**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2024] CSIH 9**
P107/23

Lord President
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion in the petition for judicial review by

THE OPEN SEAS TRUST

Petitioners and Respondents

against

THE SCOTTISH MINISTERS

Respondents and Reclaimers

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**Petitioners and Respondents: J de C Findlay KC, Colquhoun; Davidson Chalmers Stewart LLP**
**Respondents and Reclaimers: C O'Neill KC (sol adv), E Campbell; Scottish Government Legal Directorate**

25 April 2024

## Introduction

[1] This is a judicial review of a variation of fishing licenses relative to nephrops (Dublin Bay prawns) and scallops. The Scottish Ministers, in the form of Marine Scotland, accept that they did not have regard to their National Marine Plan when making the variation. The question is whether section 15 of the Marine (Scotland) Act 2010 required them to do so.

The Ministers argue that the Act's provisions, which state that the Ministers must take decisions "in accordance with" the NMP, are being complied with by other means; notably by the promulgation of statutory instruments which create appropriate schemes for fisheries management.

[2] The petitioners, who are a charity whose purposes include the conservation and environmental protection of marine species in the waters around the United Kingdom, argue that the Ministers have acted unlawfully by failing to comply with the statutory duty incumbent on them under section 15. The Ministers' interpretation of section 15 has been a bone of contention between the parties, and has been the subject of correspondence, since 2021.

**Legislation**

***The Fisheries Act 2020***

[3] Under the Fisheries Act 2020, all fishing by British boats, and fishing within British fishery limits by foreign boats, is prohibited unless authorised by a licence (ss 14 and 16). The Scottish Ministers have the power to grant licences to the owners or charterers of Scottish boats (i.e. boats whose home port is in Scotland, s 52) or foreign boats fishing in Scotland and the Scottish zone (ss 15 and 17). The Ministers may attach such conditions to a licence as appear to them to be necessary or expedient for the regulation of fishing (Sch 3, para 1). These include conditions which restrict the times which a boat can spend at sea and those whose purpose is conserving or enhancing the marine environment. The Ministers may vary the conditions by issuing a notice of variation (*ibid*, para 2). Variations tend to concern matters such as the seasonal opening and closing of sea areas, periodic adjustments to catch limits for certain species of fish, amendments to the periods of time within which

boats may fish and regulatory changes or updates. The Ministers can request the other UK fishing authorities to exercise their functions in a manner which is compatible with the Scottish licence regime in so far as applicable in Scotland and the Scottish zone (*ibid*, para 4). The other authority must comply with the request unless, in its opinion, it is unreasonable to do so.

[4] On a practical level, the Ministers make licensing decisions through Marine Scotland, now the Marine Directorate. This is the directorate of the Scottish Government with responsibility for the management of Scotland's seas. The number of licences is constant in the sense that there has been no increase in the overall authorised capacity of boats since the licensing scheme was created in the 1990s.

***The Marine (Scotland) Act 2010***

[5] Whenever they are exercising a function under the Marine (Scotland) Act 2010, the Scottish Ministers have a general duty to "act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, the enhancement of the health of [the marine area]" (s 3). The marine area is the sea within the 200 nautical mile limit of the UK's territorial sea adjacent to Scotland. It includes the bed and subsoil (s 1(1)).

[6] Part 3 of the 2010 Act introduced the concept of marine planning. This requires the Scottish Ministers to prepare and adopt a National Marine Plan for the Scottish marine area (s 5(1)). This is "a document which – (a) states the … Ministers' policies … for and in connection with the sustainable development of the area to which the plan applies" (s 5(3)(a)). Section 15 of the 2010 Act describes the role that the NMP plays in decision making as follows:

> "**15 Decisions of public authorities affected by marine plans**
>
> (1) A public authority must take any authorisation or enforcement decision *in accordance with* the appropriate marine plans, unless relevant considerations indicate otherwise.
>
> (2) If a public authority makes an authorisation or enforcement decision otherwise than in accordance with the appropriate marine plans, it must state its reasons.
>
> (3) A public authority must *have regard to* the appropriate marine plans in making any decision–
>
> (a) which relates to the exercise by them of any function capable of affecting the whole or any part of the Scottish marine area, but
>
> (b) which is not an authorisation or enforcement decision" (emphases added).

The Scottish Ministers accept that a decision to vary a licence is an authorisation decision for the purposes of section 15.

***The National Marine Plan***

[7] A very lengthy plan, namely Scotland's National Marine Plan: A Single Framework for Managing our Seas, was adopted in March 2015. Chapter 2 is titled "Marine Planning in Context". It provides that "[m]arine planning will interact with other planning and consenting processes within, and adjoining, the Scottish marine area" (para 2.1). It "provides a consistent framework for [the] continued operation" of existing regulatory regimes or legislative requirements (para 2.13). It continues (at para 2.15):

> "The Marine Acts require that public authorities must take authorisation or enforcement decisions *in accordance with* this Plan, unless relevant considerations indicate otherwise. They must also *have regard to* this Plan in taking other decisions if they impact on the marine area. This Plan therefore provides direction to a wide range of marine decisions and consents made by public bodies … for example:
>
> ...
>
> • Fishing licences: Commercial sea fishing licences will continue to be issued by Marine Scotland *in accordance with* this Plan" (emphases added).

The plan is to be applied proportionately (para 2.16).

[8] The National Marine Plan contains both general and sector-specific policies. Chapter 3 contains a number of policies which encapsulate an "ecosystem approach, putting the marine environment at the heart of the planning process to promote ecosystem health, resilience to human induced change and the ability to support sustainable development and use" (para 3.4). Chapter 4 contains general policies which apply to all development and use of inshore and offshore waters. "The General Policies apply to all … decision making in the marine environment" (para 3.10). They provide "a clear overarching framework for all activity …" (*ibid*). They are supplemented by the sector specific policies chapters (para 4.4).

[9] Policy GEN 9 of the National Marine Plan is a general policy. It is relied upon heavily by the petitioners and reads as follows:

> "**GEN 9 Natural heritage:** Development and use of the marine environment must**:**
> (a) Comply with legal requirements for protected areas and protected species.
> (b) Not result in significant impact on the national status of Priority Marine Features.
> (c) Protect and, where appropriate, enhance the health of the marine area."

[10] Earlier, in two reports from 2012, eighty one "Priority Marine Features" had been identified by Scottish National Heritage (now NatureScot) and the Joint Nature Conservation Committee. The reports were adopted by the Scottish Ministers in 2014. PMFs are "species and habitats which have been identified as being of conservation importance" (NMP para 4.56). The National Marine Plan provides that "[a]ctions should be taken to enhance the status of PMFs where appropriate" (*ibid*). "Where planned developments or use have potential to impact PMFs, mitigation, including alternative locations, should be considered" (*ibid*).

[11] Chapter 6 sets out a series of specific policies and objectives for the fisheries sector. Part 3 identifies "[k]ey issues for marine planning". Those issues include the impact of fishing as follows:

> "6.38 … Fishing has a more geographically widespread impact on the marine environment than other activities, however the degree of impact depends on the type of fishing gear used and the nature and sensitivity of species and habitats affected.
>
> 6.39 Commercial fishing inevitably impacts on marine productivity and biodiversity. The degree of impact is related to natural ecosystem dynamics … the amount of fishing taking place, the efficiency and selectivity of fishing gear … and the approaches taken by fishers to targeting species. …
>
> …
>
> 6.41 Scallop dredging is recognised as having the most significant impact on localised seabed habitats within Scotland's waters. Fishing using demersal mobile gear can also adversely affect the seabed, causing damage to benthic features and habitats. There is also the potential for loss or damage to heritage assets although fishers avoid these where possible."

**The notice of variation and the petitioners' complaint**

[12] On 1 January 2023, a notice of variation dated 30 December 2022 was published on the Scottish Government's website. The variations applied to all Scottish fishing licences. Amongst other matters, the variations set a catch limit of 20 tonnes of nephrops for certain boats between 1 January and 31 March 2023 and a 65 day limit on scallop dredging for certain boats in the same period. Nephrops can be fished by bottom trawling. This is done by pulling weighted nets along the seabed. Scallop dredging involves a triangular frame being dragged across the sea floor, thereby flipping the scallops into a collecting bag. Both nephrop trawling and scallop dredging were legal activities prior to the variation. The variation did not legalise them. It simply imposed respectively weight and time limitations on each activity.

[13] The petitioners initially sought suspension of those aspects of the variation which related to nephrop trawling and scallop dredging. This was on the basis that both methods

were likely to have a significant impact on the national status of Priority Marine Features in the areas where such methods of fishing were to be used. The impact was said to be the loss of, or damage to, mearl beds to the extent that their function could not be maintained. Allowing such methods was contrary to policy GEN 9(b) of the National Marine Plan. The complaint focussed on the impact of trawling and dredging on eleven PMFs: blue mussel beds; cold water coral reefs; fan mussel aggregations; flame shell beds; horse mussel beds; maerl beds; maerl or coarse shell gravel with burrowing sea cucumbers; native oysters; northern sea fan and sponge communities; seagrass beds; and serpulid aggregations. The petitioners provided specific examples of damage caused to PMFs in the waters at: Flotta in Orkney; Rum; Islay; Scarba (off Jura) and at the Isle of Lismore. They averred that the trawling and dredging had led to a significant reduction in the extent of the PMFs on the seabed. The continuation of such activities would contribute to the deterioration of the seabed.

[14] The Scottish Ministers did not accept that trawling and dredging would necessarily create a significant impact on the national status of Priority Marine Features although the PMFs might be affected by these methods of fishing. They did not accept that any damage had been caused in the petitioners' PMF examples. The Ministers averred (Ans 15) that the most proportionate and effective means of protecting the PMFs was:

> "by continuing to implement fisheries management measures using Scottish Statutory Instruments which impose restrictions on fishing (a) in designated Marine Protected Areas and (b) in areas outside Marine Protected Areas where the eleven PMFs … occur".

An SSI would apply to all boats in Scottish waters; not just Scottish vessels and non UK foreign boats. The Ministers averred that:

> "It would not be practically possible and would involve disproportionate use of resources … to take [the consultation and risk assessment steps, which took place when promulgating an SSI] in the context of routine licence variation notices …".

In respect of each example, there were already marine protection orders in place or management schemes in development. Section 15 of the 2010 Act did not prescribe the means by which the Ministers were to act "in accordance with" the National Marine Plan.

[15] The Scottish Ministers' policy of protecting the Priority Marine Features through the use of statutory instruments was explored in some detail in affidavits from two officials at Marine Scotland. John Mouat, who is the Team Lead on Marine Biodiversity, was involved in the network of Marine Protected Areas and the protection of sensitive habitats outwith the MPAs. He was also involved in the protection of the PMFs which were deemed most at risk from trawling and dredging. He described the policies in the National Marine Plan and how PMFs and MPAs were managed. It is clear from his affidavit that Marine Scotland were and are taking considerable steps towards creating or maintaining sustainable fisheries. These include sustainability appraisals, socio-economic impact assessments, engagement with interested parties, public consultation, ministerial decisions and parliamentary scrutiny of any statutory instrument designed to implement any selected measures. This is Marine Scotland's method of regulation, rather than to use the licensing regime. Mr Mouat went on to explain what was proposed for the future.

[16] Malcolm MacLeod is the Team Lead on Access to Sea Fisheries; the team which deals with licences. He explained the background to the variation. Its purposes included ensuring that socio-economic benefits would accrue to coastal communities, whilst at the same time helping to maintain sustainability. The variation reflected *inter alia* UK/European Union negotiations. It was not intended to protect PMFs. It was a routine variation, which was a continuation of established policy. No prior ministerial approval or impact

assessment had been sought. Had the variations not been made, Scottish boats would have been able to fish unrestricted. Mr MacLeod said in terms (Affidavit at para 34) that:

> "General Policy 9b is not considered in respect of routine licensing decisions. This is because the introduction of fisheries management measures for PMF fisheries management areas is being taken forward by the Directorate's Marine Biodiversity Team. That policy team is responsible for the development of appropriate management for such areas in line with advice from statutory advisors, engagement with stakeholders and the development of necessary impact assessments. Given the large number of areas, their location, potential impact on fishers and the communities they support, and significant public interest in the introduction of restrictions of fishing activity it is considered to be appropriate and necessary that it is led by policy officials tasked with the development of protection for PMFs. The introduction of fisheries management measures, which might include prohibitions, for the protection of PMFs through routine licence variations is not considered to be practical, proportionate or in the public interest for a number of reasons."

These reasons are: (1) an inability to carry out appropriate "stakeholder engagement"; (2) consideration of impact on wider UK vessels and waters; (3) requirement to implement outcome of international negotiations timeously through licence conditions; and (4) a need for flexible and adaptive management measures to be introduced through licences. It was Mr MacLeod's view that, if regard had to be had to the National Marine Plan when varying a licence, this would require extensive public consultations and islands community and equalities impact assessments.

**The Lord Ordinary's decision**

[17] The Lord Ordinary rejected the Scottish Ministers' interpretation of section 15 of the 2010 Act and granted declarator that the notice of variation, insofar as it concerned nephrops and scallops, was unlawful because it had been issued "without having regard to" the National Marine Plan. The Ministers had failed to consider the NMP when taking the variation decision. The NMP was an integral part of the decision making process. It was

hard to see how a decision could be taken "in accordance with" a plan, if no regard were had to that plan.

[18] The legislative intention behind section 15(1) of the 2010 Act was clear. Any authorisation decision had to be taken "in accordance with" the National Marine Plan. Subsection (3) provided that a public authority "must have regard to" the NMP when making a non-authorisation decision. The legislature could not have intended that regard must be had to the NMP in making a non-authorisation decision, but not in relation to taking an authorisation decision. The requirement to state reasons, if departing from the NMP, when taking an authorisation decision, would make no sense if that were the case. Reasons could only be given if the plan had been considered in the first place. As soon as a decision were accepted as being an authorisation decision, a duty arose to take that decision in accordance with the NMP, or to state reasons for not doing so. The Ministers thus required to grapple with the NMP. The analogy which the Ministers had drawn with a public authority's duty to have regard to European Convention human rights was not a good one. There, the focus was on whether substantive rights had been infringed. Section 15 concentrated on the decision-making process.

[19] "[I]n accordance with" meant "in agreement or harmony with". It did not connote an exact or strict degree of conformity (*R (Swire)* v *Canterbury City Council* [2022] JPL 1026 at para 42). Deciding whether conditions attached to fishing licences were in accordance with the National Marine Plan might involve questions of judgement. That did not need a mechanistic assessment of the proposals against each and every NMP policy. It did require: an evaluation of the main, relevant NMP policy areas; an assessment of how the proposals fared against them; and a judgement involving the NMP as a whole (*Tiviot Way Investments*

v *Secretary of State for Communities and Local Government* [2016] JPL 171 at para 30). The Ministers had admittedly not considered the NMP's policies in taking the relevant decision.

[20] The Scottish Ministers' ability to ask other licensing authorities to impose similar licence conditions (Sch 3, para 4 of the 2020 Act) undermined the argument that their incapacity to regulate the activity of boats from other parts of the UK, whilst fishing in Scottish waters, made it impractical for them to consider policy GEN 9. The Ministers' view that it was too difficult, if not impossible, to undertake the engagement required by the National Marine Plan was rejected. There was nothing to stop the Ministers from evaluating a variation against the NMP, or from undertaking limited engagement with relevant persons.

**Submissions**

***The Scottish Ministers***

[21] The Lord Ordinary had erred in holding that the variation was unlawful because the Ministers did not have specific regard to the National Marine Plan. The variation had been made "in accordance with" the NMP because it had been made in circumstances in which the Ministers considered that the most appropriate way to give effect to the NMP, notably Policy GEN 9, was by putting in place wider fisheries measures by means of statutory instruments, after appropriate consultation and consideration (including by the Scottish Parliament). That approach was in harmony with the NMP. It was one which was open to the Ministers and represented a proportionate application of the NMP. The NMP applied to all plan making and decision taking in the marine environment. It envisaged decisions being: based on sound evidence; drawn from a wide range of sources; and taken in the long-term public interest after appropriate consultation. Chapter 6 of the NMP related

specifically to sea fisheries. It recognised the importance of social, cultural and economic factors and sustainability.

[22] The variations were authorisation decisions. Variation decisions were issued regularly; as often as weekly. They were routine and related to matters such as catch limits and regulatory updates. The variations under challenge were time limited. They applied to specified classes of boats and particular areas of sea. Their purpose was not the protection of Priority Marine Features, but the sustainable management of fish stocks. The Ministers had taken, and continued to take, steps to develop SSIs for the protection of PMFs. They aimed to balance competing environmental and social interests and to meet the requirements of the National Marine Plan. There were a number of reasons for implementing protective measures by means of SSIs. Those included policy, parliamentary scrutiny, the need to cover all boats and the need for flexible and adaptive management measures. The Ministers' approach recognised that the imposition of conditions could engage European Convention Article 1, Protocol 1 rights. Any process which interfered with such rights required to be lawful (*R (Mott)* v *Environment Agency* [2018] 1 WLR 1022; *Salmon Net Fishing Association of Scotland* v *Scottish Ministers* [2020] CSOH 11 at para 12).

[23] Section 15(1) did not impose a procedural duty which required regard to be had to relevant plans when taking decisions. The comparison with planning applications was not appropriate. The better analogy was with the substantive duty to comply with European Convention human rights (*R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100 at para 68). The Lord Ordinary's approach would require the protection of Priority Marine Features to be considered on a piecemeal basis in routine licence variations. The Lord Ordinary erred in holding that section 15 required a proportionate consideration of the National Marine Plan. That mis-stated the legislative requirement, which was to act in

accordance with the NMP. What amounted to a proportionate application of the NMP was a question for the Scottish Ministers. It was clear from the affidavits of John Mouat and Malcolm MacLeod that to assess the compatibility of every routine decision with the NMP would paralyse the decision-making process. The Lord Ordinary had rejected that evidence without explanation.

[24] If the Scottish Ministers had to "grapple" with the National Marine Plan every time they made a routine licence variation, they would require to comply with the *Tameside* principle, ie they would have to acquaint themselves with the relevant information in order to conclude whether the decision was compatible with the NMP (*Education Secretary* v *Tameside MBC* [1977] AC 1014 at 1065). The Lord Ordinary's conclusion that the Ministers could undertake limited engagement with relevant interested parties was contrary to the evidence. The Lord Ordinary had erred in holding that the ability to ask other licensing authorities to impose similar conditions removed the Scottish Ministers' concerns about the inability of the Ministers to regulate non-Scottish boats. The Ministers recognised the potential to request reciprocal action by other authorities. A rational basis for their concerns remained.

***The petitioners***

[25] The Lord Ordinary's analysis was correct. The National Marine Plan set out the Scottish Ministers' policies for the sustainable development of the marine area. Licensing decisions, including decisions regarding variations, were authorisation decisions for the purposes of section 15. As such, they required to be taken in accordance with the NMP, unless material considerations indicated otherwise. That proposition was supported by

paragraph 2.15 and chapter 6 of the NMP. The Ministers required to consider the NMP and to apply it proportionately.

[26] The National Marine Plan was analogous to a local development plan (*R (Powell)* v *Marine Management Organisation* [2017] EWHC 1491 (Admin) at para 49). It was for the decision maker, having regard to the development plan, to decide: what the determining issues were; which evidence was material to those issues; and the conclusions to be drawn. If the court concluded that a material matter had been left out of account, the court could hold that the decision was not validly made.

[27] The Scottish Ministers accepted that they did not consider the National Marine Plan when making licensing decisions. Their submissions amounted to a suggestion that the NMP could be followed, even if it had not been applied. That was not the scheme enacted by the Scottish Parliament. A decision could not be said to be in accordance with the NMP if no consideration had been given to the NMP. An improperly taken decision could not be defended because it was arguably in harmony with the NMP in a general sense. A systematic disregard of the NMP, on the basis that the Ministers had an alternative plan to achieve the aims of the NMP, was not in accordance with the intention of Parliament. The fact that the Ministers considered that their alternative approach was reasonable was irrelevant. Their approach could not be reasonable if it did not comply with the statutory duty to take each decision in accordance with the NMP.

[28] The Scottish Ministers' submissions regarding Mr MacLeod's evidence were misconceived. The Lord Ordinary was required to answer a simple question: whether section 15 of the 2010 Act required the Ministers to consider the National Marine Plan. Mr MacLeod's observations on the practicability of doing so did not engage that question. His evidence might justify a particular approach to the application of the section 15 duty in

practice, but it could not justify ignoring it. A requirement to consider the NMP was not the same as a requirement to run significant public consultations before any decision could be taken. Routine decisions were taken by planning authorities in accordance with local development plans on a daily basis, without apparent difficulty.

[29] It was irrelevant that the Scottish Ministers could not guarantee that another UK fishing licence authority would impose parallel protective licence conditions. The power of the Ministers to request other UK licensing authorities to replicate licence conditions was an adequate safeguard.

**Decision**

[30] Although the notice no longer has any practical impact as regards either of the variations complained of (the relevant time periods having expired), the Scottish Ministers did not seek to argue that the court should refuse to entertain the case on the ground that the issues raised were of mere academic interest. Since the case concerns points of general public importance, the court is content to proceed on the footing that there are live issues in play, particularly in relation to the correct interpretation of section 15 of the Marine (Scotland) Act 2010. That question is one that will arise in the context of other licence variations and requires to be settled by an authoritative ruling of the court.

[31] The issue to be resolved is essentially one of statutory interpretation. It requires stressing *in limine* that it is of paramount importance, following the constitutional principle of the separation of powers, that the Scottish Ministers exercise their functions in compliance with the provisions of the statutes passed by the Scottish Parliament and not by some other route which they perceive to be a better, more administratively convenient or more beneficial way of proceeding. Such compliance is an essential requirement of the rule of

law, which applies just as much to the Scottish Ministers as it does to everyone else. It must be emphasised too that section 15(1) of the Marine (Scotland) Act 2010 does not say, for example, that all authorisation decisions must accord with the National Marine Plan. It does not say that the Ministers' overall marine strategy should be in harmony with the NMP. It says clearly and unambiguously that the Ministers must take any authorisation decision "in accordance with" the NMP unless "relevant considerations indicate otherwise".

[32] It is accepted by the Scottish Ministers that the variation notice was an authorisation decision. The Ministers concede that they did not consider the policies in the National Marine Plan when making the variation, yet they seek to argue that it nevertheless is in accordance with the NMP because there was a wider scheme within government for the implementation of the NMP through the use of statutory instruments. That wider scheme may well be a laudable one, and the court does not in any way seek to criticise it, but it does not constitute compliance with that provided for in the Act. Whether or not there is a wider scheme in operation, section 15(1) requires individual decisions to be taken in accordance with the NMP. In taking each decision, in the absence of contrary considerations, the Ministers must act in accordance with the NMP. If they are not so acting, they must give reasons. The contents of the NMP must be considered so that the decision can be deemed lawful; that is compliant with sub-sections 15(1) and/or (2). That is also what the NMP says (para 2.15). In failing to consider the NMP's policies, the Ministers have omitted to take into account not just a relevant consideration but an essential one. The variation notice was therefore unlawful because it was not in accordance with, and did not purport to be in accordance with, the NMP.

[33] It is notable that section 15(1) permits a public authority to take authorisation decisions which are not in accordance with the National Marine Plan where relevant

considerations justify such a course. Under section 15(2) the authority must in such circumstances state its reasons for taking the decision otherwise than in accordance with the NMP. It is impossible to see how reasons could be given for departing from the NMP if there was no need, as the Ministers argue, for the NMP even to be considered in taking an authorisation decision.

[34] The necessary compliance procedure is akin to that under the Town and Country Planning (Scotland) Act 1997 (ss 25(1) and 37(2)). The court agrees broadly, in that regard, with the approach taken in *R (Powell)* v *Marine Management Organisation* [2017] EWHC 1491 (Admin) (Holgate J at paras 51 and 87). That approach coincides with the National Marine Plan's reference (para 2.1) to marine planning interacting with other planning policies adjoining the marine area through a consistency of policy guidance, plans and decisions (para 2.18). Despite the contrary contentions of the officials from Marine Scotland, there is no apparent difficulty in taking account of, and acting in accordance with, the NMP's policies when taking decisions, including variations, in terms of section 15(1). Section 15 does not require the Scottish Ministers to conduct widespread consultation or to conduct detailed impact or equalities assessments before every decision is taken. As with decisions in the town and country planning field, officials in the relevant department can be assumed to be familiar with the general nature of the policies which will be of relevance to a variation decision. There is no need to carry out a detailed comparison of the terms of a variation with each and every NMP policy. It is sufficient that the official is able to identify any relevant policy and is able to explain, if called upon to do so, either that the variation is in accordance with that policy or that conflicting circumstances dictate a different view. Since many variations will be very similar, identical considerations might come into play each time a decision is taken. An entirely empirical approach is not needed for each one. What is

not legitimate is a stance which does not involve any consideration of the NMP when taking an individual decision because separate steps are being taken elsewhere in government, unconnected to that decision, to implement the NMP policies. The Ministers can request the other UK fishing authorities to replicate any variation proposed.

[35] All that is demanded by the court's construction is that the Scottish Ministers take decisions in accordance with their own National Marine Plan policies as required by the Scottish Parliament and the NMP itself. That does not appear to be too difficult a task. It is one which must be undertaken, because there is a statutory duty to do so. The court will, in general, adhere to the Lord Ordinary's interlocutor of 7 July 2023. The court notes that the Lord Ordinary neither sustained nor repelled any of the parties' pleas-in-law; a matter which can be of importance in relation to defining exactly what the court decided. The court will vary the interlocutor by sustaining the petitioners' third plea-in-law to the extent of finding and declaring that the notice of variation was unlawful because it was not taken in accordance with the NMP. It will repel the Scottish Ministers' third plea-in-law.