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(subject to editorial corrections)

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DAMIEN CULLEN FOR AND ON BEHALF OF DUNGANNON AND DISTRICT COURSING CLUB FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] The numbers of the Irish Hare, lepus timidus hibernicus, are believed to be greatly reduced in Northern Ireland from those of a century ago. The main cause of that reduction in numbers is believed to relate to agricultural practices. This application for judicial review concerns two decisions in relation to the Irish Hare made by Ms Angela Smith MP, Parliamentary Under Secretary of State at the Northern Ireland Office with responsibility for the functions of the Department of the Environment.

The first decision was made on 13 October 2003 refusing the applicant a licence to take hares by means of nets for the purposes of hare coursing, further to an application under Section 7D(4) of the Game Preservation Act (Northern Ireland) 1928.

The second decision concerns the making on 17 December 2003 of the Game Preservation (Special Protection for Irish Hares) Order (Northern Ireland) 2003 in exercise of the powers contained in Section 7C(1) of the Game Preservation Act (Northern Ireland) 1928 Act.

[2] Hare coursing in Ireland is regulated by the Irish Coursing Club. Coursing takes place in semi enclosed fields with each hare being chased by two greyhounds. Since 1993 it has been compulsory that all dogs are muzzled so the hare will not be killed if it is caught by the hounds. The hares are taken from the wild by netting under licence and then trained before the meeting to

know the escape routes and then released back into the wild after the meeting.

The legislation

[3] The Game Preservation Act (Northern Ireland) 1928 as amended provides –

> By section 7(1), a close season for various game that renders it unlawful for any person wilfully to take, kill or destroy any hare between the 1st February in any year and the 11th August of that year.
>
> By Section 7(2) for exceptions to the close season for hares pursued and killed either by hunting with hounds or by coursing with greyhounds.
>
> By Section 7D for the authorisation of the taking of hares by means of nets for the purposes of coursing and –
>
>> "(4) An officer, member of agent of a coursing club desirous of taking hares alive by means of nets for the purposes of the club, and authorised in writing in that behalf, may apply in writing to the Department of the Environment and that Department, if satisfied that any hares so taken are intended to be used by that club for those purposes only *and that the taking of such hares would not endanger the hare population in Northern Ireland or any part thereof,* may in writing authorise such officer, member or agent so to take hares, at any time except during the close season, subject to such conditions as may be specified in the authority; and the taking of hares under and in accordance with the conditions of any such authority shall not be a contravention of Article 12(2)(b) of the Wildlife (Northern Ireland) Order 1985.' "

The words in italics were added by the Game Preservation (Amendment) Act (Northern Ireland) 2002 made by the Northern Ireland Assembly on 13 February 2002.

[4] The Wildlife (Northern Ireland) Order 1985 includes provisions for the protection of wild animals –

> By Section 10(1) and (2) it is an offence if any person intentionally kills, injuries or takes any wild animal included on the list in Schedule 5 or has such live or dead animal in his possession or control.
>
> By Section 11 there are exceptions to the above protection if the act is required by the Department under a statutory scheme or the animal is injured or the act is incidental to lawful operations or an authorised person has carried out the act.
>
> By Schedule 5 a list of animals which are protected at all times does <u>not</u> include the Irish Hare.
>
> By section 12 there is prohibition of certain means of killing or taking wild animals which by Section 12(2)(b) includes a prohibition on the killing or taking of any wild animal included in Schedule 6 by the use of any net.
>
> By Schedule 6 a list of animals which may not be killed or taken by certain methods includes the Irish Hare and the Brown Hare.

So the netting of hares is prohibited under the 1985 Order, but may be authorised for coursing purposes under the amendment to the 1928 Act. There is a small population of the introduced Brown Hare in Northern Ireland.

[5] In relation to the issue of special protection of hares Section 7C (1) of the 1928 act provides –

> "Where the Minister is satisfied that it is necessary or expedient to provide special protection for any kind of game, he may be order prohibit the killing or taking, or the sale, or purchase, of game of any kind proscribed by the Order, during such period not exceeding one year as shall be so proscribed."

As to the making of such Orders by the Minister, Article 7F (5) provides that -

> "The Minister, where he proposes to make an order under this Act, shall cause to be published in the

> Belfast Gazette and in such other manner as he may think desirable, notice of the proposal and of the purport of the proposed Order. Such notice shall specify a time within which objections to the proposal may be lodged with the Minister; and where any such objections are duly lodged the Minister shall take them into consideration."

[6] The Game Preservation (Special Protection for Irish Hares) Order (Northern Ireland) 2003 was made in exercise of the above powers and came into operation on 19 January 2004. Article 2 provides that -

> "A person shall not kill, take, sell or purchase Irish Hares at any time during the period of twelve months beginning on 19 January 2004."

Reports on the Irish Hare.

[7] A number of reports have been published recently concerning the Irish Hare. In September 1997 Dr Dingerkus submitted her doctoral thesis on "The Distribution and Ecology of the Irish Hare, *lepus timidus hibernicus*, in Northern Ireland." This thesis was completed under Doctor, now Professor Ian Montgomery of Queen's University, Belfast. Dr Dingerkus's report stated that there was consistent evidence suggesting that the Irish Hare population had declined substantially with numbers barely in excess of 8250 individuals. The intensification of agriculture was suggested as a major factor in the decline of hare numbers. It was concluded that without the implementation of conservation proposals the species may suffer the same fate as the Corncrake, where numbers had declined and where only County Fermanagh was described as a stronghold. Proposals for conservation of the Irish Hare in Northern Ireland were presented. The management and conservation proposals included an appropriate conservation action plan to be undertaken by the Department of the Environment where the first step would be to remove the Irish Hare from the quarry list so that it was protected under wildlife legislation. The key management points were listed as the provision of species rich grassland to provide food, the provision of refuge sites, arrangements for freedom from disturbance and control of predators and hunting.

[8] In October 2002 the Environment and Heritage Service of the Department of the Environment published "Northern Ireland Species Action Plans" for the Irish Hare the Chough and the Curlew. The plan quoted the Dingerkus hare population figure of 8250 and stated that the population was thought to have undergone a substantial decline in the last 10-20 years and that population levels may have fallen to critical levels in some areas. The

factors causing loss or decline of the Irish Hare included agricultural intensification, increased predation and "illegal coursing, lamping and over-hunting". "Illegal coursing" does not include coursing that is authorised by a coursing club in accordance with the rules of the Irish Coursing Club. The action plan objectives and targets were stated to be to maintain the existing range and demonstrate a population increase by 2005, to double the present population by 2010 over as much of the range as possible and to maintain and increase the area and quality of suitable hare habitat. Proposed action on policy and legislation included a review and if necessary an increase in the level of protection given to the Irish Hare in the Wildlife Order.

[9] In February 2003 Queen's University of Belfast presented to the Environment and Heritage Service "The Northern Ireland Irish Hare, *lepus timidus hibernicus,* Survey 2002." Professor Montgomery was one of the authors. The survey produced a population estimate ranging from 7,000 to 25,200 hares in Northern Ireland. Practical recommendations included improvements in agricultural practice and the removal of the Irish Hare from the quarry list and protection under the Wildlife Order.

[10] Also presented by Queen's University, Belfast to the Environment and Heritage Service in February 2003 was "Survival and Dispersal of Coursed Irish Hares in Northern Ireland." In September 2002 the coursing clubs at Dungannon and Ballymena were granted licences to capture hares for the purposes of a study of the hares on release, with each being fitted with a radio tag mammal-collar. The movements of nine captured hares were monitored for eleven weeks. One hare lost the collar after one day. Two hares died during the study, in one case the only remains were the fur and in both cases the cause was unknown. The survey concluded that there was no evidence that coursing, at the level then current, affected the population size or the distribution of the Irish Hare in Northern Ireland.

Refusal of a licence to net hares.

[11] The applicant intended to hold a coursing event on 25 October 2003 and by letter dated 12 August 2003 applied for a licence to net up to 80 live hares from September 1 to December 31, 2003. By letter dated 13 October 2003 the applicant was informed that "….the Department has decided not to issue a permit because it would be inconsistent with the Department's proposal to make a Special Protection Order for hares under the terms of the Game Preservation Act 1928."

[12] By a press release issued by the Department dated 14 October 2003 the reasons for refusing the permit to the applicant were stated to be that the Irish Hare was in danger; the DOE Species Action Plan had among its objectives the doubling of the Irish Hare population by 2010; while dogs are muzzled

during coursing there was evidence that deaths among the coursed hares could arise from causes other than being bitten; anything that put the lives and welfare of the Irish Hare at risk was inconsistent with the policy objectives of the Species Action Plan.

[13] In the course of correspondence with the applicant's solicitors as to the reasons for the refusal of the licence to the applicant, the Minister, by letter dated 10 November 2003, stated that while the legislation requires the Department to be satisfied that the netting of hares would not endanger the hare population in Northern Ireland or any part thereof it did not preclude consideration of other factors in deciding whether or not to issue a licence; the 2002 survey had indicated that the hare population in Northern Ireland remained at a low density; the Department had published the Irish Hare Species Action Plan and one of the aims of the plan was to double the number of Irish Hares over as wide an area as possible by 2010; it was considered necessary to consider all activities with the potential to impact on the Irish Hare; hares had on occasion been killed during a coursing event or during the build up to it; the precautionary principle had been invoked and anything that put the lives of Irish Hares at risk was considered to be inconsistent with the policy objectives of the Species Action Plan; it was for these wider reasons that the decision had been taken to refuse the licence. This approach based on "wider reasons" was to be challenged by the applicant as being illegitimate.

The introduction of the Special Protection Order for the Irish Hare.

[14] The press release of 14 October 2003 also dealt with the proposed Special Protection Order. It set out that the Department had commissioned a review of the Wildlife (Northern Ireland) Order 1985 which would include consideration of the Irish Hare being included in Schedule 5 of the 1985 Order to be protected from being killed or taken at all times; the review was expected to take twelve months and in the meantime there would be published for public consultation a proposal for a Special Protection Order to prohibit the killing or taking of hares; that step was being taken, reflecting the precautionary principle, to provide the maximum possible protection for the Irish Hare pending the outcome of the review.

[15] Notice of the proposal to make the Order was published in the Belfast Gazette on 31 October 2003 and advertisements were placed in the local press. The consultation period was four weeks for objections. Many objections were received. The Minister made the decision on 16 December 2003 to introduce the Special Protection Order and the Order was made on 17 December 2003 and came into operation on 19 January 2004.

The grounds for Judicial Review

[16] The applicant's grounds for judicial review in relation to the refusal of the licence application are as follows –

(i) actual or apparent bias on the part of the Minister;

(ii) breach of the applicant's substantive legitimate expectation that the application would be granted;

(iii) breach of the applicant's procedural legitimate expectation and right to procedural fairness that prior to the refusal of the application the applicant would be accorded the right to know and to respond, namely to be informed of adverse considerations to the application and to be permitted to make representations;

(iv) the Minister misdirected herself as to the application of section 7D(4) of the Game Preservation Act (Northern Ireland) 1928 as amended;

(v) the decision was Wednesbury unreasonable, failed to take all relevant considerations into account, took into account irrelevant considerations and had no sufficient factual or evidential basis.

The grounds of judicial review in relation to the decision to make a Species Preservation Order are as follows –

(i) actual or apparent bias on the part of the Minister;

(ii) procedural unfairness in the making of the Order;

(iii) Wednesbury unreasonableness, failure to take into account all relevant considerations, taking into account irrelevant considerations and acting on no sufficient factual or evidential basis;

(iv) the Order was disproportionate.

Alleged bias on the part of the Minister.

[17] The applicant claims actual or apparent bias on the part of the Minister because of her public opposition to hunting and coursing. The applicant describes the Minister as having a well documented record of being anti-hunting and more specifically anti-coursing. She was formerly a paid

employee of the League Against Cruel Sports which is said to have had a clear anti-coursing stance. In a debate on the subject of hare coursing in Northern Ireland in the House of Commons on 26 November 2002 the Minister stated "In racing terms, I have some form on this issue."

[18] Bias can be actual or apparent. Lord Phillips in In Re Medicaments [2001] 1 WLR 700 at para. 38 described actual bias as having been applied to the situation where the decision maker was either (1) influenced by partiality or prejudice in reaching the decision or (2) actually prejudiced in favour of or against a party. The test for apparent bias has been re-stated by the House of Lords in Porter v Magill [2002] 1 All ER 465. The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased - Lord Hope at paragraphs [102] and [103].

[19] The applicant listed what were described as a number of uncontroversial and undisputed facts which tended to support the case of bias, namely the Minister's strongly held personal views against hunting and in particular coursing; the strong views being a matter of record and publically known; the Minister had been a member and employee of the League Against Cruel Sports, described as an anti-hunting organisation with a clear anti-coursing stance and she had held various positions in that group which had in recent years been criticised by the Advertising Standards Agency for mis-representing the effect of coursing on hare populations; the Minister had not verified on oath that her personal views did not form a part of her decision making; her decision to refuse the application was contrary to the advice of her officials; this was the first time in many years that such an application had been refused; this was the first time a Minister had introduced a special protection order in relation to hares; the special protection order had been introduced when devolved government was suspended and the Northern Ireland Assembly had discussed protection for the Irish Hare and had declined to adopt significantly increased protection; the Minister proposed to discuss with her ministerial counterpart in the Republic of Ireland measures to stop Irish Hares being imported into Northern Ireland; the Minister had indicated an intention to renew the special protection order despite the latest increase in the Irish Hare population. In addition the applicant listed a number of disputed matters which were said to support the case of bias, namely the disregard, distortion or misunderstanding of the views of Professor Montgomery who did not support the licence decision or the Special Protection Order; acting without any convincing evidence that coursing had an effect on the Irish Hare population; failing to consult with the Irish Hare Group; using the precautionary principle as a fig-leaf; ignoring an overwhelming number of objections to the Special Protection Order; ignoring the substantial opposition from the four main political parties in Northern Ireland; focusing on the 2010

objective in the Irish Hare Species Action Plan and ignoring the 2005 target; focusing on the lower estimates of the Irish Hare population; relying on the research of Professor Broom of Cambridge University Animal Welfare Council when that research was of extremely limited relevance to the Irish Hare and Irish Hare coursing; relying on a selective and unrefereed publication from Mike Rendle.

[20] The respondent relied on Franklin v Minister of Town and Country Planning [1947] 2 All ER 289. The Minister of Town and Country Planning held a public local enquiry into objections to Stevenage Newtown. In his speech to a public meeting prior to the relevant statute being passed the Minister stated that the Bill would become law and that Stevenage was a most suitable site and should be the first scheme under the Act and that the Stevenage project would go forward. At the enquiry no evidence in support of the proposal was adduced. The objections were considered and rejected by the Minister. Local residents and land owners challenged the making of the order on the basis that the Minister was biased in any consideration of the objections. The House of Lords held that no judicial or quasi-judicial duty was imposed on the Minister in the discharge of his statutory duties, those duties being purely administrative. The appellants had not established that the Minister had pre-judged any genuine consideration of the objections or that he had not genuinely considered the objections when they were submitted to him. In relation to the issue of bias on the part of the Minister, the question was whether the Minister had genuinely considered the report and the objections. Having considered the Minister's speech Lord Thankerton stated that the passages from a speech, which was of a political nature, demonstrated (1) the speaker's view that the Bill would become law, that Stevenage was a most suitable site and should be the first scheme in the operation, and if the Stevenage project would go forward, and (2) the speaker's reaction to the hostile interruptions of a section of the audience; the passages were not inconsistent with an intention to carry out any statutory duty imposed by Parliament, although the Minister intended to press for the enactment of the Bill, and thereafter to carry out the duties involved, including the consideration of objections which were neither fractious nor unreasonable; it had not established that either in the speech he had forejudged any genuine consideration of the objections or that he had not genuinely considered the objections at the later stage when they were submitted to him. The House of Lords adopted a distinction between judicial or quasi-judicial duties and administrative duties and that approach would not prevail today. Further the House of Lords was not applying the modern approach to the issue of apparent bias.

[21] The respondent further relied on R v Amber Valley District Council ex parte Jackson [1984] 3 All ER 401. The applicant was an objector to the proposed development of an amusement park on land owned by the county council. Planning applications were determined by the district council. Both

the county council and the district council were controlled by the same political party and that party's county group resolved that it would be the policy to support the amusement park development. The applicant applied for an Order of Prohibition preventing the district council from deciding the application for development on the ground that any such decision had been pre-empted by the decision of the party's county group to support the development. Woolf J held that the fact that as a matter of policy the majority of a local planning authority was politically pre-disposed in favour of proposed development did not disqualify them or the council for adjudicating on the planning application for the development. In applying the test of whether right minded persons would think there was a real likelihood of bias it was noted that it was not alleged that the district council had entered into any contract which precluded them from exercising an independent judgment; it was not alleged that any individual counsellor had some personal financial interest; the evidence showed that the majority of the district council were politically pre-disposed in favour of the development in respect of which planning permission was sought; but that did not have the effect of disqualifying the majority from considering the planning application; there was no evidence that the majority would not (despite the policy) consider the objections to the planning application on their merits; the members of the district council were under a duty to do so; the affidavit from the leader of the majority group on the district council stated that all material considerations would be taken into account; the decision would be taken in the light of the report prepared by the council's officers; while the applicant's anxiety was understandable it would not be proper for the court to intervene.

[22] The authorities were reviewed in relation to the decision of a local planning authority in R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Limited [1996] 3 All ER 304. Sedley J identified that alongside the principle of disqualification from participation in a decision where there is an objective basis for the influence of personal or pecuniary interests in the outcome, lies the principle that a decision will be struck down if its outcome has been predetermined, whether by the adoption of an inflexible policy or by the effective surrender of the decision makers independent judgment.

[23] The two stage test for apparent bias as defined in Porter and Magill above involves, first of all, identifying the circumstances that are said to give rise to bias, and secondly, asking whether a fair-minded and informed observer having considered the given facts would conclude that there was a real possibility that the decision maker was biased. The approach of the fair-minded and informed observer will depend on the context. In the political arena it will be recognised that political figures adopt positions on political issues that may be party political positions or may be personal political positions. Such a political figure, if he or she obtained ministerial office, may be called upon to make decisions in areas where they have adopted a public

political position, whether as a party position or a personal position. Indeed political figures will have been elected for the purpose of advancing a political position. In those circumstances the political figure may well be predisposed to a particular position that bears on the matter for decision. The fair minded and informed observer will be aware that the political decision maker will have been elected because of a public position on many issues and may well be predisposed to a particular outcome..

[24] On the other hand ministerial decision makers must make the decision in accordance with the legislative or other provisions governing the particular decision. While it is legitimate for the Minister to be predisposed to a particular outcome it would be illegitimate for the Minister to have predetermined that outcome. Wade and Forsythe on Administrative Law (9th ed.) at page 472 state that attempts to represent government policy as objectionable on grounds of natural justice "are usually complaints of predetermination, alleging that the effective decision was taken in advance, thus rendering the hearing futile and the result a foregone conclusion."

[25] It is a different matter if the political figure has a personal or financial interest in the decision. The applicant contended that the Minister was biased by reason of personal interest rather than political interest. It was said that the Minister's views on the subject of hunting and coursing were not Government or Department policy and were personal to the Minister and indicated partisanship on her part. Personal interest arises where the decision maker has previous involvement with the parties or the case and not merely where there has been some expression of partisanship. In the present case the public views of the Minister were of a political character, even if the views were not a reflection of Government or Department policy. The attempt to represent the Minister's public position as objectionable on public law grounds is not only a matter of apparent bias but also an issue of predetermination. The ministerial decision maker may be politically predisposed to a particular position but must remain open to make the relevant decision within the scope of the powers being exercised and with a preparedness to consider all material considerations. In the present case it is necessary to examine whether the tests for apparent bias have been satisfied and whether there has been predetermination of issues or forfeiture of judgment.

<u>The making of the decisions.</u>

[26] Against that background it is necessary to consider the circumstances in which the decisions were made both in relation to the refusal of the licence and the making of the Special Protection Order. Further to the application for a licence the Minister received a submission from the Environment and Heritage Service dated 18 September 2003. The submission included reference to the Minister's speech in the House of Commons on 26 November

2002 where she had mentioned two specific matters that she wished to consider before agreeing to the issue of future permits to net hares. The first specific matter had been that she would have to be satisfied that the netting of hares did not have an adverse effect on the hare population. The submission pointed out that Professor Montgomery's radio tracking survey showed that the current level of netting did not affect the population size or distribution of the Irish Hare. The second specific matter had been that the issue of permits to net hares for coursing sat uneasily alongside policies aimed at conservation of the species. The submission pointed out that Professor Montgomery's 2002 survey indicated that there had been no further decline in the population of the Irish Hare and the radio tracking survey suggested no adverse effect on the Irish Hare population. On that basis the submission stated that there was no compelling scientific evidence on which to argue for a refusal to grant a permit for 2003. Accordingly the submission recommended the grant of the application subject to conditions.

[27] The Minister was dissatisfied with the advice received from the Environment and Heritage Service. Further advice was sought and a further submission was presented to the Minister on 13 October 2003 by Stephen Peover, the Permanent Secretary of the Department. The submission commenced by noting that any decision on the application would be controversial and that the crucial consideration was that any decision could be presented and defended, if necessary in judicial review proceedings, as being reasonable in all the circumstances. The submission noted that while section 7D(4) of the Game Preservation Act (Northern Ireland) 1928 set down two tests to be satisfied (use of the hares by the club for coursing only and the absence of danger to the hare population), the power was nevertheless discretionary so that even if the two tests were satisfied the Department might refuse the permit if there were reasonable and defensible grounds on which to do so. The submission indicated two such grounds. First that although the hares are at only limited risk of death or injury from the muzzled dogs, deaths and injuries do on occasions occur from other causes. Second that there is an inherent policy conflict between the activity, the Irish Hares endangered species status and the objectives of the Species Action Plan. On those two grounds the submission suggested that it would be reasonable and defensible to refuse a permit on that occasion and on future occasions pending the outcome of the review of the Wildlife Order. Mr Poever had regard to obligations in relation to the use of public funds and proposed the refusal of the permit based on Professor Montgomery's broader recommendation on the need to protect the Irish Hare through the Wildlife Order, the application of the precautionary principle to a species whose numbers were small and the underlying policy objective of doubling the population.

[28] The Minister had regard to the reports on the Irish Hare referred to above and also took into account the research of Professor Broom of

Cambridge University Animal Welfare Centre on "capture myopathy" who was reported as suggesting that individual wild animals subject to hunting, or excessive handling, can exhibit demonstrable negative reactions to the activity. The Minister took into account the evidence that hare coursing in itself did not affect in a significant way hare numbers. However this was said to have been outweighed by the wider reasons. The Minister decided to refuse the permit.

[29] Next, the processing of the Special Protection Order. After publication of the proposal to introduce the Special Protection Order numerous objections were received. They included a written response from the Countryside Alliance Ireland dated 26 November 2003 and the Irish Coursing Club dated 27 November 2003. An analysis of the responses was presented to the Minister and on 15 December 2003 the Minister met with representatives of the Countryside Alliance as well as representatives of the four main political parties in Northern Ireland. The Minister decided to make the Special Protection Order and on 16 December 2003 she made a note of the reasons that she was satisfied that it was necessary and expedient to provide special protection for the Irish Hare. First, she defended the consultation procedure and pointed out that the opportunity for full public consultation would arise should the Wildlife Order review propose that the Irish Hare be added to the protected species list. Second, that hare coursing puts the lives of Irish Hares at risk and that allowing activities to continue that pose a threat to the Irish Hare, before the conclusions of the Wildlife Order review are available, would be inconsistent with the objective of doubling the number of Irish Hares by 2010. Third, the Minister stated that her personal views were not a material consideration and the issue was the protection of the Irish Hare population. Fourth, (in response to earlier claims of coursing club management), that no evidence had been produced that hunting and coursing clubs had adopted management practices to the benefit of the Irish Hare population.

[30] Before considering further the grounds on which the Minister acted, there are three aspects to the Minister's approach to the decision making which the applicant contends were invalid. The first involves what may be described as the wide interpretation of section 7D(4) of the 1928 Act and the second concerns the inclusion of "welfare" considerations and the third concerns the adoption of "the precautionary principle".

<u>The scope of the power to refuse a permit to net hares under section 7D (4).</u>

[31] Section 7D(4) of the 1928 Act sets out two pre-conditions for the exercise of the power to authorise the netting of hares for coursing. First, the Department must be satisfied that any hares taken by means of nets are intended to be used by the club for the purposes of the club only and secondly, that the taking of such hares would not endanger the hare

population in Northern Ireland or any part thereof. If the two conditions are satisfied the Department "may" authorise the club to take hares. The applicant contends that in the context of section 7D(4) it was mandatory for the Department to issue the authority if the two conditions were satisfied.

[32] In general the word "may" is permissive and the word "shall" is obligatory and on that general basis the formulation of Section 7D(4) accords to the Department a discretion to authorise the netting of hares and not an obligation. However the context may as a matter of statutory interpretation establish that the power , although expressed in permissive language, is accompanied by a duty to exercise it in a particular way in certain circumstances – Wade and Forsythe on Administrative Law (9th Ed.) 233 -235. However there is nothing in the context of the legislation that alters the general approach that, by the use of the word "may", section 7D(4) accords to the Department a discretion to authorise the netting of hares and does not impose an obligation on the Department to so authorise.

<u>The taking into account of "welfare" considerations.</u>

[33] The issue then concerns the identity of the factors which are relevant to the exercise of that discretion. The applicant contends that such factors must be limited to "conservation" of the Irish Hare whereas the respondent contends that the factors include consideration of the "welfare" of the Irish Hare. The factors that may be in issue in the exercise of a statutory discretion will arise expressly or by implication from the terms of the statute and may be classed as obligatory, where they must be taken into account, or discretionary, where they may take them into account, or irrelevant, where they must not be taken into account. Section 7D(4) contains two express obligatory factors, namely the use of the netted hares for coursing and the absence of danger to the hare population. With regard to discretionary factors the 1928 Act and the 1985 Order are concerned with more than the killing of animals or endangering a species; they are concerned with killing or injuring or taking wild animals. Further, it is apparent that with the introduction of the second pre-condition by amendment in 2002, the present framework of section 7D(4) contemplates that the Department may properly refuse a permit to take hares even when the Department is satisfied that the taking of such hares would not endanger the hare population in Northern Ireland or any part thereof. While there exists other legislation dealing with animal welfare that does not preclude the engagement of welfare considerations under the present legislation if it is otherwise warranted by the scope of that legislation. A decision makers adoption of discretionary factors and the weight attached to those discretionary factors may be challenged on the grounds of irrationality. In the context of the present legislative scheme the discretionary adoption of welfare considerations as factors that the decision maker may take into account can not be considered irrational.

The precautionary principle.

[34] The respondent has applied the precautionary principle by which a pessimistic approach has been taken to the state of the Irish Hare. The 1997 survey assessed Irish Hare numbers at 8,450 and the later survey identified a minimum figure of 7,000. The 2002 survey indicated a significant increase in Irish Hare numbers so as to indicate that the 2005 target of the Species Action Plan had been achieved. The applicant contends that the precautionary principle is an irrelevant consideration. The statute accords to the Minister the power to determine the approach to decision making within the context of the statutory power. The Minister was entitled to be cautious or robust in her approach. The approach she adopted could not be said to be irrational. In the circumstances the precautionary principle was an entirely appropriate approach to the two decisions made by the Minister.

The Ministers grounds for refusal of the permit.

[35] Having found in favour of the Minister on the interpretation of section 7D(4) of the 1928 Act and on the entitlement to take into account welfare considerations and on the application of the precautionary principle it becomes necessary to consider the "wider reasons" on which the decision was based. The wider reasons appear from the second submission to the Minister and the press release and the correspondence about reasons. These wider reasons concerned the deaths and injuries to Irish Hares that were said to occur on occasions from causes other than attack by the dogs; the maintenance of the hare population by 2005 and the doubling of the population by 2010; the review of the Wildlife Order considering increased protection for the Irish Hare; the precautionary approach; the welfare considerations and overall the inherent policy conflict between coursing on the one hand and the endangered species status and the objectives of the Species Action Plan.

[36] It should be stated that the extensive debate between the parties did not always engage with the arguments of the other side. The applicant's focus was on "conservation" in terms of maintaining and increasing the numbers in the hare population and advancing the position that hare coursing had no impact on such conservation. The replying affidavit on behalf of the Minister accepted that the evidence available at the time of her decision indicated that hare coursing did not have an impact of any significance on the hare population. Accordingly the Minister's approach was based on the wider reasons, being reasons that the applicant considered to be invalid in principle. The Minister also relied on conservation as a basis for her approach and Mr Hanna QC on her behalf expressed a more flexible definition of conservation than the applicant and contended that it merged into the concept of welfare. In Mr Poever's affidavit the Minister's approach is discussed in terms of

conservation and regeneration but it is apparent from the second submission and the press release and the correspondence and Mr Hanna's submissions that this reference was intended to embrace what had earlier been described as the wider reasons for the decision. Hence the parties were disputing not only the validity of the factors to be taken into account but also the definition of those factors as well as the evidence in support of the factors.

[37] The evidence of death and injury during coursing activities involved a report of two hares that were lost at the last meeting of Dungannon and District Coursing Club. One hare was killed by a cat in the paddock and the other hare died as a result of a collision with a post in the escape area. It was agreed that these casualties were not significant in relation to the hare population.

[38] The numbers of the hare population were uncertain and while the working figure had been 8250 the survey figure had been 7,000 to 25,200. The population level was a recognised cause for concern.

[39] There had been recommendations to remove the Irish Hare from the "quarry list" and add it to the protected species under schedule 5 of the 1985 Order. There is no list of quarry animals as such and the expression "quarry list" is taken to be a reference to those wild animals that are not on the protected list under schedule 5. Professor Montgomery had stated his support for protected status for the Irish Hare. However as became clear Professor Montgomery drew a distinction between hunting and coursing so while the former was considered harmful to the species the latter was not. Protection of the Irish Hare under schedule 5 would provide general protection, subject to the exceptions noted above, and the result would be to prevent the taking of hares for coursing. Professor Montgomery appears to contemplate schedule 5 protection, with an exception for the taking of hares for the purpose of coursing. That position was not apparent to the respondent when the decisions in question were made. Whether others who supported added protection considered it should be so qualified was not established.

[40] There was a basis for the precautionary principle given the concerns that had been expressed in the reports that were available about the Irish Hare.

[41] Welfare was stated to be a reason for the decision to refuse the permit in the press release of 14 October 2003. Mr Peover's affidavit states that the Minister took into account the research of Professor DM Broom from Cambridge University Animal Welfare Centre in the area of "capture myopathy". It was indicated that the research suggested that individual wild animals that are subject to hunting or excessive handling can exhibit demonstrable negative reactions to the activity. Professor Broom prepared a

review of the scientific literature under the title "The Welfare of Deer, Foxes, Mink and Hares Subjected to Hunting by Humans; A Review". The summary of his report states that in most cases there are little scientific data upon which to base conclusions about the extent of any poor welfare caused by hunting but "….absence of evidence about the extent of poor welfare should not be mistaken for evidence of absence of poor welfare." However it was stated that there was considerable information relating to the basic biology of the animals including the mechanisms which affect welfare "….and it seems likely that the welfare of these animals would also be poor when they are the subject of a chase." The welfare of an animal was defined as its state as regards to its attempts to cope with its environment and if the individual was having difficulty in coping with its environment or was failing to cope then its welfare was poor. In the conclusions on hunting of hares the report was concerned with the Brown Hare in England and it was stated - "It is likely that hare coursing or other hunting with dogs will cause very poor welfare in hares." Professor Montgomery pointed out the limited relevance of the research as the report was a collation of existing research and was not dealing with the Irish Hare or with Irish coursing and was not concerned with conservation. It was his view that stress becomes a problem only where it is prolonged, and in relation to coursing, while there were no data it was believed that extreme stress response would be very limited in duration.

[42] The broad approach was based on the policy conflict between coursing and protected status and the species plan. Mr Peover's affidavit at paragraph 7 states the Minister's conclusion that in the circumstances the need for conservation of Irish Hares and the regeneration of the population which formed the thrust of existing policy in the area prevailed over the evidence suggesting that hare coursing itself did not affect in a significant way hare numbers. Professor Montgomery's position was that coursing as practised under licence does not have any discernable effect on overall numbers of hares in Northern Ireland and that the active interest in hares and their management evident in the coursing clubs can only aid the process of population recovery. Accordingly it was his view that there was no evidence that coursing was inconsistent with conservation action for Irish Hares or the aims of the Irish Hare Species Action Plan. Mr Peover responded that there was no evidence that coursing clubs practised positive hare management for Irish Hares and pointed out that Professor Broom's studies suggested that animals placed under extreme stress had reduced breeding success. Views were exchanged on these issues and it is apparent that different positions have been adopted by the respective parties. As pointed out above the parties are not always disputing the issues within the same terms of reference.

Rationality.

[43] Having set out the basis for the wider reasons relied on by the Minister it is necessary to consider whether the applicant has established any Judicial Review grounds for setting aside the Minister's reliance on those reasons. It is not for the Court to adjudicate on the merits of the arguments but to determine whether there is a rational basis for the decision taken by the Minister within the scope of the statutory power and taking account of relevant factors and leaving out of account irrelevant factors. I have found that the Minister was entitled to take the broad approach and to take into account the various factors discussed above and I am further satisfied that there was a rational basis for her reliance on those factors. While others disagree with the material on which the Minister placed reliance and with her conclusion, there was an evidential basis on which the Minister was entitled to rely on that material and to reach that conclusion.

Bias or predetermination.

[44] However the applicant contends that there was actual and apparent bias and that the outcome was predetermined or that judgment was forfeited by reason of the many matters set out above. This was said to be exemplified when the Minister rejected the first submission and obtained a submission that provided her with an avenue to the conclusion that the application for a permit be rejected. However the Minister was entitled to examine whether there were reasons for refusing the permit. Reasons were advanced that I have accepted as being relevant to the statutory decision and the Minister was entitled to act on the basis of the information then available. No doubt it was a conclusion she welcomed but that does not invalidate the decision. Whether the issue is approached on the basis of apparent bias, by reference to the well informed and fair minded observer in the context of political decision making, or on the basis of predetermination and forfeiture of judgment, it has not been established that the decision should be set aside.

Legitimate Expectation.

[45] As a result of a promise or practice by a decision maker a party may have a legitimate expectation of, for example, certain matters being taken into account or an opportunity to make representations or a particular result. The applicant claims entitlement to a particular result, namely that by reason of the previous grant of permits for the netting of hares there was a substantive legitimate expectation that a permit would be granted by the Minister. The applicant's legitimate expectation was that the Minister would decide the application in accordance with the statutory powers and in accordance with the policy in place to deal with such applications. A decision maker is entitled to change policy and an applicant will have no legitimate expectation based on previous grants under a previous policy. The Ministers approach in the

present case may be considered to represent a change of policy. In the absence of a promise, and with an entitlement to change the approach, a challenge that seeks to establish an entitlement to a permit must be directed at the validity of the operation of the current policy and not at a claimed expectation arising from the grant of a permit under the operation of past policy. There is no basis for a legitimate expectation that the permit would be granted.

[46] The applicant claims procedural unfairness arising from the failure of the Minister to give to the applicant notice of the adverse factors operating against the application for a permit so as to enable the applicant to make representations. This point is otherwise expressed in terms of a procedural legitimate expectation of notice of adverse factors. The wider reasons for the refusal of the permit were not known to the applicant as factors operating on the mind of the Minister before she made her decision. Fairness is a flexible principle depending upon "the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates". In any scheme of statutory decision-making the courts will imply "so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness" Lord Bridge and Lloyd -v- McMahon (1987) AC625.702. In general it is a central requirement of procedural fairness that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected so that they may make informed representations. See Lord Mustill in Doody v Secretary of State [1993] 3 All ER 92 at 106e-h. In the present case the applicant was not aware that the approach being taken to the application for the permit was by reference to the "wider reasons" and these were not made known to the applicant until after the decision had been taken. The history of these applications had not suggested that these wider reasons were factors taken into account by the decision maker. In the circumstances the applicant ought to have had the opportunity to address the wider reasons for the decision, either before the decision was made or after it was made where there was an opportunity for review by the decision maker.

[47] Further the applicant contends that there ought to have been consultation with established special interest groups such as the Irish Hare Group. While there may be occasions on which decision making would involve reference to third party interests this was an individual application for a permit by a coursing club and the Irish Hare Group had not been established to become involved directly with such applications. There was no obligation to consult with such groups in dealing with this individual application for a permit.

The Ministers grounds for the Special Protection Order.

[48] The Special Protection Order was proposed as a temporary measure pending the review of the Wildlife Order considering increased protection for the Irish Hare. It emerged from Mr Poever's submission to the Minister in relation to the decision on the permit application so it was part of a broad approach to the issue of the Irish Hare. The statutory framework for such a decision is different to that arising in respect of a permit to net hares as section 7C (1) of the 1928 Act provides for special protection where the Minister is satisfied that it is "necessary or expedient" to provide such protection, and the order may extend to killing, taking, selling or purchasing. Having heard objections to the effect that it was not necessary or expedient to make such an order the Minister made her decision to introduce the Order for the reasons set out in her note of 16 December 2003. The reasons are more concerned with the issues of hare population and the precautionary approach. The Court is not deciding on the merits of the Minister's decision to introduce the Order but deciding whether there was a rational basis for the decision taken within the terms of the statutory power and taking into account relevant factors and leaving out of account irrelevant factors. The applicant contended that the Special Protection Order was unreasonable and disproportionate. In essence the concerns about the Irish Hare numbers led the Minister to place a temporary prohibition on interference with hares pending a review of the legislation on the appropriate medium to long term protection measures. There is a dispute about the relevance of the temporary prohibition to the concerns for hare populations and there is a dispute about any policy conflict between the proposed status of, and the plan for, the hares and continued taking or trading in hares. These disputes do not invalidate a cautious approach for a temporary period and the decision to introduce the Special Protection Order could not be described as unreasonable. Further, while not accepting that proportionality is a free standing basis for challenge, it has not been established that the introduction of the Order was disproportionate, given its temporary character, the precautionary principle and the broad approach of the policy conflict.

[49] The argument on actual or apparent bias was also advanced in relation to the decision to introduce the special protection Order, and raises again the issue of predetermination and forfeiture of judgment. The applicant contends that the consultation process was a sham. The reasons for the decision were based on low number of hares, caution and temporary steps pending a legislation review. The reasons have been found to be a valid basis for the decision. The Minister may have been predisposed to such a decision once the proposal was issued but that does not invalidate the decision. Again it is the position that whether the issue is approached on the basis of apparent bias, by reference to the well informed and fair minded observer in the context of political decision making, or on the basis of predetermination and forfeiture of judgment, it has not been established that the decision should be set aside.

Procedures in relation to the Special Protection Order.

[50] The applicant makes a two fold complaint about the procedures adopted by the respondent for the introduction of the Special Protection Order. The first matter concerns the consultation process and the second refers to the absence of rural proofing and regulatory impact assessment. On the consultation issue section 7F(5) of the 1928 Act provides that where the Minister proposes to make an Order a notice of the proposal and of the purport of the proposed Order shall be published and "shall specify a time within which objections to the proposal may be lodged with the Minister." There is no time limit specified in the Act. When the notice was published on 31 October 2003 it allowed four weeks for objections. The applicant complains that this period was inadequate and refers to the Northern Ireland Executive's Consultation Guidelines which state that twelve weeks should be the standard period for consultation with eight weeks being the minimum. In response Mr Peover indicates that the Minister's view was that the guidelines are relevant to proposals for new or revised policy and legislation but are not applicable to the exercise of a statutory power within the extant framework of policy and legislation and further the guidelines were not followed in respect of previous special protection orders. In any event reference is made to the opportunity that was availed of by a large number of objectors to lodge their objections and on 15 December 2003 the Minister met with representatives of the Countryside Alliance as well as representatives of the four main political parties in Northern Ireland to discuss the issue of the Special Protection Order. Her decision was made the next day and her note of decision in relation to the consultation period indicates that it was considered to be in line with the requirements of the 1928 Act, that it was proportionate given the temporary nature of the ban and consistent with the precautionary approach and the opportunity for full public consultation that would arise should the Wildlife Order review propose that the Irish Hare be added to the list of species which are protected at all times. It has not been established that the consultation period was unreasonable.

[51] Further, the applicant contends that there was no publication of the "purport" of the proposed order as required by section 7F (5) of the 1928 Act, which according to the applicant would have required something in the nature of a consultation document. The purport is the tenor of the proposal and the notice achieved that by stating that it was proposed to make an order prohibiting the killing, taking selling or trading of Irish Hares during 2004. In addition the applicant contends that the Minister failed to consult with the Irish Hare Group. However there was an opportunity for objections to be lodged and many were lodged and meetings were held with representatives of opposition groups and political parties. There was adequate opportunity for the character of the opposition to the proposal to be conveyed to the Minister and there was no obligation to consult with the Irish Hare Group.

The applicant also contends that this proposal should not have proceeded when it was opposed by the main political parties and had not been taken up by the Assembly when the issue of the Irish Hare had been under consideration. In those circumstances it was said that the Minister should have left the issue to a restored Assembly. This is a political argument about the exercise of transferred powers during direct rule. In the absence of a devolved administration to exercise transferred powers matters fall for decision by direct rule Ministers. The applicant has not established any judicial review grounds in relation to consultation for the special protection order.

[52] The second issue concerns rural proofing and regulatory impact assessment. It is government policy that all government departments and agencies intending to introduce new policies should subject that policy to rural proofing. Further it is government policy that all government departments and agencies intending to exercise statutory powers and make rules with a general effect on others should produce a regulatory impact assessment. In relation to rural proofing Mr Peover stated that the Special Protection Order is a temporary measure within an extant framework of policy and legislation and a full rural proofing assessment was not considered necessary. For the same reason a regulatory impact assessment was not considered necessary. Rural proofing and a regulatory impact assessment will form a part of the full public consultation on any proposed policy or legislative change arising from the review of the Wildlife Order. The applicant does not accept that the Special Protection Order is a temporary measure. However the respondent indicates that it is a temporary measure put in place pending the outcome of the review of the Wildlife Order. It was indicated at the hearing that this review was expected to report in mid-2005. There is no basis for not accepting the statement that the Special Protection Order is a temporary measure pending the outcome of the review of the Wildlife Order.

Developments since the Minister's Decisions.

[53] Matters have moved on since the application was refused and the Special Protection Order was made.

The Irish Hare Survey 2004 was carried out by Queens University and reported a near six fold increase in the hare population. Professor Montgomery considered that the increase was more likely three or four fold and that numbers were higher than previously thought. This placed the population at the higher rather than the lower end of the previous estimate of 7,000 to 25,200. The Director of Natural Heritage in the Environment and Heritage Service commented that this did not necessarily indicate a permanent recovery in the population and there was a need to continue

conservation measures under the Species Action Plan and carry out further surveys.

A further licence application for the taking of 80 hares for coursing in December 2004 was refused by the Minister on 10 December 2004 as the Special Protection Order was still in place.

Further the operation of the Special Protection Order has been extended to March 2005 while the review of the Wildlife Order remains outstanding.

The arguments in relation to the evidence on which the Minister could properly make the decisions were rehearsed in the affidavits in the course of this application for judicial review and the several rounds of affidavits continued up to December 2004. Material was discussed in those affidavits which would not have been taken into account by the Minster in making the decisions in question in these proceedings. However the affidavits demonstrate that all parties took the opportunity to examine all the arguments and the nature of the debate must have been in the minds of the Minister on whose behalf Mr Peover continued to swear affidavits, and of the opponents of the Minister's decisions on whose behalf the applicant continued to swear affidavits.

[54] To the extent that any argument or evidence was not rehearsed before the Minister made the decisions in question I am satisfied that the relevant arguments and evidence would have been before the Minister in making the two further decisions on the permit and the special protection order referred to above. For that reason, while I have found that adverse factors relied on by the Minister were not disclosed to the applicant, I would exercise my discretion not to grant relief to the applicant on the basis that the tenure of the decisions has become exhausted. Any factors not notified to the applicant would have come to his knowledge in the course of the Judicial Review and would have been a matter on which the applicant could have made representations to the Minister for the purposes of the later decisions and the Minister has made the updated decisions in those circumstances. The first decisions are spent and the opportunity was available to deal with the procedural aspect in the making of the current decisions.

[55] Further there has been additional evidence on the welfare issue in the course of the application for Judicial Review. By a paper published in March 2004 under the title "Stress and Capture Myopathy in Hares", Mike Rendle refers to "compelling evidence that the well-being of hares and ultimately their survival is compromised by capture, handling and transport etc." This paper is rejected by Professor Montgomery as not having been refereed and lacking substance. It is also contended on behalf of the applicant that Mr Rendle has "form" on the issue of hare coursing and the applicant accords no weight to Mr Rendle. Mr Rendle refers to a paper by J.J. O'Sullivan who is described as the Irish Coursing Club's Veterinary Surgeon, the title of the paper being "Some Thoughts on the Feeding and Management of Hares – the

Abbeyfeale Experience." In that paper Mr O'Sullivan is quoted as saying that it is impossible to avoid stress in hares once they are man-handled and taken out of their natural environment; a lot of damage can be done to hares by rough handling and netting; stress can arise from sudden environmental changes such as fluctuating temperatures, varying humidity and changes in diet. There is then exhibited by Mr Poever a report from a Mr Paddy O'Sullivan of Duchas the Heritage Service in the Republic of Ireland, which report relates to a Wexford and District Coursing Club meeting on 26 and 27 December 2003. This report makes disturbing reading in that it records that on day one it was obvious that the hares were not in good condition and 11 hares were hit by dogs and six were dead the next morning; on day two the hares were not willing to run and four hares were hit by dogs; it was decided that a post mortem should be carried out on some of the dead hares; out of a total number of 83 hares which started the coursing 40 animals were dead. A letter was also exhibited from Dr Murphy, who arranged the post mortems on the hares, and they were found to show signs of a variety of clinical syndromes and infections. It was stated that the organisms reside normally in the wild hare population without causing significant disease, but under the influence of stress the hares' immune system is compromised and these organisms suddenly multiply rapidly to cause a severe clinical disease and ultimately death; hares are normally solitary animals and are significantly stressed when corralled and coursed and this combination of circumstances resulted in the deaths.

[56] Had it been found that there was not a sufficient basis for the Minister's original decisions I would, in the light of the reports from the Wexford meeting of December 2003, have exercised my discretion to refuse relief to the applicant on the basis that there exists evidence justifying the precautionary principle pending further explanation of those events and the outcome of the review of the Wildlife Order.

[57] In summary I have rejected all the applicant's grounds for Judicial Review save for the procedural failing in relation to the application for a permit by reason of the absence of notice of adverse factors before making the decision. However I exercise my discretion against granting any relief to the applicant because the adverse factors were all capable of being addressed by the applicant in the later application for a permit. The application for Judicial Review is dismissed.