Hilary Term

[2018] UKSC 10

On appeal from: [2016] EWCA Civ 564

JUDGMENT

R (on the application of Mott) (Respondent) v Environment Agency (Appellant)

before

Lady Hale, President

Lord Kerr

Lord Carnwath

Lady Black

Lord Briggs

JUDGMENT GIVEN ON

14 February 2018

Heard on 13 December 2017

Appellant	Respondent
James Maurici QC	Stephen Hockman QC
Gwion Lewis	Mark Beard
(Instructed by Environment Agency Legal Services)	(Instructed by Harrison Clark Rickerbys Inc Simon Jackson)

LORD CARNWATH: (with whom Lady Hale, Lord Kerr, Lady Black and Lord Briggs agree)

Background

1.
This appeal concerns the legality under the European Convention on Human Rights of licensing conditions imposed by the Environment Agency ("the Agency") restricting certain forms of salmon-fishing in the Severn Estuary.

Mr Mott's interest

2.

The respondent, Mr Mott, has a leasehold interest in a so-called “putcher rank” fishery at Lydney on the north bank of the Severn Estuary. A putcher rank is an old fishing technique, involving the use of conical baskets or “putchers” to trap adult salmon as they attempt to return from the open sea to their river of origin to spawn. Mr Mott has operated the putcher rank under successive leases since 1975. Since 1979, according to his evidence, it has been his full-time occupation. He claims that, before the limits introduced by the Agency in 2011, his average catch using the rank was some 600 salmon per year, at a value of about £100 each, giving him a gross annual income in the order of £60,000.

3.
The right to operate the rank is derived from a “Certificate of Privilege” dated 14 May 1866, issued by the Special Commissioners for English Fisheries, and owned by the Lydney Park Estate. The current 20-year lease was granted jointly to Mr Mott and a Mr David Merrett, and will expire on 31 March 2018. It gives them the right to fish two stop nets and 650 putchers, in return for payment of an annual rent in two parts: a “fish rent” equivalent to 65 pounds in weight of salmon, and a “monetary rent” of (since the last review date) £276. The tenants are required to operate the putcher rank during each fishing season unless circumstances make it impossible. Further they may not assign, let or part with the fishery during the term of the lease, save upon death or disability, when they may with the written consent of the landlord assign to another family member.

4.
To operate the putcher rank Mr Mott has required an annual licence from the Environment Agency (“the Agency”), under section 25 of the Salmon and Freshwater Fisheries Act 1975 (“the 1975 Act”). The salmon season runs from 1 June to 15 August. Licences are usually issued by the Agency in late April or early May, shortly before the season opens. Until recently a licence for use of “an historic installation” such as the putcher rank (unlike other methods of fishing) could not be made subject to conditions limiting the number of fish taken (“catch limitations”). However, with effect from 1 January 2011, the 1975 Act was amended to enable the Agency to impose such conditions where considered “necessary … for the protection of any fishery” (paragraph 14A of Schedule 2 to the 1975 Act, inserted by Marine and Coastal Access Act 2009 section 217(7)).

Measures to protect salmon stock

5.
It has been government policy, as implemented by the Agency and its predecessors, supported by government, that in the interests of effective management “mixed stock fisheries” should be gradually phased out, and exploitation limited, as far as possible, to places where the stock of salmon is from a single river. The Agency considers that all the fisheries in the Severn Estuary exploit a mixed salmon stock, with fish destined to return to the rivers Severn, Wye, Usk, Rhymney, Taff and Ely and other rivers.

6.
The rivers Wye and Usk are designated as Special Areas of Conservation (“SAC”) under the European “Habitats Directive” (Council Directive 92/44/EEC), transposed into domestic law by the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”). One of the main reasons for the designation of these rivers is the need to conserve their salmon stocks. The Severn Estuary itself is designated as a SAC, a Special Protection Area (under the Council Directive on the Conservation of Wild Birds (Council Directive 79/409/EEC)), and a Ramsar site. Together, these areas constitute the Severn Estuary European Marine Site, for which salmon is a qualifying feature.

7.

For some years the status of salmon stock in the Wye and Usk has been categorised by the responsible authorities as “unfavourable” or “at risk”, because of failure to achieve stock conservation targets or the objectives set under the Habitats Directive.

Dealings between the Agency and the Tenants

8.
In late 2003, the Agency attempted to purchase the Certificate of Privilege to operate the putcher rank. It agreed terms with the Estate, subject to contract, and (as the Estate required) subject to agreement with the tenants for termination of the lease. Negotiations between the Agency and the tenants took place in 2004. By an agreement in 2004, the Agency paid the tenants £30,000 compensation not to operate the putcher rank fishery during the 2004 fishing season. The agreement also provided a further payment of £10,000, if agreement were reached before 1 June 2005 for permanent cessation. In the event negotiations for permanent cessation were unsuccessful. It was agreed in principle that compensation should be paid, but the parties failed to agree the basis of valuation. During the 2005 to 2009 seasons the tenants continued to operate the fishery. In 2010 an agreement was again reached for payment of £30,000 compensation not to operate the fishery during that season.

9.
In February 2011, the Agency offered to purchase the then remaining term of the lease (seven years), but negotiations were unsuccessful. However, in response to the application for a licence for the 2011 season, the Agency agreed to pay the tenants £35,000 compensation not to operate the putcher rank fishery during that season. Another historic installation fishery was also paid not to seek a licence in the 2011 season. The only historic installation fishery that was licensed in 2011 operated under the terms of a catch condition, imposed under the new powers in paragraph 14A of Schedule 2 to the 1975 Act which had by then come into effect. The catch condition was determined following an “appropriate assessment” under the Habitats Regulations (“the 2011 HRA”).

The dispute

10.
The events leading to the present dispute began with a letter from the Agency dated 16 April 2012, informing Mr Mott of a report by the University of Exeter (“the Exeter Report”), which, it was said, provided clear evidence of the mixed stock nature of the catch in the Severn Estuary. He was informed of the intention to set a catch limit of 30 fish for that year, and of the power under the amended 1975 Act to impose a catch limit without compensation. The Exeter Report was followed in May 2012 by a Habitats Regulations Assessment (“the 2012 HRA”) to the effect that unconstrained catches of salmon in the estuary were threatening the integrity of the River Wye SAC, and that it was necessary to limit the use of the historic installation fisheries. As HHJ Cooke, sitting as a judge of the High Court noted (para 13), the contemporary documents showed that the “controlling factor” was consideration of the numbers of salmon returning to the Wye to spawn, the stock in that river being considered to be the most vulnerable; and the impact of the claimant’s fishery was considered therefore in terms of its potential effect on salmon destined to spawn in the Wye.

11.
Mr Mott did not accept the Exeter Report’s findings. Having failed to persuade its authors at a meeting in May 2012, he commissioned his own expert report from a Professor Fewster of University of Auckland, New Zealand. The disagreements between the experts were the subject of detailed study in the courts below but are not relevant to the remaining issue in this appeal.

12.
In the meantime, Mr Mott was served with a notice under the 1975 Act on 1 June 2012, the first day of the new fishing season, limiting his catch to 30 fish. This figure was fixed “by reference to the lowest catch by any of the historic installation fisheries that had sought a licence in the preceding ten-year period”, with some increase to mitigate the risk of “reduction in licence uptake and failure to maintain possible heritage”. A further reduction to 23 salmon was proposed for 2013, and 24 for the 2014 season.

13.
The judge referred to a sentence in the Habitats Regulations Assessment for 2013 which explained that under the new regime “the catch by the most productive estuary fisheries will be restricted to the approximate long-term de minimus (sic) catch.”: [2015] EWHC 314 (Admin); [2016] Env LR 27 (para 31). He commented on the effect on Mr Mott:

“33. The final sentence quoted above was explained as meaning that the number of fish allowed per licence was set as being approximately the ten year average catch of the least productive of all the fisheries licensed. The practical result for the claimant is that his fishery of 650 putchers is given the same catch allocation as the smallest and least effective of the other putcher fisheries, which may operate 50 baskets or less. These he says are not commercially viable but operated only as a hobby. Plainly, the heaviest impact of this policy falls on the claimant who relies on the fishery for his living rather than the smaller operators.”

The proceedings

14.
In the present judicial review proceedings Mr Mott challenged the decisions of the Agency to impose conditions on the licences for 2012, 2013 and 2014, limiting catches respectively to 30, 23, and 24 salmon per season. He alleged irrationality, and breach of his rights under the Convention. It was Mr Mott’s case that the catch limit conditions have made the putcher rank fishery wholly uneconomic and the lease worthless.

15.
The judge upheld both claims and concluded that the decisions to impose the catch conditions were irrational, as the Exeter Report did not provide a reasonable basis for the view that the putcher installations were having a material effect on the salmon fishery in the river Wye. He held further that the Agency could not under Article 1 of Protocol 1 of the ECHR (“A1P1”) properly have imposed the conditions, if otherwise lawful, without payment of compensation.

16.
In a judgment dated 17 June 2016, the Court of Appeal (Beatson LJ, with whom Lord Dyson MR and McFarlane LJ agreed) allowed the Agency’s appeal on the issue of irrationality, but dismissed the appeal under A1P1. It made a declaration that all three decisions amounted to an unlawful interference with his A1P1 rights “in the absence of compensation”: [2016] EWCA Civ 564; [2016] 1 WLR 4338. Only the latter issue arises on the appeal to this court.

A1P1 Principles

17.
Article 1 of the first Protocol (“A1P1”) to the Convention provides:

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

It is accepted that the right to fish granted to Mr Mott by lease is a “possession” for these purposes.

18.
The general principles governing the interpretation of A1P1 are well established in European and domestic authorities. In Back v Finland (2004) 40 EHRR 48 the Strasbourg court explained that it comprises “three distinct rules”: the first (in the first sentence of para 52) is “of a general nature and enunciates the principle of peaceful enjoyment of property”; the second (in the second sentence of the same paragraph) covers “deprivation of possessions and makes it subject to certain conditions”; the third (in the second paragraph) concerns the right of the state to “control the use of property in accordance with the general interest”. The court added:

“The three rules are not ‘distinct’ in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. Each of the two forms of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.”

The principles were summarised by Lord Reed in AXA General Insurance Ltd v HM Advocate [2011] UKSC 46; [2012] 1 AC 868, paras 107-108.

19.
The application of A1P1, in circumstances comparable in some respects to the present, was considered by the Court of Appeal in R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2005] 1 WLR 1267; [2004] EWCA Civ 1580. The claimant company owned a stretch of canal designated a Site of Special Scientific Interest (“SSSI”) under the Wildlife and Countryside Act 1981 (“the 1981 Act”). The company entered into a management agreement with English Nature, under which it agreed not to develop fishing and boating activities in return for annual compensation of £19,000. The agreement expired at the end of 2000. In January 2001, amendments to the 1981 Act (under the Countryside and Rights of Way Act 2000), imposed a new regulatory regime under which compensation was no longer payable. The company claimed that the amended legislation involved a breach of their rights under A1P1, and sought a declaration of incompatibility under the Human Rights Act 1998. The claim failed.

20.
Neuberger LJ, giving the judgment of the court, reviewed the authorities dealing with the distinction between the taking or deprivation of property and mere control of use. As he noted, the former normally requires payment of compensation to avoid a breach of the article; the latter does not, even if the control result in serious financial loss. He noted that the division drawn by the Strasbourg jurisprudence is not clear-cut. He referred in particular to the Grand Chamber decision in Sporrong & Lönnroth v Sweden (1982) 5 EHRR 85, for the propositions, first, that under the second rule the court may need to “investigate the realities” of the situation complained of to determine whether it amounts to “de facto expropriation” and thus deprivation (para 63); and that even where the interference does

not fall clearly within the ambit of either the second or third rule, it may be necessary to consider the application of the first more general rule, and for that purpose to determine -

"… whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights …" (para 69)

21.
On the facts of Trailer & Marina, the court held:

"We accept, of course, that the consequence of the amendments effected by the 2000 Act must have been to diminish, sometimes substantially, the scope of the uses to which an SSSI could be put, and accordingly to reduce, sometimes substantially, the income which could be obtained from activities on an SSSI, and consequently its market value. It can fairly be said that, in those circumstances, the public benefit enjoyed as a result of the amendments effected by the 2000 Act will, in the absence of any compensation provisions, have been at the expense of the owners and occupiers of SSSIs. However, given the purpose and genesis of the legislation, and the jurisprudence of the [ECtHR], that cannot of itself justify an argument that there has been an infringement of the Article 1 of the first Protocol rights of the owner of an SSSI whose value has been substantially diminished as a result of the amendments effected by the 2000 Act." (para 65)

As Neuberger LJ noted, the challenge was directed to the compatibility of the legislation with the Convention. It had not been argued that the restrictions in the particular case amounted to de facto expropriation, or a disproportionate burden on the owner of the land concerned (para 68).

22.
An authoritative summary of the principles is found in the Grand Chamber decision in Hutten-Czapska v Poland (2007) 45 EHRR 4, para 167:

"Not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest', but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that article the court must therefore ascertain whether by reason of the state's interference the person concerned had to bear a disproportionate and excessive burden …"

The judgments below

23.
In the present case, the judge distinguished the Trailer and Marina case, as a challenge to the legislation as a whole, rather than a particular executive decision made under it. Thus the question of infringement of A1P1 had had to be considered in principle, and not in relation to the specific circumstances of the claimant. The court had recognised that there were powers available to compensate an owner in an "extreme case". The decision did not therefore support a conclusion that any restriction on property on environmental grounds can be made without a requirement for compensation (para 93).

24.
His own conclusion that there was no reasonable basis for the restrictions inevitably meant that the restrictions were not proportionate, however categorised. However, he went on to consider the position apart from that finding:

“96. In my judgment this case, like that in Back v Finland, has elements both of deprivation and of control. The claimant’s right is largely but not entirely extinguished. It could be exploited and would presumably have some small value if sold for leisure interest rather than commercial use. It should be considered under the general statement of principle with which A1P1 commences. Given the extent of the restriction imposed, which eliminated at least 95% of the benefit of the right, it is to be considered as closer to deprivation than mere control, and that balance is relevant when considering the proportionality of the measure challenged.

97. In adopting the measure decided on, there is no evidence that the Agency considered the extent of the effect on the claimant and his livelihood in any meaningful way at all. Though the HRAs refer to the desirability of permitting the continuation of historic fishing methods to an extent described as ‘residual’ they did not address what the consequences would be for the rights holders affected at all, looking no further than their own statement of the conservation objective.

98. There is thus no evidence that any balanced consideration took place at all. It would have been relevant to that consideration that the claimant’s rights were of a commercial nature, so that by making them uneconomic to exercise he was being deprived of his livelihood and not merely of a pleasurable leisure activity or the opportunity to maintain an ancient tradition. So far as the claimant is concerned the position is exacerbated because the method chosen of levelling all permitted catches down to the previous lowest meant that by far the greatest impact fell on him whereas others who may only have used their rights for leisure or hobby purposes would be less affected, and possibly scarcely affected at all.

99. In my judgment, the effect is that even if the Agency could properly have imposed the total catch limit that it did, the size of that limit and the way in which it was apportioned would still have meant that the claimant has been required to shoulder an excessive and disproportionate burden, such that a breach of A1P1 could only be prevented by payment of compensation.”

25.
It is to be noted (in particular from para 96) that the judge did not feel able, or find it necessary, to categorise the action under A1P1 as either deprivation (second rule) or control (first rule). He considered it under the first general rule, as identified in Back v Finland, while regarding it as closer to deprivation for the purpose of the proportionality balance.

26.
In the Court of Appeal Beatson LJ agreed with this assessment. It is unnecessary to set out his reasoning, which in substance followed that of the judge (paras 87-89). It was sufficient in any event that the court found no error in the judge’s reasoning, without needing to conduct their own independent assessment of proportionality (see In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911).

The appeal

27.

The issues identified by the parties as arising in the appeal are in short (i) whether the conditions imposed by the Agency amounted to control or de facto expropriation under A1P1? (ii) if the former, did the “fair balance” require compensation to be paid? (iii) if the latter, were there any exceptional circumstances justifying absence of compensation?

28.
Mr Maurici QC for the Agency submitted that the restrictions clearly constituted a control, rather than expropriation, in spite of the adverse effects on Mr Mott. He referred for example to Mellacher v Austria (1990) 12 EHRR 391 concerning a new Austrian Rent Act which had the effect of greatly reducing the rents to which certain landlords were entitled under existing tenancy agreements. The court held that there had been no de facto expropriation of their property, since they retained the right to use it even if they had been deprived of a large part of their income. Indeed the only example in the decided cases of de facto expropriation was the exceptional case of Papamichalopoulos v Greece (1993) 16 EHRR 440, in which the applicants were owners of a large area of valuable land in Greece, of which the military dictatorship had assumed control and transferred to the Navy to build a naval base and holiday resort for officers. Although the land was not formally expropriated, the applicants had been deprived of the entirety of the use and value of the land in question.

29.
As to whether a fair balance had been drawn, Mr Maurici drew attention to the emphasis given by European and domestic law to the protection of the environment, and the important responsibilities imposed on the Agency in that regard. The responsibility was particularly strict in respect of sites designated under the Habitats Directive (citing Sweetman v An Bord Pleanála (Galway County Council intervening) (Case C-258/11) [2014] PTSR 1092, paras 40-41). He submitted further that it would be contrary to public policy, and inconsistent with the “polluter pays” principle, for public funds to be used to pay compensation to individuals such as Mr Mott, whose activities were found to have caused environmental damage.

30.
As an example of the emphasis given to the environment in the Strasbourg case law, he cited Hamer v Belgium (2008) (Application No 21861/03). The court under A1P1 upheld an order for the demolition of a house in a woodland area, which was unpermitted, but had existed as a holiday home for 37 years with the full knowledge of the authorities. The court held that the order was a control, rather than expropriation; and that it struck a fair balance, having regard to the wide margin of appreciation enjoyed by authorities in the field of environmental protection:

“... The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular where the state has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.” (para 79)

31.
For Mr Mott, Mr Hockman QC supported the reasoning of the courts below. He submitted that the effect of the conditions was to nullify the practical use of Mr Mott’s lease, and thus amounted to expropriation. But even if they were regarded as a control, the courts below were entitled to find that they required Mr Mott to shoulder an excessive and disproportionate burden, such that breach of

A1P1 could only be prevented by payment of compensation. It was accepted that the Agency had power to pay compensation, and it had done so in the past. The 1975 Act itself (even following the amendments made by the 2009 Act), recognised that compensation might be necessary in certain cases. Thus, section 26 dealing with limitation of licences for fishing with nets provides that where an order under the section would prevent a person from fishing "in circumstances where that person is wholly dependent on the fishing for his livelihood", the Agency "may pay that person such amount by way of compensation as it considers appropriate".

Discussion

32.
The Strasbourg cases show that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis. Viewed from the Agency's point of view, and that of the public, the restrictions imposed in the present case were (as found by the Court of Appeal) a proper exercise of the Agency's powers to control fishing activity in the interests of the protection of the environment. We were not referred to any case in which such action has been treated as amounting to expropriation merely because of the extreme effects on particular individuals or their businesses. However, it was still necessary to consider whether the effect on the particular claimant was excessive and disproportionate.

33.
Mr Maurici is right to emphasise the special importance to be attached to the protection of the environment. However, this does not detract from the need to draw a "fair balance", nor from the potential relevance of compensation in that context. As Mr Hockman pointed out, the potential need for compensation is recognised in other parts of the 1975 Act itself.

34.
Compensation played a part in a Strasbourg case close to the present on the facts. Posti v Finland (2003) 37 EHRR 6 concerned a claim by two fishermen who operated under leases granted by the Finnish state. They complained that restrictions imposed by the government to safeguard fish stocks had failed to strike a fair balance under A1P1. The court held that the fishing restrictions were a control, rather than deprivation of property, and that the interference was justified and proportionate; the interference "did not completely extinguish the applicants' right to fish salmon and saltwater trout in the relevant waters", and they had received compensation for losses suffered (para 77).

35.
By contrast in Pindstrup Mosebrug A/S v Denmark (2008) (Application No 34943/06), absence of compensation did not prevent the court ruling inadmissible a claim in respect of restrictions on the commercial exploitation of a peat bog, regarded as geologically and biologically unique. The court upheld the assessment of the domestic courts that the effect on the claimants was not unduly severe, having regard to the findings that they had not invested in production facilities for the purpose of exercising their extraction rights at the bog and that they had access to the extraction of considerable amounts of peat elsewhere.

36.
Against that background I am unable to fault the judge's analysis of the applicable legal principles in this case. As already noted, he did not find it necessary to categorise the measure as either expropriation or control. It was enough that it "eliminated at least 95% of the benefit of the right", thus making it "closer to deprivation than mere control". This was clearly relevant to the "fair balance". Yet the Agency had given no consideration to the particular impact on his livelihood. The

impact was exacerbated because the method chosen meant that by far the greatest impact fell on him, as compared to others whose use may have been only for leisure purposes. Indeed the judge might have gone further. He thought that the lease might have retained “some small value” if sold for leisure rather than commercial use. However, as Mr Hockman pointed out, even that is doubtful given the strict limits in the lease on the power to assign.

37.
I would therefore uphold the decision of the courts below. In doing so, I would emphasise that this was an exceptional case on the facts, because of the severity and the disproportion (as compared to others) of the impact on Mr Mott. As the Strasbourg cases show, the national authorities have a wide margin of discretion in the imposition of necessary environmental controls, and A1P1 gives no general expectation of compensation for adverse effects. Furthermore, where (unlike this case) the authorities have given proper consideration to the issues of fair balance, the courts should give weight to their assessment.

38.
I would dismiss the appeal.