

GLS Disclosure Webinar

CASE REFERENCE

**R. (on the application of Quark Fishing Ltd) v Secretary of
State for Foreign and Commonwealth Affairs (No.1)**

Also known as:

**Secretary of State for Foreign and Commonwealth Affairs v
Quark Fishing Ltd**

Court of Appeal (Civil Division)

30 October 2002

Westlaw Case Analysis 6 pages

Official Transcript 27 pages

Status:  Positive or Neutral Judicial Treatment

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Case Analysis

Where Reported

[2002] EWCA Civ 1409; [Official Transcript](#)

Case Digest

Subject: Fisheries **Other related subjects:** Administrative law

Keywords: Administrative decisions; Compliance; Conservation; Fishing rights; Licences

Summary: Licence to fish in waters off South Georgia and the South Sandwich Islands wrongly refused by Secretary of State - Material on which decision was based did not give accurate or fair picture of vessel's record of compliance with conservation measures - Material put forward by Secretary of State in proceedings did not convey fair and full picture of decision-making process - Court could not conclude that relevant decision was taken on rational grounds having regard only to relevant considerations - South Georgia and South Sandwich Islands Order 1985.

Abstract: The Secretary of State appealed against a decision ([2001] EWHC Admin 1174, [2002] A.C.D. 31) quashing a direction made pursuant to the South Georgia and South Sandwich Islands Order 1985 s.5(1) refusing the grant to Q of a licence to fish in the territorial waters of South Georgia and the South Sandwich Islands. The refusal was based on Foreign Office advice that the allocation of licences to United Kingdom flagged vessels should be reduced from four to two for political reasons and that, in allocating licences between vessels of a particular flag state, preference should be given to those with the best records of compliance with international conservation measures.

Held, dismissing the appeal, that the material put forward by the Secretary of State in the proceedings did not convey a fair and full picture of the decision making process in the case. In particular, applicants for licences had been led to believe that their loyalty to the fishing area in question would be a relevant factor. In fact, it was not, the decision instead turning on a comparison of the applicants' record of compliance with conservation measures. The Secretary of State was entitled to reduce the number of licences as a matter of foreign policy and that aspect of the decision could not be questioned on public law grounds. However, once it had been decided to reduce the number of licences, the four applicants should have been informed of that fact and that conservation compliance criteria would be applied. Further licence applicants should have been invited to make representations. In addition, the data upon which the Secretary of State had relied in assessing conservation compliance contained factual errors to Q's detriment. Accordingly,

the Secretary of State had failed to adopt a fair procedure in the decision making process for the grant of fishing licences.

Judge: Aldous, L.J.; Laws, L.J.; Jonathan Parker, L.J.

Counsel: For Q: David Vaughan Q.C. and Fergus Randolph. . For the Secretary of State: Kenneth Parker Q.C. and Daniel Beard.

Solicitor: For Q: Thomas Cooper Stibbard. . For the Secretary of State: Treasury Solicitor.

Appellate History & Status

Queen's Bench Division (Administrative Court)

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)

[\[2001\] EWHC Admin 1174](#); [\[2002\] A.C.D. 31](#); [Official Transcript](#)

Affirmed

Court of Appeal (Civil Division)

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)

[\[2002\] EWCA Civ 1409](#); [Official Transcript](#)

Related Cases

Quark Fishing Ltd (Disclosure), Re

[\[2001\] EWHC Admin 920](#); [Official Transcript](#); QBD (Admin)

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.2)

[\[2003\] EWHC 1743 \(Admin\)](#); [\[2003\] A.C.D. 96](#); [Official Transcript](#); QBD (Admin)

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.2)

[\[2004\] EWCA Civ 527](#); [\[2005\] Q.B. 93](#); [\[2004\] 3 W.L.R. 1](#); [\[2004\] H.R.L.R. 28](#); [Times, May 10, 2004](#); [Official Transcript](#); CA (Civ Div)

R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.2)

[\[2005\] UKHL 57](#); [\[2006\] 1 A.C. 529](#); [\[2005\] 3 W.L.R. 837](#); [\[2006\] 3 All E.R. 111](#); [\[2006\] Eu. L.R. 424](#); [\[2005\] H.R.L.R. 41](#); [\[2006\] U.K.H.R.R. 535](#); [Times, October 17, 2005](#); [Official Transcript](#); HL

Quark Fishing Ltd v United Kingdom (Admissibility) (15305/06)

[22 B.H.R.C. 568](#); [\(2007\) 44 E.H.R.R. SE4](#); ECHR

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[\[1968\] A.C. 997](#); [\[1968\] 2 W.L.R. 924](#); [\[1968\] 1 All E.R. 694](#); [\(1968\) 112 S.J. 171](#); HL; 1968-02-14

Key Cases Citing

Considered

R. (on the application of I) v Secretary of State for the Home Department

[\[2010\] EWCA Civ 727](#); [Official Transcript](#); CA (Civ Div); 2010-06-29

All Cases Citing**Mentioned by**

R. (on the application of Das) v Secretary of State for the Home Department

[\[2013\] EWHC 682 \(Admin\); Official Transcript](#); QBD (Admin); 2013-03-26

Mentioned by

R. (on the application of Hemming (t/a Simply Pleasure Ltd)) v Westminster City Council

[\[2012\] EWHC 1260 \(Admin\); \[2012\] P.T.S.R. 1676; \(2012\) 109\(23\) L.S.G. 16; Official Transcript](#); QBD (Admin); 2012-05-16

Mentioned by

R. (on the application of Public and Commercial Services Union) v Minister for the Civil Service

[\[2011\] EWHC 2556 \(Admin\); Official Transcript](#); QBD (Admin); 2011-07-08

Mentioned by

R. (on the application of Evans) v Secretary of State for Justice

[\[2011\] EWHC 1146 \(Admin\); \(2011\) 108\(21\) L.S.G. 15; Official Transcript](#); DC; 2011-05-12

Considered

R. (on the application of I) v Secretary of State for the Home Department

[\[2010\] EWCA Civ 727; Official Transcript](#); CA (Civ Div); 2010-06-29

Mentioned by

R. (on the application of Shoemsmith) v Ofsted

[\[2010\] EWHC 852 \(Admin\); \(2010\) 154\(17\) S.J.L.B. 27; \[2011\] P.T.S.R. D13; Official Transcript](#); QBD (Admin); 2010-04-23

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Mentioned by

A v HM Treasury

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[\[2009\] UKSC 9; \[2010\] 1 A.C. 464; \[2009\] 3 W.L.R. 1270; \[2010\] H.R.L.R. 10; \[2010\] U.K.H.R.R. 86; \(2009\) 159 N.L.J. 1737; Times, December 02, 2009; Official Transcript](#); SC; 2009-12-01

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[\[2009\] EWHC 695 \(Admin\)](#); [\[2009\] N.P.C. 60](#); [Official Transcript](#); QBD (Admin); 2009-04-03

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[\[2007\] EWHC 2417 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2007-11-02

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[\[2006\] EWHC 747 \(Admin\)](#); [\(2006\) 103\(18\) L.S.G. 31](#); [\(2006\) 150 S.J.L.B. 540](#); [Official Transcript](#); QBD (Admin); 2006-04-07

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[\[2005\] EWHC 1378 \(Admin\)](#); [\[2006\] 1 F.L.R. 175](#); [\[2005\] 2 F.C.R. 603](#); [\[2005\] Fam. Law 861](#); [Times, August 12, 2005](#); [Official](#)

[Transcript](#); QBD (Admin); 2005-07-04

Significant Legislation Cited

South Georgia and South Sandwich Islands Order 1985 (SI 1985 449) s.5(1)

Legislation Cited

South Georgia and South Sandwich Islands Order 1985 (SI 1985 449) s.5(1)

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Licences to fish and the conservation of Antarctic marine living resource.

Antarctica; Conservation; Environmental protection; Fishing zones; Territorial waters.

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Cross on Local Government Law

Chapter: Chapter 10 - Judicial Control of Local Authorities, Legal Proceedings by and Against Local Authorities and the Human Rights Act 1998

Documents: [10-100 The claim for judicial review](#)

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Documents: [Section 2. - Entitlement to Procedural Fairness: Overview](#)

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Chapter: Chapter 7 - Procedural Fairness: Entitlement And Content

Documents: [Section 15. - Right to Reasons](#)

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White Book 2013

Chapter: Section A - Civil Procedure Rules 1998 and Practice Directions

Documents: [Rule 31.5 Disclosure](#)

White Book 2013

Chapter: Section A - Civil Procedure Rules 1998 and Practice Directions

Documents: [Rule 54.14 Response](#)

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Case No: C/2001/2831/A, Neutral Citation No [2002] EWCA Civ 1409

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
(THE HON MR JUSTICE SCOTT BAKER)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 30th October, 2002

B e f o r e:

LORD JUSTICE ALDOUS,
LORD JUSTICE LAWS
AND
LORD JUSTICE JONATHAN PARKER

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Appellant

— v —

QUARK FISHING LIMITED

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Kenneth Parker QC and Daniel Beard (instructed by Treasury Solicitors) for the Appellant
David Vaughan CBE QC and Fergus Randolph (instructed by Thomas Cooper Stibbard) for the
Respondent

J U D G M E N T
As Approved by the Court

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Lord Justice Laws:

INTRODUCTORY

1. The Patagonian Toothfish (*Dissostichus Eleginoides*) swims the deep waters of the southern seas. It is a very valuable catch, sometimes described as "white gold". In 2001 it sold on the quayside for about US\$9,000 per tonne, or about £2.5m for 400 tonnes. The principal means of fishing for it is by what is called "longlining", which involves the use of a long baited line. There is also some "pot fishing", in which baited pots are weighted and sunk. Quark (the respondents to this appeal) hoped and expected to be granted a licence for the *MV Jacqueline* to fish by longline for up to 400 tonnes of toothfish in the territorial waters of South Georgia and the South Sandwich Islands in the 2001 season. But by force of a direction given on 7 June 2001 by the Secretary of State, the *Jacqueline* was refused such a licence.
2. This is the Secretary of State's appeal against the decision of Scott Baker J, as he then was, given in judicial review proceedings in the Administrative Court on 5 December 2001 when he quashed the Secretary of State's direction. The appeal is brought with permission granted by the judge below. I should say at this stage that Quark's claim is historic only, since (and in the sense that) a licence was granted for the *Jacqueline* to ply for toothfish in the 2002 season.

THE LEGAL FRAMEWORK

3. It is convenient first to establish the nature and source of the Secretary of State's power to give such a direction, and other characteristics of the relevant legal regime. The statutory trail starts with the South Georgia and South Sandwich Islands Order 1985 ("the Order"), made pursuant to powers contained in the British Settlements Acts 1887 and 1945. Before it took effect in October 1985 the territories of South Georgia and the South Sandwich Islands ("SGSSI") had for eighty years been a dependency of the Falkland Islands. By s.3 of the Order they became a separate and distinct Overseas Territory; and the Order, in effect, is the constitution of SGSSI. A number of its provisions are in a common or standard form which has over time come to be generally used in the drafting of constitutions for such territories. S.4(1) establishes the office of Commissioner of SGSSI, to be appointed by Her Majesty. S.4(2) allows for an Acting Commissioner to be designated by the Secretary of State during any period when the office is vacant or its holder unable to perform his functions. S.5(1) provides:

"The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him, and, subject to the provisions of this Order and of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State."

It is under this section that the Secretary of State acted in giving the impugned direction of 7 June 2001. S.7 empowers the Commissioner 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×"

S.9 empowers the Commissioner to "make laws for the peace, order and good government of the Territories". By s.13(1) he may deploy the power given by s.9 to "establish a Supreme Court and such other courts of justice (including a Court of Appeal) for the Territories as he may think fit×"

4. In 2000 the then Acting Commissioner, in exercise of his power under s.9 of the Order, made the Fisheries (Conservation and Management) Ordinance 2000 ("the Ordinance"). By it the Fishing (Conservation and Management) Ordinance 1993 ("the 1993 Ordinance") was repealed and re-enacted with amendments. The Ordinance, which came into force on 1 January 2001, makes provision for the regime of fishing licences which is at the centre of this appeal. S.2 contains definitions. I must refer to two of these. "Convention" is defined as "the Convention on the Conservation of Antarctic Marine Living Resources made in Canberra on 20th May 1980, as amended from time to time, and includes any Protocol to that Convention and any decision or measure which is for the time being in force adopted pursuant to that Convention by the Commission to that Convention". I shall refer to this Convention by the acronym "CCAMLR". "Maritime Zone" is defined as "the zone of that name established by and defined in a Proclamation of the Commissioner dated 7th May 1993 (Proclamation No 1 of 1993)". So defined the Maritime Zone extends 200 miles from the shores of SGSSI.

5. S.4 of the Ordinance requires the Commissioner to appoint a Director of Fisheries who amongst other things shall by s.4(1)(f) be responsible for "the issue, variation, suspension and revocation of licences for fishing and fishing-related operations". S.4(2) provides:

"In the performance of his duties under this Ordinance the Director of Fisheries shall be subject to the direction of the Commissioner×"

S.4(5):

In the performance of their duties under this Ordinance the Director of Fisheries and every Fishery Protection Officer shall have regard to the provisions of the Convention but the question as to whether the Director of Fisheries or any Fishery Protection Officer has done so in any particular instance shall not be inquired into in any court."

6. S.5 of the Ordinance is cross-headed "Licensing of Fishing Boats". Its material provisions are as follows:

"(1) The Commissioner may by Order provide that in any of the fishing waters lying to the north of sixty degrees south of latitude specified in the Order (a 'specified area') fishing is prohibited unless it is authorised by a licence granted by the Director of Fisheries×"

(2) Such an Order may apply to fishing boats generally in the specified area or to fishing -

- (a) for a specified description of fish;
- (b) by a specified method; or
- (c) during a specified season of the year or other period.

×

(7) A licence under this section may authorise fishing either unconditionally or subject to such conditions -

- (a) as the Director of Fisheries may have been directed by the Commissioner to impose;
- (b) as in the opinion of the Director of Fisheries may be necessary or expedient to regulate the conduct of fishing and fishing-related operations by the licensee under authority of the licence;
- (c) as to the use to which the fish may be put;
- (d) prohibiting or restricting the use of any equipment which might kill or harm any aquatic bird or marine mammal to be found or likely to be found in the area to which the licence relates;
- (e) as to the disposal of waste, effluvia or deleterious matter by the fishing boat to which the licence relates;
- (f) otherwise as in the opinion of the Director of Fisheries may be necessary or expedient to secure the fulfilment of any obligation under or objective of the Convention,

as are contained in or specified in the licence×

×

(9) The licensing 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 of Fisheries to be expedient or necessary for the regulation of fishing.

(10) The Director of Fisheries -

- (a) may from time to time vary a licence granted under this section;
- (b) may revoke or suspend such a licence if he considers it to be necessary for the regulation of fishing or to be appropriate having regard to the conduct of the licensee, and whether that conduct was within a specified area or elsewhere.

(11) Where the Director of Fisheries varies, revokes or suspends a licence he may, if he considers it appropriate in all the circumstances of the case, refund the whole or part of the fee paid in respect of that licence.

×

Other subsections, which I need not set out, impose criminal sanctions for fishing without a licence or in breach of condition (subss.(3) and (12)), and authorise the charging of a fee for licences (subs.(4)).

7. S.5 of the Ordinance effectively replicated s.5 of the 1993 Ordinance, and it is unnecessary to identify such differences as exist between the two provisions. On 26 July 1993 the then Acting Commissioner made the Fishing (Maritime Zone) Order 1993, which came into force on 2 August 1993. Its effect was to impose a licensing regime for fishing in the Maritime Zone. It was continued in force by s.26(2)(a) of the Ordinance ("any× order× made× under the 1993 Ordinance shall continue in force as if it had been× made× under this Ordinance×"). In the result, at all times material to these proceedings, the licensing regime envisaged by s.5 of the Ordinance was operative and effective.

CCAMLR

8. It is convenient next to describe the nature and functions of CCAMLR. The treaty was negotiated in the late 1970s in order to confront the threat of over-exploitation of fin-fish in the Southern Ocean (that is, sub-Antarctic and Antarctic waters) and also to address concerns at the implications of large-scale fishing for the crustacean krill, which is the staple food of many marine species in the area. CCAMLR was adopted in May 1980 and entered into force in April 1982. Its secretariat is based in Hobart, Tasmania. Its executive body is its Commission ("the CCAMLR Commission"), which meets annually for two weeks in Hobart, usually in October/November. At the relevant time the CCAMLR Commission was constituted by 23 States (including the United Kingdom, which had been a founding State Party to CCAMLR), and the European Union acting through the Commission of the EU. The CCAMLR Commission is assisted by an advisory Scientific Committee which in turn has a number of subsidiary Working Groups. As we shall see, certain parts of the Report of the Working Group on Fish Stock Assessment which was appended to the Report ("the 2000 Report") of the Nineteenth Meeting of the Scientific Committee (Hobart, 23 - 27 October 2000) have a special importance in the case.

9. Article IX of CCAMLR provides in part:

"(1) The function of the Commission shall be to give effect to the objective and principles set out in Article II of this Convention [*viz* the conservation of Antarctic marine living resources]. 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 this 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;

×

(f) the designation of open and closed seasons for harvesting;

×

(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."

10. At its annual meetings the CCAMLR Commission adopts conservation measures pursuant to Article IX(1)(f) and (2), taking account of advice given by the Scientific Committee. Such measures include the specification of the quantity of any species that may be taken in any defined fishery in the forthcoming season. This is called the Total Allowable Catch ("TAC"). Measures thus adopted become binding on the Members 180 days after their adoption, save that where within 90 days a Member places a reservation on the measure, then it will not apply to that Member. The measures are enforced by the Member States of CCAMLR, essentially through their national jurisdiction (including, of course, their jurisdiction in dependent territories) over their own flagged vessels. Article XXI(1) provides:

"Each Contracting Party shall take appropriate measures within its competence to ensure compliance with the provisions of this Convention and with conservation measures adopted by the Commission to which the Party is bound in accordance with Article IX of this Convention."

Member States possessing exclusive economic or maritime zones within the CCAMLR area are able to enforce the measures within their zones also in relation to foreign flagged vessels. This jurisdiction is enjoyed by the UK in relation to the Maritime Zone extending 200 miles from the shores of SGSSI, as defined by the Ordinance.

11. CCAMLR's area of application is divided into areas and sub-areas. We are concerned with area 48 (South Atlantic sector) and in particular sub-area 48.3 (South Georgia). The greater part of the SGSSI Maritime Zone falls within sub-area 48.3. This is where the toothfish are most populous. In consequence the TAC for toothfish has very largely been taken within South Georgia Waters, with very little from outside. Sub-area 48.3 is effectively

administered for CCAMLR purposes by the UK through the legal mechanisms contained in the Ordinance (and behind it, the Order) and the Fishing (Maritime Zone) Order 1993.

12. An important feature of CCAMLR is its system - or systems, for they are quite distinct - of observation and inspection on board vessels, part of whose purpose (certainly that of the inspectors) is to verify compliance with conservation measures which have been adopted. These systems are provided for as a matter of principle by Article XXIV, which I need not set out. There is a monitoring body, the Standing Committee on Observation and Inspection ("SCOI"), which was established by the CCAMLR Commission. Amongst other things it is required to review inspection and observation reports, and itself to provide reports and recommendations which are considered by the CCAMLR Commission.
13. As regards *inspection* (as opposed to *observation*) there is a document headed "Text of the CCAMLR System of Inspection". I may summarise its primary relevant provisions. Each Member of the CCAMLR Commission may designate inspectors, who must be familiar with the fishing activities in question, with the provisions of CCAMLR itself and measures adopted under it. Inspectors so designated may board fishing vessels at sea in order to verify compliance with conservation measures. They may inspect every aspect of the vessel, including catch, nets and other fishing gear, and may take photographs and/or video footage. They are obliged to make reports on an approved CCAMLR *pro forma* . Where an inspection shows there has been a violation of adopted measures it is the Flag State's obligation to take appropriate action.
14. As is stated by Dr Richardson (Head of the Polar Regions Section in the Overseas Territories Department of the Foreign Office and the UK representative at the annual meetings of the CCAMLR Commission), inspections provide no more than a "snapshot" of a vessel's operation, being carried out at a particular point in time. The system of observers works differently. Here too there is a text, the "CCAMLR Scheme of International Scientific Observation". Again, scientific observers may be designated by each Member of the CCAMLR Commission. Annex I to the text sets out the functions and tasks of the scientific observers. Unlike the inspectors, the observer will normally remain on board a vessel for the duration of the fishing trip. He collects and records data, including "details of the vessel's operation (eg. partition of time between searching, fishing, transit etc., and details of hauls)", "biological data by species caught", "by-catches, their quantity and other biological data", "entanglement and incidental mortality of birds and mammals". Dr Richardson says that it is not the observer's function to monitor compliance: he is not a "spy in the camp". However like the inspector (and as one would expect) he has to make a *pro forma* report; and although it will not contain any record or accusation of non-compliance as such, its analysis by the CCAMLR Commission may facilitate the determination of levels of compliance with conservation measures.
15. In light of the events which happened in this case, while dealing with CCAMLR I should describe one particular conservation measure adopted under Article IX. This is the measure, originally numbered 29/XIX, for the "Minimisation of the Incidental Mortality of Seabirds in the Course of Longline Fishing or Longline Fishing Research in the Convention Area". It is CCAMLR's principal regulatory initiative for the reduction of seabird mortality

in the toothfish longline fishery. It was I think first introduced in 1997, but has been reissued annually with amendments. There are three relevant provisions, whose wording has not materially changed over successive versions of the measure. They are, first, a requirement that longlines shall be set at night only; secondly, a prohibition of the dumping of offal while longlines are being set, coupled with a stipulation that "if discharge of offal during the haul is unavoidable, this discharge shall take place on the opposite side of the vessel to that where longlines are hauled." Since longline vessels invariably haul on the starboard side forward of the bridge, any discharge of offal during the haul must accordingly take place on the port side. The third provision requires that the vessel shall tow a streamer line, "designed to discourage birds from settling on baits during deployment of longlines". The streamer must be at least 150 metres long, with branch streamers at 5 metre intervals, and is to be "suspended at the stern from a point approximately 4.5m above the water and such that the line is directly above the point where the bait hits the water".

THE FACTS

(1) As They Were Known to Quark

16. Quark is a company registered in the Falkland Islands and is owned to the tune of 25.1% by Falkland Islands residents; the remainder is Spanish owned. The *MV Jacqueline* (previously named the *Thunnus*) was purchased by Quark from the government of SGSSI in 1996. She had earlier been registered in Belize, had been subject to outstanding charges in favour of creditors amounting to something like US\$1,500,000, and had become government property following forfeiture proceedings after arrest for fishing without a licence. Upon Quark's purchase she was reflagged in the Falkland Islands. Since then she and Quark have been entirely committed to the Falkland Islands, where the company pays tax, and to toothfish longline fishing in SGSSI waters.
17. The *Jacqueline* was licensed for such fishing by the Director of Fisheries of SGSSI for each of the seasons 1997, 1998, 1999 and 2000. It is useful at this stage to replicate a table set out in the judicial review Grounds, showing for each of those years the toothfish TAC for the SGSSI territorial waters, the number of licences granted, and the average catch available per vessel licensed.

| <u>Year</u> | <u>TAC</u> | <u>Licences Granted</u> | <u>Average per Vessel</u> |
|-------------|-------------|-------------------------|---------------------------|
| 1997 | 5000 tonnes | 13 (2 UK) | 384 tonnes |
| 1998 | 5300 | 10 (2 UK) | 330 |
| 1999 | 3500 | 11 (3 UK) | 318 |
| 2000 | 5300 | 14 (4 UK) | 379 |

The *Jacqueline* was in each of these seasons one of the UK licensees. We also have a document showing the nationality of each of the licensees for each of these seasons, but it is unnecessary to set it out.

18. There is amongst the papers a copy of the letter to Quark from the SGSSI government (written presumably on behalf of the Director of Fisheries) inviting applications for licences for the 1997 season. Licences were and are per vessel, although the letter contemplated that the company might wish to apply in relation to more than one vessel. The letter refers among other things to the amount of the TAC, the requirement to accommodate a scientific

observer, and to relevant CCAMLR conservation measures including the successor of 29/XIX (which was then 29/XV) for the minimisation of seabird mortality. So all those matters were plain between the parties. The letter (dated 24 January 1997) by which the offer of a licence for the *Jacqueline* was made drew attention "in particular" to 29/XV.

19. There were like documents for successive years. In each season in which the *Jacqueline* fished under licence, she had on board a CCAMLR observer; and Mr Vaughan QC for Quark makes the point that no complaints emanated from anything said by the observers so as to suggest a violation of conservation measures, not least that relating to seabird mortality. On 1 July 2000 there was prepared a report of an official CCAMLR inspection of the *Jacqueline* which had been conducted at sea on the same day. It recorded that "[t]he vessel was in compliance with all the relevant CCAMLR Conservation Measures, except one". The exception was only to do with the storage and disposal of plastic bands used to seal boxes, in breach of a measure concerned with the use and disposal of plastic on fishing vessels. (Apparently there had been incidents when fur seals had got entangled with plastic packaging bands.) As regards the seabird mortality measure (which had now become 29/XVI) this was said:

"The vessel was in full compliance with this Conservation Measure. A Bird Scaring Streamer is deployed whenever shooting lines. From the vessel's logbook all setting of lines has been undertaken during the hours of darkness. Discharge of offal takes place on the opposite side of the vessel to the hauling operations, very few seabirds were seen near the fishing line being hauled."

I should notice also that some emphasis is placed by Quark on checks or inspections which were carried out upon the *Jacqueline* at King Edward Point at the start of each fishing season, and on these occasions no complaint was made about her equipment. But these checks were executed not on behalf of CCAMLR or, directly at least, with a view to monitoring compliance with CCAMLR conservation measures; they were done by SGSSI Government Marine Officers, and (as Dr Richardson puts it) "cover[ed] matters including safety and verifying whether equipment complies with the relevant licence conditions". However the licence conditions routinely included a stipulation that the CCAMLR measures be complied with.

20. Mr Vaughan says that a vessel's "track record" for compliance with conservation measures was plainly an important factor in the allocation of licences. He points to a letter from the FCO to Quark dated 22 February 2000, in which among other things this was said:

"The fishery has been relatively stable in the past few years with vessels, such as yours returning on an annual basis× The strong competition for licences should provide an incentive for all operators to employ good practices and full compliance with CCAMLR Conservation Measures."

21. So it was that when Quark came to apply for a licence for the *Jacqueline* for the 2001 season they must have thought they had a very fair wind, to put it at its lowest. Not only did they enjoy (as they believed) a more or less exemplary record as regards compliance with CCAMLR conservation measures; they were also loyal adherents of the fishery and the Falkland Islands. In his letter of application dated 12 January 2001 Mr Summers, the managing director, claimed that Quark was "fully conversant with the conservation measures applicable within the CCAMLR areas, and is fully supportive of SGSSI in its efforts to introduce best practice into the South Georgia fishery". Then under a heading "Loyalty and Past Record", he stated:

"Following her purchase from GSGSSI in 1996 and refurbishment the *Jacqueline* and Quark Fishing Ltd have worked every year in the South Georgia fishery and have completed four successful longlining seasons; we remain committed long term to this fishery×"

22. At length, however, longline licences were granted for only two of the British registered vessels, the *Argos Helena* and the *Argos Georgia*; the *Jacqueline* and the only other British-registered vessel, the *Lyn*, were refused. The decision-making process which led to this result is at the centre of Quark's challenge to the Secretary of State's direction; and I may say at this stage that the business of uncovering the course it took has in my view been tortuous and problematic. But I must postpone any judgment until I have explained what happened.

23. The announcement of the awards of toothfish longline licences for 2001 was made on 14 March 2001. I should make it clear that at this stage there had been no direction given by the Secretary of State pursuant to s.5(1) of the Order, although, as we shall see, the decision was effectively made in London and not the South Atlantic. It does not appear that any reasoned letters were sent, either to the successful or the unsuccessful applicants. Mr Summers had a meeting with the Director of Fisheries the day after the announcement, on 15 March, and wrote to him on 19 March complaining that Quark had been unfairly treated. He said, first, that there had been an understanding that upon Quark's purchase of the *Jacqueline* from the SGSSI government, she would thereafter be licensed to fish for toothfish (it seems to me plain that the implementation of any such understanding would have been beyond the lawful power of the SGSSI authorities). More substantially, he claimed that the *Jacqueline* was the only vessel with a record of loyalty to the fishery for each of the previous four years. Then this:

"You said to me that the reason that the *Jacqueline* was not offered a license [sic] this season was only because she did not compare well to other vessels in respect of compliance with CCAMLR conservation measures; you were however not able to provide any evidence of this, or indicate how this conclusion may have been reached, other than to speculate that the CCAMLR observer from last season may have delivered a negative report. We have the draft of the CCAMLR observer's report which you are welcome to review; it contains no criticisms whatsoever of our compliance with conservation measures. We are not aware that any previous report contained any negative comment either×"

24. There followed an exchange of correspondence which included a letter of 10 April 2001 to Quark's London solicitors from the Attorney General for SGSSI in which this was said:

"The policy of GSGSSI in relation to the licensing of vessels to fish in the Maritime Zone implemented by the Director of Fisheries has not been published as such, although it may, in part, be divined from the Ordinance.

×

This year Mr Jarvis [the Director of Fisheries], as your clients are I think aware, originally had in mind issuing nine licences, four of which would be

issued to British-flagged vessels, of which the *Jacqueline* would have been one and consulted the Foreign and Commonwealth Office and the Commissioner on that proposal.

As a result of those consultations, Mr Jarvis took the view that to allocate four of the nine potential licences for the longline fishery to UK-flagged vessels would alienate other CCAMLR Members whose vessels had previously fished in South Georgia waters. He accordingly decided to increase to seven the number of licences granted to foreign-flagged vessels and consequently to reduce to two the number of licences issued to British flagged vessels. He decided to licence [sic] the two British-flagged vessels which had the better record of compliance with CCAMLR conservation measures. This led to the *Jacqueline* not being granted a licence in respect of the forthcoming season."

25. Unsurprisingly Quark was very far from satisfied. On 3 May 2001 it launched proceedings for judicial review in the Supreme Court of SGSSI to challenge the refusal by the Director of Fisheries to allocate a licence to the *Jacqueline*. I shall refer to this litigation as "the SGSSI proceedings". The hearing took place in Stanley in the Falkland Islands on 31 May and 1 June 2001 before the Chief Justice of SGSSI. He gave his decision on 1 June, quashed the decision to refuse, and remitted the matter to the Director of Fisheries with a direction that he reach a fresh decision by 1600 hours on Friday 8 June. However his reasoned judgment was not delivered, as I understand it, until 8 June itself. Although the material before the Chief Justice included data relied on by the FCO in order to rank vessels for comparative compliance with conservation measures in such a way as to deny the *Jacqueline* a licence, and although he made certain observations about those matters (to which I will have to return), the basis of his decision was that the Director's refusal of a licence for the *Jacqueline* flowed from his erroneous belief that he was bound to follow advice from the Commissioner (who in turn had been advised by Mr White, Head of the Overseas Territories Department of the FCO) and that accordingly the Director had closed his mind to relevant factors and failed to evaluate for himself the merits of the licensing issues. I shall come shortly to the evidence before this court concerning the relation between the Director and Commissioner in the South Atlantic and senior officials in London in the context of the decision-making process.
26. On 7 June 2001 (the day before delivery of the Chief Justice's reasoned judgment) the Secretary of State as I have said gave the direction under s.5(1) of the Order which has been impugned in these proceedings. I should first set out part of the fifth preamble:

"WHEREAS× I× advised the Commissioner of SGSSI× that if the Director were minded to grant 10 licences as aforesaid [sc. to fish for toothfish by longlining]:

(a) The number of licences granted to UK or UK Overseas Territories-flagged vessels should be 2 out of 10;

(b) The selection of the 2 UK or UK Overseas Territories-flagged vessels from amongst the applicants for licences should be made on the basis of the vessels' comparative record of compliance with CCAMLR Conservation Measures; and

(c) In the light of the information contained in the Nineteenth CCAMLR Report including, in particular, the information contained in the Report of the CCAMLR Working Group on Fish Stock Assessment [viz. the Report appended to the 2000 Report, to which I have referred] at Tables 54 and 55 thereof, the fishing vessels *Argos Georgia* and *Argos Helena* had the best two records of compliance with the relevant CCAMLR Conservation Measures of UK or UK Overseas Territories–flagged vessels applying for longline toothfish fishing licences".

Then the executive words of the direction are:

"× I hereby instruct the Commissioner, in the exercise of his powers under section 4(2) of the 2000 Ordinance, to direct the Director not to grant a licence to fish for toothfish during the Fishing Season to any UK or UK Overseas–Territories flagged vessels other than the *Argos Georgia* and the *Argos Helena*."

The direction, of course, overcame the legal flaw in the earlier decision which had led the Chief Justice of SGSSI to grant relief. But Quark had other points to make including (as I shall show) arguments going to the direction and not only the general decision–making process. These proceedings for judicial review were lodged in the Administrative Court on 11 July 2001. I shall refer to them as "the London proceedings".

(2) The Decision–Making Process: Only Later Known to Quark

27. It is necessary to examine the materials relating to the process which led to the decision of 14 March 2001 with some care. I will start with a letter dated 8 February 2001 from the SGSSI Director of Fisheries, Mr Jarvis, to Dr Richardson in London. This letter is plainly of some importance as indicating the Director of Fisheries' own position as regards the grant or distribution of licences. But it was only disclosed by the Secretary of State after an order to that effect was made by Scott Baker J. Dr Richardson's reply to it of 16 February 2001, and two further letters respectively dated 28 February 2001 (from the SGSSI Commissioner to Mr White, who was, as I have said, Head of the Overseas Territories Department at the FCO) and 9 March 2001 (Mr White to the Commissioner), to which Mr Vaughan attributes considerable importance, were not disclosed until Mr Parker QC, for the Secretary of State, produced them on the last day of the hearing in this court; though as I understand it, it is accepted that these documents were in counsel's possession at the time when Mr Parker and his learned junior were settling the Secretary of State's evidence in the proceedings in the SGSSI Supreme Court. Mr Vaughan complains bitterly at this late disclosure. I shall deal with the impact, if any, of the course of disclosure or the lack of it on the merits of the case when I come to state my conclusions.
28. By the date of the Director's letter of 8 February the licence applications for the 2001 season had all been received. There were 36 applications for longline licences, including that submitted for the *Jacqueline* and applications in respect of the other three British registered vessels: these were the *Argos Helena*, the *Argos Georgia* and the *Lyn*. The TAC for sub–area 48.3 had been set at 4,500 tonnes, of which 600 had been allocated for pot fishing, the rest for longlining. In the letter the Director stated:

"This enables us to offer 9 licences for 400 tonnes and 1 licence for 300 tonnes×

Below is my recommended list of successful applicants for longlining licences. As usual the decision is based on a number of factors:

- loyalty to the fishery;
- as wide a spread of flag states as the number of licences will allow;
- ×
- also taking into account local politics;
- information from ISOFISH [a freelance website giving information about rogue vessels in CCAMLR areas] and adherence to CCAMLR Conservation Measures.

The vessels are×"

And the recommendation included all four British registered vessels.

29. Before coming to Dr Richardson's reply to the letter of 8 February, I find it convenient to refer to his witness statement made in the London proceedings on 28 September 2001. I assume this is put forward for the purpose of these proceedings as the Secretary of State's definitive factual account of the decision-making process. I should say that Dr Richardson was the only witness to make a statement on behalf of the Secretary of State in the London proceedings; before Scott Baker J the Secretary of State relied on affidavits sworn in the SGSSI proceedings by Mr Jarvis, Mr Lamont (the Commissioner), Dr Croxall (the UK representative on the CCAMLR Scientific Committee: he gives the background to the 2000 Report), Dr Parkes (a marine fishery expert who offers observations on Table 55 to the Working Group Report and the ranking of the relevant vessels for compliance with 29/XVI), and by Dr Richardson himself.

30. In his statement in the London proceedings Dr Richardson makes brief reference (paragraph 42) to the recommendations put forward by the Director of Fisheries in the latter's letter of 8 February, though without identifying the letter itself. For reasons of diplomatic policy he considered that the number of licences to be issued to British-flagged vessels should be fewer than recommended. He said (paragraphs 44 - 46):

"44. × On behalf of the FCO, I× emphasised that an important consideration of the SGSSI in allocating the licences should be ensuring as equitable a distribution of licences amongst CCAMLR flag states as possible whilst taking account of particular vessels' track record in terms of compliance with CCAMLR Conservation Measures and also loyalty to the fishery.

45. The principal result of my suggestion was that the allocation of licences to UK flagged vessels would be reduced from 4 to 2× I further suggested that, in allocating licences between vessels of a particular flag state, preference should be given to those with the best records of compliance with CCAMLR×

46. The FCO had been involved in the preparation of the 2000 Report and was aware of its contents which included statistics for comparative compliance with CCAMLR Conservation Measures by different fishing vessels× As can be seen from tables 54 and 55 of the 2000 Report [he means the Working Group Report which was appended to the 2000 Report], of the

UK Overseas Territories flagged vessels, two vessels flagged in the Falklands, the *Jacqueline* and the *Lyn*, had the worst records of compliance with Conservation Measure 29/XVI. The practical result of my suggestion would be, therefore, that the *Jacqueline* and the *Lyn* would not get Toothfish fishing licences for the SGSSI Zone for the 2001 season."

I shall have to turn to the Working Group Report, and in particular Table 55, which has loomed large in the issues joined between the parties; but first there is more to say about the course of the decision-making process. Dr Richardson goes on to state (paragraph 50) that following his advice and recommendations, the Director of Fisheries raised the matter with the Commissioner for SGSSI, who in turn took the matter up with Mr White, and Mr White reiterated his (Dr Richardson's) advice to the Commissioner. These observations amounted to an implicit reference to the letters of 28 February and 9 March 2001 which as I have said were produced (along with Dr Richardson's reply to the Director of Fisheries dated 16 February 2001) by Mr Parker on the last day of the hearing in this court. These then were the events which, on Dr Richardson's evidence in the London proceedings, led to the allocation of licences on 14 March 2001 and the exclusion of the *Jacqueline* and the *Lyn* from the allocation.

31. Mr Jarvis, the Director of Fisheries, swore an affidavit in the SGSSI proceedings. The account there given of these matters largely marches with that of Dr Richardson. I should set out paragraph 22:

"× Dr Richardson was concerned that distribution amongst different flag states was not equitable or desirable given the nature of the UK's dealings with states within CCAMLR. He advised that only two vessels flagged in UK Overseas Territories should be granted licences. Furthermore, amongst the UK vessels, those with the best records of compliance with CCAMLR over recent years should be licensed. He informed me that, on the balance of information provided by CCAMLR, this would mean that the *Jacqueline*, which had a significantly poorer record of compliance with CCAMLR than the *Argos Helena* or the *Argos Georgia*, should not be granted a licence."

32. It is also worth noticing the terms in which the first explanation of the decision of 14 March 2001 was formulated in the course of litigation, in Dr Richardson's affidavit in the SGSSI proceedings. There he said (paragraph 53):

"It was× suggested by me, on behalf of the FCO, to the Director of Fisheries that his proposed allocation should be amended. Within the constraint of the size of the TAC and, therefore, the limitation on licence numbers, I suggested that the primary consideration of the SGSSI in allocating licences should be ensuring as equitable a distribution of licences amongst CCAMLR flag states as possible, but giving some preference to UK Overseas Territory-flagged vessels. The principal result of this suggestion was that the allocation of licences to UK flagged vessels should be reduced from 4 to 2 (the same number as had been allocated during previous years). Two of the licences which the Director of Fisheries had proposed to grant to UK flagged vessels would, therefore, be reallocated to vessels sailing under the flags of other CCAMLR states. The two licences allocated to UK Overseas Territory flagged vessels should be allocated to those vessels which had the best compliance records. In suggesting this I was aware of the findings of the

CCAMLR Scientific Committee for 2000 which included statistics for comparative compliance with CCAMLR by different fishing vessels×"

I should note that there had *not* been only two British-registered vessels granted licences "during previous years". Four licences had been allocated to UK-flagged vessels in the previous year (2000), and three in 1999.

33. Then the Director of Fisheries describes the decision-making process in his affidavit in the SGSSI proceedings thus (paragraph 25):

"In relation to UK flagged vessels× although there was a general preference for UK and UK Overseas Territories flagged vessels and for loyalty shown to the fishery by the various vessels, the following considerations were crucial to the nature of the allocation of licences for the 2001 fishing season and, in particular, the refusal of a licence to the applicant's vessel *Jacqueline* :

- (i) The size of the TAC for toothfish in Sub-area 48.3;
- (ii) The equitable distribution of licences amongst various flagged states - as advised by the FCO; and
- (iii) The level of compliance with CCAMLR Conservation Measures - as advised by the FCO relying upon CCAMLR material."

34. Now I will introduce the documents only disclosed by the Secretary of State on the last day of the hearing before this court, starting with Dr Richardson's reply of 16 February 2001 to the Director's letter of 8 February 2001. Its pattern is to follow the bullet points in the Director's letter. Under "Loyalties to the Fishery" some observations are made which are not, I think, of any relevance to the position of the *Jacqueline* . The material passages are under the heading "Compliance with Conservation Measures":

"12. This is a difficult matter for it entails a degree of subjectivity regarding vessels' previous performance and potential black-listing. Sources of information are CCAMLR's own database, information from other Parties, and (if used judiciously) information from the NGO organisation 'Isfish'.

13. As you are aware, the obligations of Conservation Measure 29 were amended at CCAMLR XIX to make it obligatory not to discharge offal on the same side of a vessel as line hauling.

14. Para 9.12 of the Commission's report calls on Parties not to license vessels which cannot comply with this requirement. Some of those vessels would need physical reconfiguration before they could be considered fit to be licensed. If I recall the *Isla Camila* and *Jacqueline* ? were vessels which previously failed to meet this requirement. Checks should be made to ensure that all prospective vessels in the fishery this year can now meet this requirement.

15. As to compliance levels generally, we would have to point out that, unfortunately, the *Lyn* and *Jacqueline* have some of the poorest track records of vessels operating in the CCAMLR area. Unless the performance of those vessels has greatly increased in the intervening months, then we do not believe we would be enhancing the UK's standing in the international

community by preferentially licensing such vessels which are known to have a poor compliance record, whilst excluding vessels with an excellent performance level."

Dr Richardson then sets out "our conclusions", one of which was:

"[T]he UK's involvement in the fishery should not be disproportionate in either vessel numbers or quota allocation."

And in the result he recommends an "initial allocation" which included only two licences for British-registered vessels. He makes no observations on the question whether the *Jacqueline* (or the *Lyn*) should be licensed or not.

35. The next document is the letter from Mr Lamont, the SGSSI Commissioner, to Mr White dated 28 February 2001. It is plain he had seen the correspondence between the Director and Dr Richardson. He says:

"The political issue for us is Mike's [sc. Dr Richardson] proposition that two Falkland-flagged vessels should be removed from the fishery. Mike Summers and Tony Blake are the leading Falkland Islanders associated with these vessels, the *"Jacqueline"* and the *"Lyn"*. It may be that, from a pure fisheries angle, that makes sense. Politically, the realisation that no Falkland-flagged vessel was allowed to fish for toothfish would provoke a hostile reaction×"

And he asks that the Director's recommendations (in the letter of 8 February) be reconsidered.

36. The last in this collection of letters is that of Mr White to the Commissioner dated 9 March 2001. It is clear from the opening paragraph that they had held discussions on 6 March. There follow these relevant passages:

"Our view remains that to allocate four of the nine potential licences for the longline fishery to UK OT [ie, Overseas Territories]-flagged vessels would be seen by others as disproportionate. A view we could not contest. This would be the case especially as within the current Toothfish pot fishery we have already allocated 50% of the licences and two thirds of the (albeit limited) quota on a tonnage basis to UK OT-flagged vessels belonging to, and operated by, a Falkland Islands-based company, Argos.

Reducing licences for UK OT-flagged vessels down from four to two in the longline fishery leaves us with the invidious task of deciding which vessels to licence [sic]. But as with licence allocations more generally, we need to be as objective as possible. So certain factors must come into play, and here the past performance of vessels in the fishery is a crucial factor. Looking across the potential candidates it is clear that the Argos vessels have a relatively high compliance record with CCAMLR regulations. The *Lyn* and *Jacqueline* in contrast are unfortunately almost at the bottom of the list. Last year CCAMLR did a ranking (copy provided to Government House earlier in the season) based on compliance with relevant Conservation Measures, in particular data reporting, and vessels' ability to comply with seabird mitigating measures. For ease of reference I attach as an example the ranking for the latter. From that you will see that the *Lyn* and *Jacqueline* are not good

performers. And of course what is also relevant here is that failure to comply with CCAMLR Measures means in effect failure to comply with South Georgia law since the provisions of those Measures are set as conditions on a vessel's licence. So I am afraid, given a need to choose which should receive licences, the *Lyn* and the *Jacqueline* are in the bottom half of the draw.

×

We remain in favour of an equitable split amongst CCAMLR Parties' access to the SGSSI fishery. For wider political reasons that is in our interest. We also wish to see a level of preferential access given to UK-OT flagged vessels. But that does need controlling if the wider objective is to be met. We cannot be seen to be preferentially licensing vessels whose compliance record with responsible regulatory measures is low×

37. The "ranking" attached to the letter of 9 March is a one-page document headed "League Table of Vessel Compliance with Conservation Measure 29/XV, based on analysis of performance in respect of line weighting, streamerlines, night setting and offal discharge on all cruises, 1997 - 2000." The table is not altogether easy to understand. Six vessels are listed under the heading "Autoline", and then in another column nineteen vessels are listed under the heading "Spanish-System": these nineteen include the *Argos Helena*, the *Argos Georgia*, the *Jacqueline* and the *Lyn*. So far as I can see the first list of vessels can be ignored. The "Spanish-System" is, as I understand it, the name for the type of longlining deployed by the *Jacqueline* (and the other 18 in the list). Under another heading "Area", 48.3 - that must of course be sub-area 48.3 - is shown against 16 of the 19 vessels, including the *Jacqueline* and the *Lyn*. Then there is a heading consisting simply in the letter "N" beneath which a number, ranging between 1 and 7, is shown against each vessel. I understood counsel to suggest that this referred to the number of years fished by each listed vessel. If so, the document is, as Alice said, curiouser and curiouser: it purports to deal with the years 1997 - 2000, but the numbers under "N" as I have said go up to 7, and against the *Jacqueline* the number entered is 3: but it is beyond contest that she fished for all four years 1997 - 2000. Finally, under the heading "Compliance", percentage marks are allocated to each vessel. The *Jacqueline* is fourth from the bottom with 17%. The *Lyn* is second from the bottom with 8%.
38. It is plain from paragraph 53 of Mr Parker's written reply on behalf of the Secretary of State put in after the hearing in this court that this ranking was not based on Table 55, whereas Dr Richardson's advice, set out in the letter of 16 February 2001 was so based: see paragraphs 44 and 53 of the reply and paragraphs 44 - 46 of his statement in the London proceedings, which I have set out in part. I think it follows that the final basis of the advice given by London to SGSSI, that the *Jacqueline* should not be licensed to fish for toothfish in 2001, has been and remains unclear.
39. There followed the decision as to the allocation of licences on 14 March 2001, the SGSSI proceedings, and the Secretary of State's direction of 7 June 2001. While I have sought to examine in some little detail the processes which led to the decision of 14 March, Mr Parker rightly stressed the fact that the challenge in the London proceedings is distinctly aimed at the Secretary of State's direction. He was at pains to emphasise the terms of the direction, which (in the preamble I have cited) make it plain that its basis was Table 55 - albeit the

position regarding the decision of 14 March is as I have said unclear. In relation to that, it is to be noticed that one of Quark's complaints in their judicial review Grounds in the London proceedings (paragraph 32(1)) was that after the judgment in the SGSSI proceedings there was no proper reconsideration *de novo* of the application for a licence for the *Jacqueline*. I should record what was said by Dr Richardson at paragraph 61 of his statement in the London proceedings:

"Following the decision of the Supreme Court SGSSI on 1 June 2001, the Secretary of State decided that he should issue instructions to the Commissioner *in order to ensure that the pattern of licence allocation which had been put in place prior to the judgment was reinstated..* ." (my emphasis)

And paragraph 62:

"× the factors which had been considered relevant to the initial licence allocation decision were those which it [sic] considered relevant even after the initial decision had been quashed. In addition× it was a major concern of the Secretary of State that a reconsideration of the decision not to allocate quota to the *Jacqueline* could affect the position of other vessels. If the reconsideration resulted in an allocation of fishing licences which differed from the original allocation this would inevitable require a reduction in quotas lawfully allocated to vessels by the Director of Fisheries in the initial allocation."

I will postpone for the present any consideration of the impact of this evidence.

(3) Table 55

40. Table 55 forms part of the Report of the Working Group on Fish Stock Assessment which, as I have said, was appended (as Annex V) to the 2000 Report. I should first refer to these passages in the body of the Working Group Report:

"7.49 In Subarea 48.3 the total estimated seabird by-catch in 2000 was 10% of that in 1999 and 4% of that in 1997. By-catch rates in 2000 were 0.05% of those in 1997. These changes, achieved in large part by restricting fishing to winter months, but also by improved compliance with Conservation Measure 29/XVI, particularly night setting, have culminated in reducing seabird by-catch in the regulated fishery to negligible levels.

×

7.52 Compliance with the streamer-line design was poor and only 33% of the streamer lines deployed complied fully with the specifications in Conservation Measure 29/XVI (Table 54). The length of most of the streamer lines was less than 150 m and this continues to be the main reason for non-compliance× [O]nly 25% of the lines used in Subarea 48.3× were greater than 150 m in length× Some vessels have persistently poor compliance with this element of the conservation measure (eg. [then 10 vessels are named, including the *Jacqueline*, the *Lyn*, and the *Argos Helena*]). Compliance with other elements such as the attached height of the line and the number and spacing of streamers per line remains high (85–100%). Nineteen observers indicated that spare streamer-line material was present on board.

×

7.54 In Subarea 48.3 four vessels (*Faro de Hercules* , *Isla Sofia* , *Isla Camila* and *Jacqueline*) are still operating with offal discharge on the same side as the haul, in contravention of Conservation Measure 29/XVI.

7.55 Compliance with night setting has improved in Subarea 48.3 from 80% last season to 92% this season×

×

7.60 Details of compliance with streamer line, offal discharge and night-setting requirements of Conservation Measure 29/XVI are summarised on a vessel-specific basis in Table 55×

Table 54 deals with compliance rates for what is described as the 1999/2000 season with the minimum specifications for streamer lines set out in what was then Conservation Measure 29/XVI. Table 55 is headed in part: "Summary of compliance with Conservation Measure 29/XVI regarding night setting, correct configuration and use of streamer lines and offal discharge practices in the Convention Area, from 1998 to 2000. The *Argos Georgia* , *Argos Helena* , *Jacqueline* and *Lyn* are among the 25 vessels listed in the Table (some of the vessels listed fished in areas other than 48.3). There are three headings: "Night Setting", "Streamer Line" and "Offal Discharge". Under each of these there are three sub-columns, for 1998, 1999 and 2000 respectively. Against the name of each vessel there is entered "Y" or "N" ("Yes" or "No") to indicate compliance or non-compliance with the conservation measure standards for each heading in each of the three years; save that where in a given year a vessel did not fish, a dash ("–") is entered. Here are the entries for the four UK-registered vessels:

| | <u>Night Setting</u> | | | <u>Streamer Line</u> | | | <u>Offal Discharge</u> | | |
|----------------------|----------------------|------|------|----------------------|------|----------|------------------------|------|------|
| | 1998 | 1999 | 2000 | 1998 | 1999 | 2000 | 1998 | 1999 | 2000 |
| <i>Argos Georgia</i> | – | – | Y | – | – | <i>N</i> | – | – | Y |
| <i>Argos Helena</i> | Y | Y | Y | Y | N | N | Y | Y | Y |
| <i>Jacqueline</i> | Y | Y | N | N | N | N | N | N | N |
| <i>Lyn</i> | – | N | Y | – | N | N | Y | Y | Y |

Thus the *Argos Georgia* had fished only for the year 2000. The italicised "N" against the *Argos Georgia* 's name in relation to the Streamer Line standard for 2000 reflects this statement in the heading to the Table: "Vessels in their first year in the fishery that failed to comply with a conservation measure are indicated in italics." I note that Mr Summers' evidence in the London proceedings (paragraph 16 of his statement) is that the *Argos Georgia* originally had a pot fishing licence for 2000, but over two months caught only 17 tonnes of her 600 tonnes allocation; after which a successful application was made to transfer the remaining 583 tonnes to longline. So she only spent half the 2000 season longlining for toothfish.

THE JUDGMENT OF SCOTT BAKER J

41. A principal emphasis of the decision below in Quark's favour consists in the judge's conclusions as to the use of Table 55 to judge the extent of the *Jacqueline* 's compliance with CCAMLR conservation measures. He held (paragraph 90) that Table 55 provided "an inadequate and unfair basis on which to determine conservation compliance", and I will deal with that in due course. But the judge first made some more general observations, which I should also record before arriving at my own conclusions in the case. He said:

"69. The grant of a licence to a vessel for Toothfishing in SGSSI waters is an extremely valuable commodity× In my judgment there is no reason why applicants for such a licence should be left in any doubt about the criteria upon which they will be granted. The process should be transparent and the criteria published at the time applications are invited. It is not satisfactory to say, as the Attorney General did in his letter of 10 April 2001, that the policy has not been published as such, although it may in part perhaps be divined from the Ordinance. If the Secretary of State is minded to give a direction of the kind that he gave in the present case, and in my judgment he was fully entitled to take into account the wider international picture, then I can see no reason why it should not, in the ordinary course of events, be given at the same time as applications are invited for licences so that all applicants can know the basis on which the decision will be made.

70. It seems to me clear that what actually happened was that the Secretary of State's advice/direction only bit on United Kingdom flagged vessels. The applications for licences for all the other vessels were decided by the Director in accordance with the criteria set out in his letter to Dr Richardson of 8 February 2001. But there is a further problem: whether the yardstick required by Dr Richardson (CCAMLR compliance) was accurately and fairly applied."

42. The judge then turned to the arguments on Table 55. He dealt separately with the three heads, "Night Setting", "Streamer Lines" and "Offal Discharge". Table 55 showed the *Jacqueline* to have failed to comply with the night setting standards in the season 2000 only, but to have failed under the other two heads for all three years 1998 - 2000. The judge stated (paragraph 75 of the judgment) that the source (or, perhaps, a principal source) of the data in Table 55 was the scientific observers' reports, and this is amply confirmed by Mr Parker's written argument in reply. This tends to sour Dr Richardson's assertion that the scientific observer is not a "spy in the camp". Indeed in the course of the hearing Mr Vaughan produced a note headed "Spy in the Camp", effectively asserting in terms that it was a function of the scientific observers to monitor compliance, and accordingly urging the importance of having regard to the primary data as described in the observers' reports rather than the mere summaries or synopses produced in annexures to CCAMLR reports such as Table 55.
43. On night setting in the 2000 season, the conclusion in Table 55 was, said the judge, based on two sentences in the relevant observer's report. One was: "All sets were carried out during the times of nautical dusk, night and nautical dawn". The other was: "Most setting operations were conducted during darkness and the streamer line was used normally". Scott Baker J indicated (paragraph 75) that on reading these statements he was "left in considerable doubt" whether there was any failure by the *Jacqueline* to comply with the night setting requirement. I do not understand the Secretary of State to dispute Table 55's reliance on these statements. What is said (written reply, paragraph 38) is that CCAMLR treats the night setting requirement as met if at least 90% of the lines are set at night, and the *Jacqueline* 's score was 88% (see Table 48).

44. On streamer lines, the judge noted that the *Jacqueline* 's only failure (for the year 2000) was that the line was short: 80 rather than the required 150 metres. He cited the observation of the scientific observer:

"Only one streamer line (80m) was used during 68 settings observed (72 sets) and was of own design. The vessel had two more lines for replacement use. It always seemed effective in the settings with presence of seabirds."

So it was submitted for Quark, and the judge accepted, that there was a failure as to one detail only of the streamer line requirement, and the failure was "of a technical nature in the light of their other bird prevention measures". Scott Baker J acknowledged that the *Jacqueline* was shown in Table 55 as having failed the streamer line requirement in 1998 and 1999, as well as 2000, and observed that "[t]he reason again appears to be the length of the streamer line. No effort appears to have been made, either on the inspections or any other time, to draw these or any other CCAMLR compliance deficiencies to the attention of [Quark]".

45. As for offal discharge, the judge found and the Secretary of State accepts that the negative finding for the year 2000 was simply wrong: the discharge chute was moved to the other side of the vessel before the 2000 season commenced. There was no dispute but that the *Jacqueline* had been in breach of the offal discharge requirement in 1998 and 1999. But that had been put right by the time licences were applied for in 2001.
46. The judge expressed his conclusions as to the use of Table 55 thus (paragraph 84):

"My conclusion is that Table 55, on which Dr Richardson relied, does not give an accurate or fair picture of the *Jacqueline* 's CCAMLR compliance record. This was damaging to [Quark] because it was relied on to determine the *Jacqueline* 's CCAMLR compliance record in relation to other United Kingdom flagged vessels without [Quark] having the opportunity to point out the deficiencies. Mr Parker submits that the CCAMLR report and with it Table 55 are documents in the public domain that were available to [Quark] from the autumn of 2000. The evidence leaves me in some doubt about the availability and certainly the accessibility of these documents. More significantly, however, it was never made clear to [Quark] or, indeed, to any other licence applicants, that the observers' reports would be interpreted so as to produce a record of comparable compliance between vessels, or that it would be used in determining future licence applications."

47. Scott Baker J proceeded, with some force, to voice further criticisms of the decision-making process in the case. It is with respect not necessary to set them out. I will gather all the relevant points in my own conclusions, to which I now turn.

CONCLUSIONS

48. This case possesses a number of different strands which tend to intertwine. I will set out my conclusions under separate headings, which I will draw together; or their connection will anyway be evident.

DISCLOSURE

49. I have already referred to Mr Vaughan's vigorous complaint at the Secretary of State's late disclosure of the correspondence of February and March 2001. He was inclined to submit that this was merely an instance of a more general failure of frank disclosure of which, he submitted, the Secretary of State through counsel was guilty in both the SGSSI and the London proceedings. At the court's invitation he put in substantial written submissions after the hearing to justify this position. Inevitably this drew from Mr Parker a no less vigorous response. It is I think convenient at this stage to put this somewhat acid skirmish in its proper place.
50. Mr Parker submits, correctly, that there is no duty of general disclosure in judicial review proceedings. However there is - of course - a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G - 1062A.
51. I make it clear at once that I acquit Mr Parker of any intention to conceal relevant material from the court, and nothing I have to say is intended to cast the slightest shadow on his professional integrity, or that of his junior. However, I consider that the material put forward by the Secretary of State in the SGSSI and London proceedings did not convey a fair and full picture of the decision-making process in the case, and the letters of February and March 2001 demonstrate as much.
52. A conspicuous example of this want of frankness, or at least of clarity, concerns the policy criterion of loyalty to the fishery. In both the SGSSI and the London proceedings the plain impression was given that in allocating licences for toothfish fishing in the 2001 season, loyalty to the fishery had been a relevant factor: see for example paragraph 25 of the Director of Fisheries' affidavit in SGSSI and paragraph 44 of Dr Richardson's statement in London. But it is clear from the letters that it played *no* part in the decision of the crucial question, which two of the four UK-registered vessels would be granted licences. As between the four, the decision turned only on actual or perceived levels of compliance with CCAMLR standards.
53. Next, it is in my judgment striking that the various references in the statements and affidavits to the Director's recommendations to Dr Richardson omit any mention of the Director's criteria having been put forward "as usual", an expression used in the letter of 8 February 2001. This is an important point of departure between the contemporary documentation and the written evidence. Paragraph 44 of Dr Richardson's statement in the London proceedings (which I have cited) looks for all the world as if it were merely

describing the application of existing and uncontentious policy. But it is plain from the letters that Dr Richardson's advice in February 2001 urged a substantial departure, certainly in terms of outcome, from the approach which otherwise would have been taken by the Director of Fisheries. The Secretary of State accepts that (to use Mr Parker's words) "if he [the Secretary of State] had not given the advice which he did give in February/March 2001, the Director of Fisheries in March 2001 would have granted licences to all four UK Overseas Territories flagged vessels, including the *Lyn* and the *Jacqueline* ."

54. Thirdly - and I have already canvassed this - whereas the Secretary of State's evidence was to the effect that Dr Richardson's advice of February 2001 was based on Table 55, Mr White's letter of 9 March was not; and one is left in doubt what was the real foundation for the 14 March 2001 decision so far as it turned on compliance rates. I think it is clear that for his part the Director of Fisheries simply followed the Department's advice, whatever its basis.
55. There are some other more detailed points, but I need not go into them. On this matter of disclosure we have, in my judgment, to bear in mind that what matters is the effect of any failure on our appreciation of the overall merits of the case; we are not concerned to discipline or penalise the Secretary of State. Even so, I am constrained to say that the Secretary of State in this case has fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review.

CONSULTATION

56. There is a respondent's notice which, as I understand it, urges this court to hold that Quark should have been involved (or invited to be involved) in the decision-making process to a greater extent than was indicated by the judge in paragraph 69 of his judgment which I have set out. On this part of the case, it is I think very important to be careful what one means. There is in my judgment no question of Quark being *consulted* , either as to the allocation of licences by the Director on 14 March 2001 or the issue of the Secretary of State's direction. There is, however, a real question how far fairness required that an opportunity be afforded to Quark to *make representations* as to what the decision should be.
57. The question is to be decided by reference to our well established principles of public law. In that light, I have no doubt that there is at least one matter upon which Quark had no entitlement to make representations at all, important though it plainly has been in the history of the case. The limitation of the number of licences to be issued to British-registered vessels to two, against the Director's recommendation of four, was arrived at as a matter judgment in the field of foreign policy. It is I think clear that foreign policy issues are an area of government decision-making as regards which our public law principles of fairness will not impose a requirement upon the Secretary of State to invite representations from parties who may be affected by the decision. Though Mr Vaughan may fairly categorise this limitation to two licences as a new policy, his clients had no right to have any voice in whether it should be adopted or not.

58. But that is not the end of this part of the case. Once it was decided that there should be licences in 2001 for no more than two British-registered vessels, then for the four candidates for those licences - the *Argos Helena*, the *Argos Georgia*, the *Jacqueline* and the *Lyn* - the competitive playing-field was quite different from what had obtained in previous years. There would be two winners and two losers. Let it be assumed for the moment that the Secretary of State was entitled to discount loyalty to the fishery, so that that consideration would play no part in deciding who would win and who would lose. The decision would be made by reference to a judgment, however precisely arrived at, about the vessels' relative compliance with CCAMLR conservation measures. I cannot see why that beauty contest should have been conducted in secret, as in my judgment it plainly was. I agree with the approach taken by Scott Baker J at paragraph 69 of his judgment, which I have set out. Once it was concluded that the allocation of licences would proceed according to Dr Richardson's advice in February, I see no reason why the four vessels' owners should not have been approached and told in terms (a) that only two would get licences, (b) that which two depended on CCAMLR compliance, and (c) that the Secretary of State/Director was minded to decide CCAMLR compliance by reference to Table 55 (if that was the case). Representations could accordingly have been invited. Appropriate documents could have been provided. A tight timetable could have been insisted upon. That would have been a fair procedure, and would have in no way trespassed on the Secretary of State's duties and prerogatives in relation to foreign policy. In my judgment, our public law standards of fairness and reasonableness required that some such procedure should have been adopted. No one would then have been in any doubt as to the prospective basis of the decision, and the protagonists would have been enabled to say what they wished to say about their own individual merits.
59. I am conscious that this reasoning draws no distinction between the process leading to the decision of 14 March 2001, and the direction of 7 June 2001. I shall deal with the implications of this circumstance in due course.

LOYALTY TO THE FISHERY

60. However, given the history, I do not think the Secretary of State was entitled entirely to discount loyalty to the fishery as a relevant consideration in deciding upon the appropriate allocation of licences as between the four British-registered vessels, at least without inviting representations on the point. The foreign policy dimension required only that the number of British-registered vessels to be licensed should be cut to two; it was not concerned with the criteria to determine how the favoured two should be chosen. Accordingly there was nothing to inhibit an invitation to put forward representations to persuade the Secretary of State to retain, on fairness grounds, loyalty to the fishery as a criterion. I accept Mr Vaughan's submission that by past practice a legitimate expectation had been generated that loyalty would be taken into account; and I accept also his further submission that the Secretary of State has shown no rational basis for its being disregarded, at least, as I have said, as between the four British-registered vessels.

THE SUBSTANTIVE DECISIONS

61. If contrary to my view fairness did not require a notification of the prospective basis for the 2001 decision, nor an invitation to make representations, nor the retention of loyalty to the fishery as a relevant consideration, then as it seems to me it was all the more incumbent on the decision-makers to ensure that the conclusion arrived at was solidly and soundly based on clear objective facts.

(1) The First Decision: 14 March 2001

62. I have already held (paragraph 38) that the basis on which the Secretary of State recommended the rejection of the *Jacqueline* and the *Lyn* from the allocation of licences for 2001 remains unclear, because it is not possible on the material we have to reconcile Dr Richardson's apparent reliance on Table 55 with Mr White's reliance on a different table, or "ranking", which represents other CCAMLR information. (I consider also - though it is a small point - that that part of paragraph 15 of Dr Richardson's letter of 16 February 2001 where he says "Unless the performance of those vessels [sc. the *Lyn* and the *Jacqueline*] has greatly increased in the intervening months" is very difficult to understand: I assume that the vessels would not have fished between the end of the 2000 season and the date of the letter.) In the circumstances I am not prepared to assume, or find as a fact in these proceedings, that the decision of 14 March 2001 was taken on rational grounds having regard only to relevant considerations. I have already referred in passing (paragraph 50) to Lord Upjohn's speech in *Padfield* . He said (1061G - 1062A):

"× if he [sc. a Minister of the Crown] does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

So also, as it seems to me, where the Minister has given conflicting, or apparently conflicting, reasons.

(2) The Need for Substantive Reconsideration

63. It follows that unless the direction of 7 June 2001 can be seen to have been the result of fresh consideration, and to have been rationally and fairly arrived at by the application of criteria which are themselves clear and reasonable, it must be held to be legally defective. Moreover, I think it was the expectation of the Chief Justice in the SGSSI proceedings that the ranking exercise would be re-considered in substance. Although he quashed the decision to refuse the *Jacqueline* a licence essentially because the Director had wrongly held himself bound (in effect) by the Secretary of State's advice, he also made these observations (page 40 of his judgment):

"Much of what has been placed before me and much of what Mr Vaughan and Mr Parker have submitted during the course of this hearing has related to the accuracy or (as the former would have it) the inaccuracy of the data used by the FCO in producing a ranking of vessels in such a way that the *MV Jacqueline* was excluded. It will be apparent from the above, however, that my decision is not in any dependent upon that. I would however add this. On reading the papers, I was somewhat puzzled by the relating of compliance data to the vessel alone. This seemed to me only part of the picture. Ships are inanimate, and once a licensing authority is satisfied that a vessel meet [sic] the appropriate physical criteria (eg. safety measures, navigation and identification equipment) it is less the vessel and more the manner of

operation which would be of concern to the licensing authority. It would, for example, be possible for a vessel which had an excellent compliance record later to become subject to the control of a master, fishing master, charterer, or owner who had a poor record of compliance in those waters or elsewhere. Similarly, a vessel which had a poor compliance record in earlier years might now be under the control of those with an impeccable record. Counsel were not able to help me with this.

Similarly, it is apparent that when producing a ranking order based upon the figures actually used by the FCO, where data was not available relating to a particular vessel, the assumption was made that this equated to compliance on the part of that vessel. Whilst to do otherwise might have been inequitable in so far as those other vessels were concerned, it may well have had the effect of distorting the position in which the *MV Jacqueline* was placed in the overall ranking."

64. It is true that, following the order that a fresh decision be made within 7 days of 1 June 2001, the Secretary of State's direction was given (7 June) before the Chief Justice's judgment was handed down (8 June); and with respect to the Chief Justice, it was perhaps less than helpful to require a fresh decision to be made before the parties would see his reasons for quashing the refusal of a licence to the *Jacqueline*. But the Secretary of State was well aware of the criticisms advanced against Table 55 in the SGSSI proceedings, and he cannot properly have assumed that a fresh substantive decision was not required.

(3) *The Second Decision: the Direction of 7 June 2001*

65. I do not believe that substantive reconsideration was given to the merits of the *Jacqueline*'s position before the direction was issued. Paragraphs 61 and 62 of Dr Richardson's statement in the London proceedings, which I have cited at paragraph 39, suggest that that is the position. It is true that Dr Richardson (paragraph 61) refers to "the reasoning behind the instructions [sc. the direction]" and sets out four criteria, of which the fourth was "the comparative level of compliance with CCAMLR Conservation Measures of vessels of the same flag"; but paragraph 62 begins "In other words, the factors which had been considered relevant to the initial licence allocation were those which it considered relevant even after the initial decision had been quashed". There is nothing by way of documents, or separate reasoning set out in the evidence, to show that the question had been looked at afresh. Certainly, as I have made clear, the direction unambiguously refers to Table 55, and not to the rather more mysterious table appended to Mr White's letter of 9 March 2001. But that alone does not persuade me that the matter was substantively reconsidered. For this reason alone, then, Scott Baker J was in my judgment right to quash the direction.
66. But if that is wrong, and either there was no need for such reconsideration or it was in fact given, there remains the question whether Table 55 was a legally satisfactory basis on which to found the decision to refuse the *Jacqueline* a licence. Mr Parker was at pains to submit, not least in his written reply, that it was reasonable and appropriate for the Secretary of State to rely on Table 55 - it was a CCAMLR document. But the complaint on this part of the case is not as to the *provenance* of Table 55, but as to the substance of its contents. As

regards that, I have to say that I have seen nothing to displace Scott Baker J's criticisms. Here are the main points. (1) The conclusion that the *Jacqueline* was in default in relation to night setting was factually doubtful, and at best the failure was marginal. (2) The failure on streamer lines was really technical, at least for 2000. (3) The Table was simply wrong on offal discharge for the year 2000 - this I think is quite important, since the presumption must have been that, the *Jacqueline* having been reconfigured to comply with the offal discharge requirement for 2000, she would thereafter continue to comply. (4) The *Jacqueline*'s loyalty to the fishery actually counted *against* her on Table 55, since the years (1998 and 1999) when the *Argos Georgia* did not fish were effectively counted in her favour as years of compliance.

67. There are some other points. There is documentation to show that on one day in the 1998 season the scientific observer was kept off the bridge of the *Argos Helena*, and there are some question-marks over the accuracy of Table 55 *vis-à-vis* that vessel. Overall, however, I am content to agree with Scott Baker J as to the use of Table 55. It did not in the circumstances amount to a fair basis for denying the *Jacqueline* a licence.

IN THE RESULT

68. For all these reasons, some of them alternative to others, I would dismiss this appeal. I feel constrained to add, and I do it with a sense of melancholy, that while for my part I have found nothing to demonstrate bad faith on the part of the Secretary of State, the history of this case has demonstrated to my mind that the approach taken to the public decisions that had to be made fell unhappily short of the high standards of fairness and openness which is now routinely attained by British government departments.

Lord Justice Jonathan Parker:

69. I agree.

Lord Justice Aldous:

70. I also agree.

Order: Appeal dismissed with costs on the standard basis; detailed assessment if not agreed; those costs to include the costs of the applications for further discovery; payment on account of costs ordered in the sum of £60,000.

(Order does not form part of the approved judgment)