

**THE FISHERIES BILL
ECHR MEMORANDUM FOR THE BILL AS INTRODUCED INTO
THE HOUSE OF LORDS**

INTRODUCTION

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Fisheries Bill. This memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra).
2. Lord Gardiner of Kimble, Parliamentary Under Secretary for Rural Affairs and Biosecurity, has made a statement that in his view the provisions in the Fisheries Bill are compatible with the Convention rights.
3. This memorandum deals only with those parts of the Bill which raise ECHR issues.

SUMMARY OF THE FISHERIES BILL

4. The Fisheries Bill (the Bill) will provide the legal framework for the United Kingdom to operate as an independent coastal state under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) after the UK has left the European Union (EU) and the Common Fisheries Policy (the CFP).
5. The Bill contains the following provisions:
 - **Fisheries objectives and fisheries statements:** the Bill replaces the sustainability objectives currently in Art. 2 of the Basic Regulation of the Common Fisheries Policy (Regulation (EU) 1380/2013) (the Basic Regulation), making them “fisheries objectives” of the Secretary of State and the Devolved Administrations (the “Fisheries Administration” or “FAs”). The fisheries objectives also include the objective of securing that all UK fishing boats have equal access to UK waters, a “national benefit objective” to ensure that UK fishing boats bring social and economic benefits to the UK (e.g. by requiring catches to be landed in UK ports, or to employ UK labour) and a “climate change objective”. The FAs are required to publish a joint statement setting out their policies for achieving or contributing to the achievement of those objectives. The statement must include

a list of fisheries management plans the FAs will introduce for different stocks in different areas. The joint fisheries statement may omit policies involving functions related to reserved matters or, to the extent they do not relate to reserved matters, other UK quota functions of the Secretary of State. The Secretary of State must then publish a separate fisheries statement setting out the omitted policies. The FAs must publish fisheries management plans and must pursue the policies contained in the relevant fisheries statement and comply with fisheries management plans unless a change of circumstances indicates otherwise.

- **Access to UK waters:** after the implementation period (IP), any access for EU and other foreign vessels to UK waters will be a matter for negotiation. The Bill revokes the EU legislation which currently provides for automatic rights for vessels registered in the EU to access UK waters. By revoking provisions in the Fishery Limits Act 1976, it removes the need to designate which countries' vessels are able to fish in UK waters and introduces a new requirement that foreign vessels fishing in UK waters must be authorised to be in UK waters under international agreements or arrangements or must have a licence issued by a Fisheries Administration. The Bill also extends a number of statutory instruments to foreign vessels which regulate fishing activities in UK waters and which currently only apply to British vessels, so that they are bound by the same rules.
- **Fishing boat licensing:** the Bill replaces and clarifies existing powers for the FAs to license fishing in UK waters. For the most part, this is a consolidation of existing powers but the Bill makes several significant changes. It provides for equal access for UK vessels in UK waters by clarifying that licences issued by any UK licensing authority (the Marine Management Organisation (MMO) and the Devolved Administrations) are effective throughout UK waters. It also requires for the first time that foreign vessels are prohibited from fishing in UK waters unless they have a licence issued by a licensing authority.
- **Fishing opportunities:** the Bill revokes EU legislation which currently sets UK fishing opportunities and gives the Secretary of State powers to determine the UK's fishing opportunities. Before doing so she must consult the Devolved Administrations. She must notify Parliament of the designation. The Bill also

introduces powers for the Secretary of State and Welsh Ministers to sell annual fishing opportunities to those in their respective fishing industries.

- **Discard prevention charging scheme:** the Bill contains a regulation-making power to set up a scheme for charging English fishing licence holders that land fish in excess of their authorised quota. This will support the implementation of the landing obligation (which requires all species subject to quota controls to be landed) by encouraging the uptake of more sustainable fishing practices.
- **Marine environment:** the Bill extends the powers of the MMO, Scottish Ministers and Welsh Ministers to regulate fishing for the purposes of protecting and enhancing the marine environment. Extended byelaw making powers for the MMO and extended order making powers for the Scottish and Welsh Ministers will enable them to regulate fishing in their offshore as well as territorial waters and outside marine protected areas. The Bill also provides for the MMO to exercise research, advisory, assistance and training functions outside UK marine waters. Currently, all MMO functions are exercisable in relation to the UK marine area under the Marine and Coastal Access Act 2009.
- **Cost recovery:** the Bill allows the cost-recovery powers of the MMO and the Devolved Administrations to be extended by regulations and Devolved Administrations to enable them to charge for services provided to the fishing industry.
- **Grant schemes:** the Bill provides powers for the FAs to introduce schemes of financial assistance for the fish and fish farming industries, to improve the marine and aquatic environment, to promote recreational fishing and to improve the health and safety of fishers. The powers replace and broaden existing domestic funding powers and will allow new funding schemes to replace funding currently received under the European Maritime Fisheries Fund (EMFF).
- **Power to amend UK law (including retained EU law) related to fisheries:** the Bill provides a power for each FA, by regulations, to make provision in relation to listed fisheries matters and for listed purposes. The Secretary of State could introduce UK-wide measures with the consent of the Devolved Administrations.

The power could be used to amend UK law (including primary legislation and retained EU law).

- **Power to amend UK law (including retained EU law) related to aquatic animal health:** the Bill provides a power, by regulations, to make provision in relation to listed matters related to the control of aquatic animal diseases and for listed purposes. The power is exercisable by the Secretary of State and the Devolved Administrations. The Secretary of State could introduce UK-wide measures with the consent of the Devolved Administrations. The power could be used to amend UK law (including primary legislation and retained EU law).
- **Extension of the legislative competence of the National Assembly for Wales:** the Bill extends the legislative competence of the National Assembly so that it has competence in relation to fisheries, fishing and fish health in the Welsh zone (12-200 nautical miles) as well as in Welsh territorial waters (0-12 nautical miles).

THE BILL AND CONVENTION RIGHTS

6. The Bill contains a number of provisions which engage Convention rights, in particular Article I of the Protocol to the Convention (right to property). Several provisions in the Bill confer functions on public authorities, which are required under section 6(1) of the Human Rights Act 1998, to act in ways which are compatible with Convention rights.

Protocol I Article I (right to property) of the Convention

7. The Department has considered the Bill in light of Protocol I, Article I (“A1P1”) of the Convention. The Department accepts that the act of fishing constitutes an economic activity which could engage A1P1. The right to carry out fishing activity under licences and the units used to allocate fishing quota (Fixed Quota Allocations - FQAs) which attach to licences have been found to amount to “possessions” for the purposes of A1P1¹.

¹ *Mott v Environment Agency*, [2016] EWCA Civ 564; and *United Kingdom Association of Fish Producer Organisations v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin). In *Christina S FR 224 and others v Scottish Ministers* [2013] CSOH, however, the Court suggested that A1P1 was not engaged as the petitioners had no legal right to any particular future quota in a licence granted to them by the respondents.

Power of the Secretary of State to determine fishing opportunities

8. Clause 23 makes provision for the Secretary of State to determine the annual quantity of fish that may be fished by British fishing boats and to determine the number of days that British fishing boats may spend at sea. The provision itself does not amount to an interference with property. Moreover, the power relates to future fishing opportunities and the Department considers that it is strongly arguable that it would not interfere with property rights on the grounds that future income cannot be considered as a property right unless it has already been owned or is enforceable: *Gudmundsson v Iceland* 23285/94.
9. Even if there is considered to be interference, which the Department considers unlikely, then in determining whether any interference was in the public interest, the Strasbourg jurisprudence recognises a wide margin of appreciation to the authorities of State parties (see *James v UK* 8793/79). In this respect the sustainability objectives which will affect decisions on the determination of fishing opportunities reflect public interest concerns. In the Department's view, that public interest, by its nature, and in application of the fair balance test, would justify any prima facie interference with property rights.

Revocation of existing fishing rights for foreign vessels

10. Schedule 4 repeals section 2 of the Fishery Limits Act 1976 and the orders under it which provide for foreign fishermen to have access to British fishery limits. The Department accepts that fishing is an economic activity which is capable of generating property rights. Prohibiting access to foreign fishermen who have previously been able to fish within British fishery limits is potentially an interference with such rights. To the extent that there is an interference the Department observes that it is strongly arguable that any interference would be considered to be "control" rather than "deprivation" of property rights as foreign vessels would still be able to fish, albeit not in UK waters. Foreign vessels fish against the quota they are allocated by their home state and could fish for that quota in other waters.

11. Further, any interference would be consistent with the principle of legality in that the termination of the fishing rights will be in accordance with international law. The UK's withdrawal from the EU Treaties, the CFP and the London Fisheries Convention (which recognises some historic arrangements for access to UK waters) will conform to the relevant withdrawal provisions in the relevant treaties.
12. Finally, the Department considers that any interference can be justified as proportionate on the grounds that (i) the fishing rights of foreign fishermen should be considered as rights arising from international agreements between States which are subject to termination in accordance with the terms of those agreements; (ii) the beneficiaries of those rights will have had sufficient notice required by the terms of those agreements and would therefore have had time to re-arrange their economic activities; and (iii) there is a possibility of future agreements according mutual fishing rights, but on a different basis.

The licensing of foreign fishing boats

13. Clauses 14 and 16 concern the licensing of domestic and foreign fishing boats. The Department accepts that fishing is an economic activity which is capable of generating property rights, and that in so far as the licensing system restricts the carrying out of such activities, it may constitute an interference with those rights. The Department notes that licensing in respect of sea fishing is not an innovation. Licensing has been used for many years to regulate fishing and its impact on stocks and on the marine environment. The Bill consolidates and rationalises existing licensing provisions rather than introducing new systems of control. To that extent there is minimal interference.
14. Further interferences with business or the value of commercial goodwill, including decisions in relation to licences or permits, are generally characterised as controls of use rather than deprivations. The Department considers that any interference would be compatible with the Convention, since it would be in accordance with the law and the general interest.
15. Furthermore, there is a strong argument that the measure would be proportionate, in that in that it strikes a fair balance between the means employed in furtherance of the

general interest of sustainable development, the protection of the environment and the protection of the individual's fundamental rights (here, the individual's economic and commercial interest).

16. Other provisions in the Bill provide regulation-making powers, the exercise of which potentially raise A1P1 issues. The Department would consider such issues before making regulations but sets out what it sees as possible A1P1 implications below.

Power to introduce scheme for the sale of quota

17. Clause 27 provides a power for the Secretary of State, by regulations, to introduce schemes for the sale of quota. The power relates to quota which can be allocated in a calendar year by the Secretary of State to or for the benefit of English fishing boats. There are corresponding powers for the Welsh Ministers under Schedule 5.

18. The Department accepts that charging fishers for rights to fish for quota which they have historically fished without charge is potentially an interference with existing property rights. The Department considers that any interference would amount to control rather than deprivation and would be justified by public interest considerations, striking a fair balance between the furtherance of sustainable development and protection of individual rights.

19. The Department accepts that selling or leasing the quota available to English fishers is a further control on the public "right" to fish. This "right" has only ever applied to the extent that it is not limited. Unrestricted fishing would lead to overfishing and damage to the marine environment so controls on fishing have, for many years, been imposed through licensing, including controls on the vessels and fishing gear which can be used, the amount of fish which can be fished and the amount of time fishers can spend fishing. Selling quota is another control which will be used to encourage sustainable fishing and the Department considers that this is a reasonable interference with the public "right" to fish.

Power to set up a discard prevention charging scheme for those landing fish in excess of quota

20. Clauses 28 to 32 provide a power for the Secretary of State, by regulations, to set up a charging scheme for those in the English industry landing fish in excess of the quota they are permitted to catch. Such schemes would not be mandatory: fishers or those representing them could choose whether to register under them. Those paying the discard prevention charge would not be prosecuted for exceeding their quota entitlement. The Department recognises that charging for the landing of fish potentially interferes with property rights. However, the Department considers that any such interference is minimal. Scheme members can choose whether or not to join the scheme and get a benefit in return: they are not prosecuted for the overlanding of fish. The Department also considers that any interference is justified for the reasons justifying licensing controls and limits on fishers' access to quota.

21. For the reasons given in paragraphs above the Department considers that the Bill is compatible with A1P1.

Article 6 (right to a fair trial) of the Convention

22. The Bill contains a number of provisions which could potentially engage Article 6. Clauses 14, 15, 16, 17, 18, 19 and Schedules 2 and 3 restate enforcement and penalty provisions in relation to licensing and extend UK fisheries controls to foreign fishing boats. Clause 28 concerns a power to create a voluntary charging scheme for those landing fish in excess of their permitted quota limits. Clause 44 and Part 2 of Schedule 9 broaden existing powers to make byelaws and orders for the purposes of marine conservation in the offshore region with associated offences. Clause 33 and Schedule 6 provide powers, by regulation, to introduce schemes of financial assistance to the sea fish and fish farming industries in England and in the areas of the Devolved Administrations. These provisions arguably engage Article 6 (right to a fair trial) as they re-state or create or provide for the creation of new criminal offences, allow for administrative civil determinations and the system under which those affected by them may bring about challenge.

23. The Department's view is that Article 6 rights are not interfered with by these provisions. Compliance with Article 6 will be secured when these powers are implemented. Civil appeals procedures will be designed to comply with Article 6 in that there will be recourse to an independent and impartial tribunal in the assessment

of civil rights and there will be the additional safeguard of judicial review. In relation to the imposition of offences, anyone accused of a criminal offence will have the right to a fair and impartial trial in the English criminal courts.

24. Accordingly, in the Department's view the Bill is compatible with Article 6.

Article 14 (Prohibition of Discrimination)

25. The Department has considered the provisions in light of Article 14, read together with Protocol 1, Article 1.

26. As outlined above, the Department considers that Clause 12, which introduces a new prohibition on foreign fishing boats fishing in UK waters without a licence, potentially falls "within the ambit" of Protocol 1, Article 1.

27. If Clause 12 falls within the ambit of A1/P1, the Department considers that Article 14 is engaged on the grounds that the proposed provision treats foreign fishers differently to domestic fishers. This arises because foreign fishers will not be subject to all the exceptions to the prohibition to fish as domestic fishers are, for example: some of the exceptions in Clause 14(2) relating to recreational fishing and fishing by unpowered vessels under 10 metres in length both of which are available to UK fishers.

28. If Article 14 is engaged, the Department considers that any differential treatment that is said to arise is objectively justified on the grounds that it is necessary for the UK to be able to exert full control over its waters in order to be able to protect both fish stocks and the marine environment more widely, and because the requirement to control foreign vessels through licensing arises as a necessary consequence of leaving the EU.

29. It follows that if Article 14 applies at all, the Department considers that the provision made is objectively justified and that no issue of incompatibility with the ECHR arises.

Remaining Bill provisions

30. The remaining provisions of the Bill not referred to above are considered not to engage Convention rights, or, if they do, to do so in a way in which it is clear there is no interference