the light of the scores. It was not a pre-condition that only one Chilean vessel should get a licence. Rather it was the concern of the Foreign Office that it was advantageous diplomatically to give a licence to a country otherwise not entitled (by virtue of the scores) to such a licence.

39. Accordingly, I do not consider that any arguable question arises from the advice tendered by the Secretary of State. I have in any event already drawn attention to the position stated by Laws LJ about foreign policy and its treatment in judicial review.

40. SGF contend that the scores awarded in respect of their application for a licence are so low as to be irrational. I do not consider this to be a sustainable point. It will be remembered that irrationality for judicial review is a high threshold. It must be arguable that no director placed as the Director was placed could have scored SGF's application as it was scored. In various cases this has been described as the decision-maker taking leave of his senses. There is nothing to suggest that the scores were irrational.

41. In effect this is recognised by the Claimant for it is said that there is no reasoning as to the scores and that in the absence of adequate disclosure – which it is contended has not occurred – the Court should infer arguability as to irrationality. I have already dealt with the question of candour, which also deals with the question of disclosure.

42. The Claimant has not pointed to a legal requirement for reasons and, generally speaking, if there is no such requirement reasons do not have to be given. However, if reasons are given they should be adequate and comprehensible. In this case the decision letter, which one looks at as a whole for its reasoning, was perfectly comprehensible. As Mr. Woolgar pointed out the letter of decision (p81) although just one page gave a considerable

amount of information. It said exactly what had happened, gave the reason for lack of success and stated what the scores were against the criteria.

43. SGF next maintain that two-thirds of the vessels that were granted licences were owned beneficially by the same individual. This, it is said, creates an arguable appearance of want of impartiality. I do not consider this correct. If such is the case it simply gives the appearance that one owner has a number of good vessels. In the event this matter was hardly pressed by Mr. Bowen.

44. It follows that an application for leave to move should be refused. I do not consider the grounds as they have come to be expressed through the focus of oral submissions and the latest skeleton argument dated 26 April 2019 reveal an arguable case. I put the matter in terms of an application for leave to move because whether one was considering a renewal application or a prospective appeal one would want to see whether this was a case fit for the grant of leave to move for judicial review.

45. This means that residual points can be speedily dealt with.

46. I have already drawn attention to the fact that leave was granted and subsequently set aside. This now sounds strange in England where applications to set aside the grant of permission are not, under the Civil Procedure Rules, available. None the less it is available in the Falklands and provoked two steps by SGF Ltd namely a renewed application to the Court of Appeal for leave to move and an application for leave to appeal.

47. Under the Rules of the Supreme Court 1965 an application to set aside was- and where such Rules still operate is-possible. This led to the circumstance discussed in the White Book of 1997 as to whether the process of reaching the Court of Appeal (when leave had

been set aside) was by way of renewed application or appeal. (The cases of *Begum* and *Ryco* were discussed at 53/1-14/34).

48. I have the clear impression that this kind of procedural debate is not one which the Court of Appeal in England views as desirable for it takes up time, which might otherwise be used in addressing the substance of any given matter. This Court should, in my view, also consider these kinds of procedural debates as worth avoiding rather than relishing.

49. However, I should draw attention to the argument on behalf of the Director. In particular he has referred to a case called *Kemper Reinsurance v Minister of Finance* [2000] 1 AC 1 in which the Privy Council expressed the view that a renewal application was, in fact, a true appeal. In the light of that decision that references Order 59 rule 14(3), which the Director says does not apply in the Falklands, the Director goes on to say that SGF only had available to them the ability to seek permission to appeal rather than to renew as of right.

50. For my part I would decline to determine whether the Director is right or wrong. Instead I would say the following. First, care should be taken before the making by a respondent of an application to set aside leave to move for judicial review. I consider a respondent may well be better advised to deal with the case substantively; after all if it was capable of being set aside it should straightforwardly be capable of being defeated. Further, setting aside leave may simply generate an expedition to this Court with the possibility that this Court returns the substantive question to the Supreme Court of the Falklands Islands.

51. Second, I consider that hereafter it would be prudent if any such applicant, following a set aside, for leave to seek judicial review in this Court made plain in one initiating document that it would seek such permission as was necessary for the question of grant of

leave to be pursued in this Court. The important substantive question will always be – as has here been discussed – whether there is an arguable case in law for judicial review.

52. Against that background I consider, first, there is no prospective arguable basis for judicial review. Therefore leave to move for judicial review should be refused. Consequently, permission to appeal could and should be refused as there would be no substantive point to the appeal. As a matter of form the renewed application can be dismissed and permission to appeal refused.

53. I should mention that I have read the judgment of the Chief Justice when he set aside the grant of leave. I approached the matter through my own eyes but that judgment on all principal matters is consistent with what I have said and I agree with it.

54. It follows that if My Lord and My Lady agree with me the application for leave to move for judicial review whether pursued by initiating application or prospective appeal should be refused so that the substantive applications (for leave to move and to appeal) should be dismissed.

55. My Lord, the President, signified at the end of the hearing that any question of costs was to be dealt with by written submissions. I suggest that any application for costs be so made within 14 days of the handing down of this Judgment by dispatch to the parties on 27 June 2019. Responses to such application should be made in writing and/or by email to the Registrar within 7 days thereafter.

The President: I agree.

Bucknall J.A : I agree

IN THE MATTER OF:

R (SGF) LTD

v.

DIRECTOR OF FISHERIES

J U D G M E N T
