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(subject to editorial corrections)*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY PATRICK WYLIE
FOR JUDICIAL REVIEW**

WEATHERUP J

Eel fishing on Lough Neagh.

[1] This is an application for Judicial Review of decisions of Lough Neagh Fishermen's Co-operative Society Limited dated 17 April 2003 and 24 June 2003 refusing the applicant a boat owner's licence to fish for eels on Lough Neagh.

[2] The respondent was registered as a friendly society on 24 May 1966 and owns the rights to eel fishing on Lough Neagh and the River Bann. The Rules of the respondent were revised in October 1995 and the objects of the Society include the increase in prosperity of fishermen by co-operative action in all kinds of fishery activity and fish marketing and distribution and the improvement and development of the fishing industry in general and Lough Neagh in particular.

[3] In Toome Eel Fishery (NI) Limited v Cardwell and Others [1966] NI 1 the Court of Appeal accepted the claim of Toome Eel Fishery (NI) Limited to the exclusive right to fish for eels in Lough Neagh with their title founded on a Crown grant made in 1661, a title which had been accepted by the House of Lords in Johnston v O'Neill [1911] AC 552. The defendants in the 1966 action were four fishermen and a London company which purchased eels. An injunction was granted restraining the defendants from interfering with the plaintiff's rights. Having failed in their legal challenge in 1966 the fishermen

then arranged to purchase the eel fishing rights and this exercise was completed in 1972.

[4] The applicant has commercially fished the waters of Lough Neagh for eels and other fresh-water fish for 47 years. He has been employed as a boat-helper by his brother Charles who held a boat-owner's licence. The applicant has been a member of the Lough Neagh Fishermen's Association since 1958. The Association is registered as a Trade Union. The applicant is also a member of the respondent Society, having purchased 1200 shares in 1972 of which 600 were registered in his own name and the remainder divided equally between his wife and son.

The refusal of a boat owner's licence.

[5] Because of difficulties between the applicant and his brother Charles the applicant was not nominated as boat-helper to his brother in 2000. The applicant then applied to the respondent for a boat-owner's licence and was refused in 2000 and again in 2001 and 2002. This application for Judicial Review concerns the applicant's application for a boat-owner's licence in 2003. His application was received by the respondent on 25 February 2003. He received notice of refusal in writing from the respondent on 17 April 2003 in the following terms -

"A licensing panel was constituted to consider all applications received. In considering all applications from persons who did not hold a boat-owner's licence in recent years the panel applied the agreed criteria. It was not possible to accommodate all the applications received from persons who did not hold a boat-owner's licence in recent years within the agreed ceiling. It is unfortunately necessary in the interests of conservation and for other reasons to restrict the number of boat-owner's licences issued each season."

[6] The applicant's solicitor gave notice of appeal against the refusal of the boat-owner's licence and by letter dated 24 June 2003 from the respondent the applicant was notified that his appeal had not been successful.

Public law.

[7] Judicial Review is the province of public law issues and not private disputes involving no element of public law. The respondent contends that the issue of boat-owners licences for eel fishing on Lough Neagh is a private

law matter between the applicant and the Society rather than a public law matter and accordingly it is contended that the applicant cannot challenge the respondent's decision by way of Judicial Review proceedings. In Re Kirkpatrick's Application [2004] NIJB 15 Kerr J held that a challenge to the refusal of a boat-owners licence for eel fishing on Lough Neagh was a matter of public law. The respondent therefore contends that Re Kirkpatrick's Application was wrongly decided.

[8] In Kirpatrick's Application Kerr J restated the approach to the subject of public law that he has taken in Re McBride's Application [1999] NI 299 at 310 -

“It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity.”

[9] The Court of Appeal has endorsed Kerr J's general approach to the subject of public law matters as quoted above, as appears in Re McBride's Application (No.2) [2003] NI 319 by Carswell LCJ at 336 para 25 and by implication Nicholson LJ at 347 para 2 and McCollum LJ at 358 para 9.

[10] Applying the above approach to the refusal of a boat owner's licence in Re Kirkpatrick's Application Kerr J at paragraph 26 stated that Lough Neagh is the largest inland water-way in the United Kingdom; the conservation of its natural resources is a matter of intense public interest; the public has a legitimate concern as to how fish stocks are maintained and how fishing activities are regulated in this substantial and important natural asset; the licensing system operated by the society is supplemented by monitoring and regulation of fishing activities by bailiffs; it was described as an “historical accident” that fishing rights are privately owned by the Society; but for that historical accident one would expect that such an important natural resource would be controlled by a public agency accountable to Government and ultimately the public. Accordingly the licensing system for eel fishing in Lough Neagh was stated by Kerr J to be a matter of public law.

[11] The respondent does not challenge Kerr J's general statement of the approach to public law matters but rather contends that he was mistaken in his finding that the refusal of boat owners licences in Lough Neagh

constitutes a public law matter. The respondent contends that as the Society is a private body which owns private fishing rights there is no public element arising as the grant or refusal of a boat-owners licence does not “impact on the public generally” nor does it “affect the public”. On the other hand the applicant contends for a generous interpretation of the concept of public law matters, adopts the approach and conclusion of Kerr J in Re Kirkpatrick’s Application and draws a parallel with the concept of “public authority” under section 6(3) of the Human Rights Act 1998.

[12] The public law concept in Judicial Review is not identical to the public authority concept under the Human Rights Act but they occupy some common ground. Under section 6 of the 1998 Act it is unlawful for a “public authority” to act in a way which is incompatible with a Convention right. The expression “public authority” is not defined in the 1998 Act but section 6(3)(b) provides that public authority includes “any person certain of whose functions are functions of a public nature....” save where, in relation to a particular act, the nature of the act is private (section 6(5)). For the purposes of the 1998 Act there are core public authorities and hybrid public authorities, the latter being subject to the 1998 Act in respect of their public functions but not their private acts.

[13] The scope of “public authority” has been examined in the context of privatised services. In Donaghue v Poplar Housing and Regeneration Community Association [2001] EWCA CIV 595 the Court of Appeal considered the issue of public authority in relation to a Housing Association providing accommodation on behalf of a local authority which had statutory obligations in relation to homelessness. The Court of Appeal held that the Housing Association was a public authority in providing accommodation and then seeking possession. An act which would otherwise be private becomes public based on “...a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activity of a public body, the more likely they are to be public” (para 65). The parallel was drawn with applications for Judicial Review where there is no clear demarcation line which can be drawn between public and private bodies and functions and in a border-line case the decision is very much one of fact and degree (para 66).

[14] In R (A and Others) v Partnerships in Care Limited [2002] EWHC 529 (Admin.) the decision of hospital managers to change the focus of the ward in which an applicant was detained at a private psychiatric hospital from care and treatment of patients suffering from personality disorder to care and treatment of patients suffering from mental illness was held to be a decision of a functional public authority. Keith J relied on DeSmith, Woolf and

Jowell's Judicial Review Administrative Action 5th Edition (1995) para 3-031 which states that –

“... the activities of a private body (such as a recently privatised company) may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing, or possibly its dominant position in the market, it is under an implied duty to act in the public interest.”

De Smith gives the example of the private company running a prison being subject to public law because the prisoners for whose custody and care it is responsible are there because of the order of the Court and because the purpose and nature of their detention is a matter of public concern and interest. Likewise Keith J stated that the need for the hospital's patients to receive care and treatment which may result in their living in the community is a matter of public concern and interest. The hospital's patients admitted under statutory compulsion provide a basis for distinguishing those admitted to residential homes by choice. In R (Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936 a decision to close a residential home was held not to be a matter of public law.

[15] That some commentators consider that the courts are taking too narrow an approach to the concept of public authority is apparent from “Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act” (2004) PL 643. It is stated that the consequence of the decisions is that most private organisations that contract with public bodies to provide services do not constitute public bodies for the purposes of the Human Rights Act despite the public nature of the work in which they engage. The view is expressed that this leaves real gaps in the protection offered by the Act, particularly to those vulnerable groups who are dependent upon the private sector for the provision of their basic needs and support.

[16] The House of Lords considered the functions of parochial church councils in Aston Cantlow and Others v Wallbank and Another [2003] 3 WLR 283. It was held that the functions of parochial church councils are primarily concerned with pastoral and administrative matters within the parish and do not perform functions of a public nature. A public authority for the purposes of section 6 of the 1998 Act exercises functions of a broadly governmental nature. In considering the touchstone to be used in deciding whether a function is public for this purpose Lord Nicholls stated that there is no single test of universal application but factors to be taken into account include the extent to which in carrying out the relevant act the body is publically funded

or is exercising statutory powers or is taking the place of central government or local authorities or is providing a public service (para 12).

Lord Hope referred to the purpose of sections 6 to 9 of the 1998 Act as providing a remedial structure in domestic law for the rights guaranteed by the Convention and Article 34 of the Convention provides that the Court may receive applications from any “non-governmental organisation”. This was considered an important guide to the nature of those persons who are to be taken to be public authorities.

Further Lord Hope stated that the decided cases on the amenability of bodies to Judicial Review have been made for purposes that have nothing to do with the liability of the State in international law and cannot be regarded as determinative of a body’s membership of the class of core public authorities or whether a body falls within the hybrid class. However the case law on Judicial Review may provide some assistance as to what does or does not constitute a function of a public nature within the meaning of section 6 (para 52).

[17] The issue arose again in relation to decisions of the business conduct committee of Lloyds of London to approve minority buy-outs of the applicant’s membership in four syndicates at Lloyds. The Court of Appeal, in line with earlier decisions in relation to Lloyds of London, held in R (Dr Julian West) v Lloyds of London [2004] EWCA CIV 506 that the decisions under challenge were concerned solely with the commercial relationship between the applicant and the relevant managing agents and this was governed by the contracts into which he had chosen to enter. The decisions were of a private not a public nature (para 31). In contrast to the decisions of the takeover panel considered in R v Panel and Takeovers and Mergers ex parte Datafin Plc [1987] QB 815 it was stated that the functions of the business conduct committee of Lloyds were totally different. The functions of the takeover panel involved regulatory control in a public sphere where governmental regulatory control was absent whereas Lloyds was concerned with the working out of private contractual arrangements at Lloyds which is itself subject to external governmental regulation (para 32).

[18] The respondents contend that the issue of boat-owners licences is not a public law matter because the right to fish for eels in Lough Neagh is a private right which has been purchased privately by the respondent; that the owners of the eel fishing rights in Lough Neagh are in no different a position in relation to the public than the owners of a quarry or the owners of natural mineral rights; that it is of no account that the title to the eel fishing rights may be traceable to an ancient Crown grant and nor is the current private status an “historical accident” and nor does it follow that the private eel fishing rights would otherwise be held or controlled by a government agency; that the prospect of control by a public agency would not render this a matter of public law as government controls and regulates many enterprises; that

while there may be a public interest in conservation the respondents refusal of new licences does not engage any public interest in conservation.

[19] I do not accept the respondent's submissions on this issue. Control of boat owners licences is an aspect of the management and conservation of Lough Neagh. The scale of Lough Neagh and of the resources of the Lough and of the potential fishing fleet on the Lough and the management of the harvesting of the resources of the Lough render the licensing function of the respondent a matter that not only interests the public but impacts on the public generally and affects the public. To adopt the language of the authorities referred to above, I am satisfied that the issues arising from the grant of boat owners licences are matters of public interest impacting on the public generally and affecting the public; the description of the activity set out above amounts to a combination of features which impose a public character or stamp on the acts; the regulation of the fishing involves an implied duty to act in the public interest; the issues that arise are matters of public concern and interest and the regulatory control arises in a public sphere where direct governmental regulatory control is absent and the regulatory activities are providing a public service.

[20] Rejection of the respondent's argument on the public law issue takes into account the absence of statutory underpinning of the respondent. The respondent is not a creature of statute but there is statutory regulation of the industry. The functions of the Department of Agriculture extend to fisheries under the Fisheries Act (NI) 1966. Under section 15 the Department may make regulations for the management, conservation, protection and improvement of the eel fisheries of Northern Ireland, including the use of eel weirs, fixing the close season, prescribing licence duties payable to the Fisheries Conservancy Board, fixing the type of fishing engine, nets, and the sizes or weight of eels caught. The functions of the Fisheries Conservancy Board are the conservation, protection and improvement of the salmon and the inland fisheries of Northern Ireland, although its power to make bye laws does not extend to eel fisheries.

[21] Rejection of the respondent's argument on the public law issue also takes into account the personal impact on the applicant and the commercial nature of the fishing enterprises. The decision to refuse a boat-owners licence to the applicant undoubtedly has specific impact on the applicant in his personal capacity and indeed the applicant emphasises his position as a member of the respondent Society. However the decisions of the respondent and the policy adopted by the respondent in relation to the grant of boat-owners licences are broader matters of public concern and interest. In the words of DeSmith, Woolf and Jowell's *Judicial Review of Administrative Action* 5th Edition (1995) para 3-031 cited above the activities of an organisation may be governed by the standards of public law when, by virtue of the functions it is performing, it is under an implied duty to act in the

public interest. That is the present case. While the eel fishing organisations may be motivated by considerations of commercial profit (in the same way as private companies may carry out functions in relation to prisons or hospitals or housing) the impact of the decisions to grant or refuse boat owners licences remain broader matters of public concern and interest and have an impact upon and affect the public interest. I am satisfied that the function of the respondent in relation to the regulation of boat-owners licences is a matter of public law.

The applicant's grounds.

[22] The applicant's grounds for Judicial Review are as follows –

- (a) the respondent acted unfairly and unreasonably in its consideration of the application for a licence;
- (b) the respondent acted arbitrarily in its refusal of the application;
- (c) the respondent did not act in accordance with its criteria for considering applications;
- (d) the society acted unfairly and contrary to natural justice in its conduct of the appeal procedure;
- (e) the respondent's conduct of the licence application procedure and appeal lacked transparency;
- (f) the respondent's consideration of the application was biased against the applicant;
- (g) the applicant had a legitimate expectation that he would be allowed to continue his livelihood by the respondent granting him a licence.

Conservation.

[23] At the heart of the respondent's approach to the grant of boat-owners licences the respondent places the issue of conservation. The applicant did not accept that concerns about conservation were the basis of the respondents approach.

[24] The Rules of the respondent Society provide for a management committee and a board of directors. That board of directors also constitutes the board of directors of Toome Eel Fishery (NI) Limited. The management

committee decides on the approach to be taken to applications for boat-owners licences and boat-helpers licences from season to season. Further to a meeting on 5 February 2003 the management committee determined that, for the most part, the procedure operated for each of the seasons from 1988 to 2002 should be adopted in respect of the 2003 season. By circular dated 6 February 2003 the management committee summarised its decisions as being that the “absolute limit” on the total number of licences should remain at 190 and the “actual number” to be issued would take account of the number actually issued for and actively fished in each season from 1988 to 2002; that each person to whom a boat owners licence had been issued for 2002 should be invited to complete an attached form to be returned to the respondent by 27 February 2003; that if a 2002 licence was not required again consideration would be given to the issue of a licence in its place; that the agreed provision for the transfer of licences (as opposed to the grant of new licences) should continue to apply; a licensing panel would consider applications and in particular would consider applications from persons who did not hold a boat-owners licence in 2002 in the event of licences being available for allocation.

[25] The Circular also set out a summary of the criteria to be applied to the grant of a boat owners licence. An application would not be considered unless the applicant had held a boat-owners licence or a boat-helpers licence for at least seven consecutive seasons out of the proceeding ten seasons and had during each of those seasons fished in a boat the gross earnings of which in each relevant season was not less than half of the average earnings of boats during that season. Further the helper nominated by the applicant to fish in the boat should satisfy certain conditions. In addition the applicant for a new boat-owners licence had to be under 60 years of age. The applicant satisfied the criteria.

[26] Patrick Close, the Secretary of the respondent, set out on affidavit that no new boat-owners licences had been issued since 1990 and described three main issues facing the Society. First, the continuing downward trend in the amount of elvers which naturally enter Lough Neagh each year. In order to sustain the average fishing in Lough Neagh it was estimated that at least 8 million elvers must enter the Lough each year and this was achieved up to 1982. However since 1983 the required level has not always been achieved with the result that the respondent has purchased elvers from abroad. There has been a total purchase of 77 million elvers at a cost of over £1 million. Second, there has been an increase in competition in the market for eels. Eel farming has increased and with improved efficiency has made in-roads into the respondents traditional markets. Further the strength of sterling has impacted on prices in the markets within the Euro zone. Third, improved technology and equipment has resulted in fishing boats filling their quotas more easily. The concern of the management committee on issues relating to conservation and the preservation of eel fishing on the Lough is apparent from the minutes of the meetings over recent years.

[27] These concerns extend beyond Lough Neagh. The Commission of the European Communities has published a Communication to the Council and the European Parliament on the development of a community action plan for the management of the European eel. This Communication indicates that the concerns of the respondent in relation to eel fishing apply elsewhere in Europe. The International Council for the Exploration of the Sea (ICES) recommended in its October 2002 Report that a recovery plan for the European eel is needed urgently. ICES further advised that the rebuilding plan should include measures to reduce exploitation of all life stages and restore habitats. ICES also recommended that if no such plan is agreed exploitation should be reduced to the lowest possible level. In considering emergency action the Commission accepted the need to reduce the exploitation of eels to the lowest possible level while the recovery plan was being formulated. The first priority was stated to be to maximise the escapement of silver eel, and this is stated to be a measure that, with highest probability, will enhance the recruitment of eel to the spawning stock. To secure this end the Commission proposed that it would urgently address the issue of a prohibition on fishing activities likely to catch silver eel. By letter dated 30 May 2003 from the Department of Culture, Arts and Leisure reference was made to a regional workshop on action plans for eels convened by the European Commission where it was recognised that the European eel stock is a shared resource and that “stock status is precarious”. The proposals for the action plan were set out.

[28] That the conservation of the eel fisheries is a serious and pressing issue for the respondent is beyond doubt. It has reached the point where the European Commission has raised the issue of a prohibition on fishing activities likely to catch silver eel. However, the applicant questions whether the respondent has undertaken appropriate measures to tackle conservation concerns beyond merely restricting the grant of new licences. He proposes the purchase of sufficient elvers to maintain fishing as well as conservation and further proposes enhanced policing in order to reduce the catch of young eels. In response Mr Close outlines the dilemma for the respondent. He states that by May 2004 only 250,000 elvers had been recruited, which he describes as a “catastrophic reduction”. As this reduction is experienced throughout Europe and beyond, the required supply of elvers is not available and prices are exceptionally high. By way of illustration it is stated that in 2003 the respondent purchased 4 million elvers at a cost of £170 per kilogramme and in 2004 no customer was allowed to purchase more than 50% of the previous year’s purchase and the price was £320 per kilogramme. Further it is stated that the respondent has reacted to the catch of undersized eels by discussion at meetings of the management committee and circulars to fishermen and financial penalties imposed on offending fishermen. It is the judgment of the respondent that part of its approach to the problems that it is encountering should be that boat owners licences be restricted and that that

should be achieved by granting no new licences. I am satisfied that the respondent has made that decision on conservation grounds. The approach to the conservation issue and the management of eel fishing is a matter for the judgment of the respondent, subject to challenge on Judicial Review grounds.

The welfare of Society members.

[29] The applicant contends that the decision to grant no new boat owners licences has been made without regard to the welfare of the fishermen and in particular those like the applicant who are members of the respondent Society. The applicant refers to the objects of the Society which include action to increase the prosperity of fishermen by co-operative action and to improve and develop the fishing industry in general and of Lough Neagh in particular. The applicant contends that the respondent has failed to take into account the rights of members of the Society and although the Circular admits of the grant of new licences the respondent has fettered its discretion by refusing to grant any such licences.

[30] The respondent has operated a policy of issuing no new licences since 1990 and has thereby reduced the number of new boat owners licences by natural wastage. The number of boat owners licences that have been issued has fallen from 200 (1990) to 161 (2000), 148 (2001), 142 (2002) and 131 (2003). The approach of the respondent has not involved removing the livelihood of an existing boat owner by refusing a licence to an existing licence holder. In carrying out the pressing need to reduce eel fishing the respondent has therefore sought to balance the need for conservation with the welfare of established boat owners. This has necessarily excluded the applicant who has never held a boat owner's licence, although he has maintained his livelihood under a boat helper's licence. The applicant is not prevented from obtaining a boat helper's licence, although it is the case that he has not been approached by any other boat owner to work as a boat helper.

[31] I am satisfied that the respondent has balanced the needs of conservation with the needs of the eel fishing community. In so doing the respondent has sought to preserve the licences of existing boat owners who wish to continue. The respondent has not sought to grant licences to those who are not already licence holders and I am satisfied there is no basis for a public law challenge to the respondent's approach.

Transfer of boat owners licenses.

[32] The applicant contends that in reality new boat owners licences have been issued through the procedures for license transfers. There are procedures in place whereby the licence of a boat owner who is unable to use

his licence may be transferred to another. Mr Close describes the transfer procedure as involving an application to the respondent for the transfer of the boat owner's licence. This requires a determination by the respondent in accordance with criteria that provide for transfer from father to son, that the son be over 21 years of age, that he should have worked as a boat helper for seven out of the ten previous seasons and that the earnings of the relevant boat be at least 50% of the average of all the boats. Further the respondent reserves a residual discretion to permit a transfer application in exceptional circumstances.

[33] Mr Close refers to 39 transfers that have been approved by the respondent between 1991 and 2003 of which 29 involved a transfer from father to son and two involved the reversal of an earlier transfer from father to son. Of the remaining eight cases one involved a transfer from uncle to nephew where the uncle had no sons and six involved transfer from brother to brother. In each case the overall criteria were satisfied. The final case, and the one emphasised by the applicant, involved a boat owner who died in August 2001 and his boat helper of eleven years was permitted to fish for the remainder of the season under the deceased boat owner's licence. At the end of the season the respondent agreed to transfer the boat owner's licence to the boat helper as he and the boat satisfied the overall criteria and no new licence was being created.

[34] The transfer decisions are taken by the board of directors on behalf of the respondent. The respondent is entitled to operate a separate procedure for the transfer of licences and to have the decisions taken on its behalf by a body other than that which considers the annual applications, provided that does not create unfairness. Mr Close refers to transfer decisions going to the licensing panel but it appears from the papers that transfer decisions are made by the board.

[35] I am satisfied that the transfer procedures operate under a separate system which is not a disguised form of grant of new boat owners licences. The transfer procedures are consistent with the conservation policy of the respondent in that additional licences are not granted. The transfers operate in circumstances that are different to those in which the applicant finds himself. There are separate decision making systems for licence applications and licence transfers and I am satisfied that there is no unfairness arising from the procedures adopted.

The reasons for refusal of the licence.

[36] The applicant contends that he has not been given adequate reasons for the refusal of the boat owner's licence, nor for the refusal of the appeal. The letter of refusal of 17 April 2003 indicated that restrictions in the number

of boat owner licences was necessary “in the interests of conservation and for other reasons”. The other reasons are the three main issues facing the society as outlined by Mr Close, namely, that the continuing downward trend in the amount of elvers entering Lough Neagh, the increased competition from farmed eels and the impact of trading in the Euro zone and the advances in technology and equipment increasing the efficiency of fishing. The other reasons are essentially aspects of the overall conservation reason. The reasons furnished by the respondent are part of a standard letter of refusal which has been issued to the applicant in each of the four years that he has been refused a boat owner’s licence. It is clear that for some years there have been restrictions on the number of boat owner licences in the interests of conservation and the applicant has been so informed.

Legitimate Expectation.

[37] The applicant contends that he has a legitimate expectation that he would be allowed to continue his livelihood by the grant of boat owner’s licence. Legitimate expectation must be based on some promise or practice of the respondent that grounds the expectation. The applicant can legitimately expect that his application for a boat owner’s licence would be considered in accordance with the policy adopted by the respondent. There was no promise or practice by the respondent which would have entitled the applicant to expect that by his membership of the respondent Society or by his history as the holder of boat helper’s licence he would have a legitimate expectation of the grant of a boat owner’s licence.

Procedural fairness.

[38] The procedures adopted by the respondent give rise to some cause for concern. The reality is that the management committee decided that no new boat owner licenses would be granted. They did not invite applications from any person who had not previously held a boat owner’s licence, but nevertheless received nine new boat owner’s licence applications in 2003. The Circular does admit of the possibility of new licences being granted but in accordance with the decision to grant no new boat owner licences the nine applications were refused.

[39] However, in practice all boat owners licence applications, including the nine new applications, were before the meeting of the licensing panel on 31 March 2003. The nine applications for new boat owners licences were assessed by the licensing panel against the two criteria concerning the applicant having held a boat helper’s licence for seven of the previous ten years and of being on a boat which had at least half the earnings of the average boat. Four new applicants, including the present applicant, satisfied

those criteria and five did not. The licensing panel made recommendations in respect of the re-issue of existing boat owners licences but made no recommendations in respect of new applications, other than recording the agreement of the panel that four of the nine applicants for new licences satisfied the basic criteria. At the meeting of the management committee on 10 April 2003 the recommendations of the licensing panel were adopted and no mention was made of the new applications in the minutes of the meeting. The licensing panel met again on 16 April 2003 to consider applications received since the date of the previous meeting and made recommendations in relation thereto. No reference was made to new applications in the minutes of the meeting.

[40] A total of four appeals were lodged in relation to the refusal of new licences. Three appeals were lodged by those who had satisfied the basic criteria, and that included the applicant, and one appeal was lodged where the basic criteria were not satisfied. The appeal panel met on 1 June 2003 to consider appeals in relation to new licences. The minutes of the meeting of the appeal panel record that the original recommendations of the licensing panel not to issue new boat owner licences were unanimously upheld by the appeal panel. However the licensing panel had not made any such recommendation but merely agreed to assess the new applicants by reference to the criteria. It appears that the appeal panel did not have power to consider the decision of the management committee that no new licences would be issued. This referral of the appeals to the appeal panel appears to have been an empty exercise as the management committee had decided that no licences would be issued.

[41] Mr Close gives a less than satisfactory account of these procedures in his affidavit. At paragraph 17 of his affidavit he states that the management committee set down the criteria for granting licences but licensing decisions were taken by an entirely independent committee known as the licensing panel constituted specifically for that purpose. It is stated that neither the management committee nor any other person connected with the Society exercises any influence over the decisions of the committee. However in relation to the re-issue of boat owner licences, the licensing panel made recommendations only and the management committee made the decisions. In any event the discussion in paragraph 17 implies that the licensing panel made the decision in relation to new applications. In reality the licensing panel made no decision in relation to new applications other than determining whether there had been compliance with the basic criteria. Further, at paragraph 20 of Mr Close's affidavit, it is stated that appeals were determined by an appeals committee which comprised some members of the licensing panel supplemented by members of the management committee. It is stated that the applicant's appeal was duly considered and it was resolved that the licensing panel had correctly applied the criteria for the grant of a

boat owner's licence and the applicant's appeal was refused. This is hardly a complete description of the empty process undertaken by the appeal panel.

[42] The applicant described the procedures as a sham. It is the position that assessment of compliance with the basic criteria by new applicants was of no consequence if the management committee had determined that no new boat owners licences would be granted. Any reference to an appeal panel to consider the decision of the licensing panel was irrelevant to the real decision made by the management committee. If any appeal procedure were to be meaningful it would have involved an appeal against the decision of the management committee not to issue any new boat owner licences. In reality there was no appeal.

[43] A decision maker acting in a public law setting must comply with the requirements of procedural fairness. Those requirements are infinitely flexible depending on the context of the decision making. However, there is no right to an appeal as an essential part of procedural fairness. Procedural fairness generally requires that a party should have the right to know and to respond to matters adverse to his interest. In the present case the reality is that the applicant challenges the respondent's policy decision to grant no new boat owners licences. It will have been apparent to the applicant that this approach to the grant of new licences had been taken by the respondent for some years. However the procedures adopted by the respondent did not afford the applicant the opportunity to address the adoption of that policy for the 2003 applications. Whether during consideration of, or in response to, or on appeal from the decision on the application or the adoption of the policy for that year, the applicant was entitled to make representations on the policy. Such representations might have been made at such stage, and in writing or orally, as the respondent might determine consistently with fairness to the applicant.

[44] In the present proceedings the issues concerning the policy were debated in the affidavits. It is apparent from the course of the proceedings that the considerations advanced by the applicant were not sufficient to persuade the respondent that there was any alternative policy to that of not granting new boat owners licences. In view of the anxious concerns that are apparent from the papers in relation to the future of eel fishing it is necessary to consider whether, if the applicant had had the opportunity to address the policy decision during the process, he might have persuaded the respondent that in considering applications in 2003 there should have been additional boat owners licences granted.

[45] It is necessary to bear in mind that Judicial Review is not concerned with the merits of the decision in question. Wade and Forsythe's *Administrative Law* (7th ed.) at page 533 caution against the conclusion that an applicant's representations "would make no difference" as that might

compromise the principle that the procedures and the merits should be kept strictly apart. Nevertheless it is recognised that there may be exceptional cases where it is acceptable to consider whether the absence of the irregularity would alter the outcome. Bingham LJ adopted such an approach in R v Chief Constable of Thames Valley Police ex parte Cotton [1990] IRLR 64 where he set out six reasons why such a holding should be a rare event. The six reasons were set out again in Bingham LJ's article "Should Public Law Remedies be Discretionary?" [1991] PL 64 at 72 -

- (1) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could or would have put if he had had the chance.
- (2) As memorably pointed out by Megarry J in John v Ross [1970] Ch 345. 402, experience shows that that which is confidently expected is by no means always that which happens.
- (3) It is generally desirable that decision makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision maker's mind became more closed.
- (4) In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision.
- (5) This is a field in which appearances are generally thought to matter.
- (6) Where a decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not be lightly denied.

[46] The nature of the decision will be an important aspect of the approach of the Court. The present case concerns a policy decision rather than one based on some personal default on the part of the applicant. It is a judgment made on a class of application. It concerns a licence in a sphere where it has been determined that the supply is exhausted. The papers in this case indicate that not only was the refusal of new boat owners licences a necessary decision for the respondent in the present circumstances but that national and international authorities have such concerns that measures may yet be required to effect further reductions in the scale of eel fishing. Any challenge made by the applicant to the respondent's policy would inevitably have been rejected. Accordingly I am satisfied that, despite the shortcomings of the procedures adopted by the respondent, any representations made by the applicant would not have affected the outcome.

[47] The remedies available in Judicial Review are discretionary. I would exercise my discretion against granting relief to the applicant. R (Argyll

Group Plc) v Monopolies and Mergers Commission [1986] 1 W.L.R. 763 is a further example of the Court finding public law grounds to intervene in a decision but declining to do so in the exercise of its discretion. The Court of Appeal, in a case of ultra vires delegation, concluded that the same decision would have been made by the correct decision maker, and exercised its discretion not to grant relief on grounds of public interest and good administration. In the present case the respondent would have reached the same decision had the applicant challenged the policy not to grant new boat owners licences, the policy decision was made in the public interest in conservation of resources of Lough Neagh and the interests of good administration of the regulatory system require that in all the circumstances the policy decision made in 2003 should not be reopened.

[48] For future fishing seasons the respondent's Circular and procedures should be changed so as to render transparent any policy that will be applied to licence applications as well as the decision making process that will be involved in the determination of such applications.

For the reasons set out above the application for Judicial Review is dismissed.