

Case Commentary

Fishing quota: a very large squatting claim?

United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs [2013] EWHC (Admin) 1959

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This case was a judicial review over the reallocation of unused fishing quota from the larger to smaller scale operators. The larger operators sought to quash the decision on the grounds of legitimate expectation, interference with a possession under human rights law and discrimination. The claim was dismissed on all three grounds but the reasoning for the dismissal of the human rights claim potentially established fishing quota as a possession, before finding no interference as unused quota had no value. Since most quota in the UK is used this could require compensation to fishers if there are further adjustments.

In the case of *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC (Admin) 1959, Mr Justice Cranston handed down one of the most important judgments regarding the creation of proprietary rights from state licences in recent years. The case was a judicial review against a decision by the Department for the Environment, Food and Rural Affairs (Defra) to redistribute unused fishing quota from the English Fish Producer Organisations (FPOs) to the English inshore fishing fleet. FPOs were originally free associations of commercial fishing companies recognised by EU law with rights and obligations relating to the market in fishery products. In the UK FPOs also have a role in the collective control of much of the UK's fishing quota on behalf of their members. The UK fleet of smaller inshore vessels, although employing a large number of fishers, is largely outside the FPO system and has historically been allocated little quota. The case concerned a small amount of unused quota (worth marginally more than £1 million) but the points of principle related to the very nature of the UK fishing quota itself which, together with vessel licences, was valued in 1999 at more than £1 billion. The effects of the decision were to be so significant that the court permitted intervention not only by representatives of the smaller fishermen but also by the environmental campaign group Greenpeace.

The claimant relied on a substantive legitimate expectation and Article I Protocol I (A1PI) of the European Convention on Human Rights to substantiate its claim that, although fishing quota was granted on a temporary basis, the practice had become so established that

quota now amounted to a possession. The claimant also raised a further point of discrimination between English FPOs and those based elsewhere in the UK, on the basis that the redistribution of quotas was to affect only English FPOs.

The legitimate expectation claim was based on correspondence between Defra and fisheries leaders that the current practice of allocating quota would be permitted to continue and that the policy would not be affected by failing to capture the entire annual quota. Mr Justice Cranston detailed a good current assessment of both the domestic and the EU legal basis for legitimate expectation – something of interest for followers of this rapidly developing area of law (para 80) – and then dismissed the claim on the basis that there had been no clear, unambiguous and unqualified undertaking given by the Defra (para 99). He also went on to determine that the minister's actions were proportionate (para 106).

With regard to the third ground, that of discrimination, Mr Justice Cranston emphasised 'practical policy making in the light of devolution settlements' (para 126) and held that there was no discrimination. However, it is questionable whether we can infer that pragmatism and devolution are sufficient criteria to show that no discrimination occurred. Secondly, he considered that if discrimination had occurred, this would have been objectively justified because the aim was to maximise the utilisation of available quota. The principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. That would seem to have been the case here.

It is the human rights element that is problematic, mired as it is in the complexity of fisheries regulation, property rights and the definition of possession and justified interference/deprivation under A1PI of the ECHR.

Mr Justice Cranston had 'sympathy' with the interveners' contention that fish are a public resource (para 100), but this shows a real failure to understand the fundamental principles of the case. Fish are ownerless until captured and then they become the property of the captor. It is the *right to fish* or, more explicitly, the right to undertake fishing, which is the public right. The implications of this point, although acknowledged, were never fully appreciated or dealt with in the judgment.

Instead, the judge looked at quota itself and tried to decide whether it is a possession under human rights law and whether its removal amounts to an unlawful interference/deprivation (para 109). It is at this point that the judgment becomes contradictory, effectively requiring two universes. In the first universe all fishery is publicly owned; in the second only those fisheries outside the quota system remain public as the quota regime has the effect of excluding public ownership by turning quota

into a possession. The judgment tacitly endorses both contradictory universes at the same time. Without relying on specific authority it states: 'for better or worse the concept of possessions have been given an expansive interpretation' (para 112) and, because trades in quota have been authorised, quota has been taxed and has a value so that it has become a possession (para 113). At a stroke this finding destroyed the public's value in the resource, and therefore this point deserved a far fuller investigation than it received in the judgment.

The judge continued by stating that although quota is a possession, its redistribution did not amount to an unlawful interference with or deprivation of quota because that particular quota had been consistently unused and therefore had no economic value. The FPOs would not suffer economic loss and therefore no compensation would be payable.

This reasoning seems to be a rather narrow interpretation of the law. Relying on *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265 and quoting from Rix LJ, the judge stated that there would be an interference for the purpose of Article 1 only 'if there had been material economic consequences' (para 115). In this case, because the quota had not been used, quota transfer to the smaller fishing fleet did not constitute interference as it did not make the dispossessed FPOs worse off.

The judge only considered possession in economic terms. Moreover, the definition of economic loss was narrow in itself. In fact, the judge stated that no economic loss would occur because the quotas in question had not been used for a definite number of years (para 119). The question that arises, therefore, concerns assessment of any economic loss. Can it be measured, as in this case, by reference to the economic gain (owing to its use) in a determined period of time? And if so, what is the appropriate length of time to decide whether something has or does not have value? And what about including the possibility of future use? More broadly, is the emphasis on 'use' at all justifiable? Like an unused spare room, an unused possession still has a value. This

was not disputed by either of the main parties, who both used valuation data in their evidence.

It is surprising that no mention of the public interest was made to justify the argument that the deprivation was lawful. The judge might have relied on the public good argument, which he could have done had he established a connection with redistribution of scarce fishing resources as serving sustainability goals. This is a shame, especially because the economic argument is weak.

The result of the decision is that the vast majority of quota, if actively used, is potentially a possession and therefore could require compensation if it is reallocated; that is unless, of course, the opposite view from reading the same judgment is taken, namely that the fishery remains a public resource.

Reading this decision from the perspective of proper resource management, it looks even more peculiar because it may have the perverse incentive of pushing fishers to use all their quota merely to ensure its continued allocation and to protect their possession. This position is compounded by the reformed common fisheries policy (CFP), which is likely to require a reallocation of quota in line with sustainable practice. Will that now require compensation to those dispossessed quota holders? If we follow the judgment it specifically incentivises those engaged in unsustainable fishing to use their quota to ensure compensation when quota is removed under the CFP rules.

Despite the peculiar result the case has not been appealed and the minister's decision to reallocate unused quota stands. Perhaps the claimants did not appeal the decision because they established the principle of quota as a possession and they were happy to leave it there. Since the vast majority of quota is used this could amount to the creation of a very substantial proprietary right indeed, at the expense of the public. For the other parties it would be surprising to appeal a decision ostensibly in their favour on the facts.

In short, the story is unlikely to end here and this is just another messy chapter in the eventful tale of UK fisheries management.