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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 ALLAN KIRKPATRICK

FOR JUDICIAL REVIEW

KERR J

Introduction

[1] Allan Kirkpatrick is a private water bailiff. For several years he has sought a licence from the Lough Neagh Fishermen's Co-operative Society Ltd to allow him to fish for brown eels on Lough Neagh. He has been refused a licence on every occasion.

[2] By this application Mr Kirkpatrick challenges the decision of the Society to refuse him a licence for the year 2000-2001.

Background

[3] The Society was established in the early 1960's to represent the interests of local fishermen and to secure access to eel fishing and other fishery rights on Lough Neagh. At the time that the Society was set up the exclusive right to fish commercially for eels on Lough Neagh and the River Bann was vested in the Toome Eel Fishery Ltd. That company based its claim to the fishery rights on a Crown grant in 1661 and the common law principle that there is no public right to fish in non-tidal inland lakes.

[4] The company's title was challenged unsuccessfully in the courts in this jurisdiction in 1966. The Society thereafter set about the task of acquiring fishing rights for its members. It was registered under the Industrial and Provident Societies Acts (Northern Ireland) 1893 to 1963 and it bought a shareholding of one of the five companies that owned shares in Toome Eel Fishery Ltd.

[5] Shares in the Society were issued among its members and when bank loans had been paid off, profits from the marketing of brown eels were used to build up sufficient reserves to buy the remaining shares in the company. This was finally achieved in January 1972. There is a total issued share capital of 50,001 shares all owned by the Society except for one share that is held by Rev Oliver Kennedy, the chairman of the Society.

[6] The Society now has control over the issue of licences for eel fishing on Lough Neagh. It is essential to obtain a licence if one wishes to fish commercially on Lough Neagh. The Society has developed criteria for the grant of licences. In broad summary the latest version of these requires an applicant for a licence to have held a boat owner's licence or a boat helper's licence for at least seven consecutive seasons out of the preceding ten; that he has fished in a boat whose income was not less than half of the average income for boats in those seasons; that the helper nominated by the applicant be over 18 and eligible for a boat helper's licence and not otherwise employed. Applications will not be entertained from anyone over 60 unless they previously held a licence. In dealing with applications the Society reserves the right to take into account that licences have been held by members of the applicant's family; whether the applicant himself held a licence in the past and if so in what circumstances it was surrendered or withdrawn.

[7] Mr Kirkpatrick has launched proceedings against the Society on a number of occasions in respect of his failure to obtain a licence. He had applied for a boat owner's licence in 1998. When this was refused on 8 April 1998, he lodged a complaint on 4 July 1998 with the Fair Employment Tribunal (FET) alleging discrimination on the ground of religious belief and/or political opinion. He was refused a scale fishing licence in 1998 and on 22 July 1998 lodged a further complaint with FET alleging religious/ political discrimination and victimisation. Mr Kirkpatrick made a further application for a boat owner's licence in 1999 and when it was refused he again lodged a complaint with FET in similar terms to that in 1998. The applicant's brother John applied for a licence as boat helper in each of the applications by the applicant for boat owner's licence and John Kirkpatrick has lodged complaints with FET in respect of the refusal of these licences. Both brothers have issued Civil Bills in the County Court alleging breach of statutory duty in and about the Society's refusal to grant them boat owner's and boat helper's licences. These proceedings have been adjourned pending the outcome of the complaints before FET.

[8] On 15 February 2000 Mr Kirkpatrick submitted an application to the Society for a boat owner's licence. He received a letter from Patrick Close, the secretary of the Society, on 18 April 2000 informing him that his application was unsuccessful. The letter stated, "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". Mr Kirkpatrick does not accept this explanation. He suggests that a significant percentage of licences issued are not used. He believes that Fr Kennedy and Mr Close control the Society. He says that all the members of the management committee are Catholic and that he is being discriminated against because he is Protestant. He also claims that when he asked Fr Kennedy why he was not being granted a licence, the priest replied that his "presence could cause conflict". He also believes that because, in his capacity as a water bailiff, he was involved in the prosecution of a number of Lough Neagh eel fishermen, the Society is ill disposed to him. Further he claims that because he has lodged complaints against the Society with FET the decision makers in the Society are prejudiced against him.

[9] In his affidavit filed for the purposes of the present application Mr Kirkpatrick referred to earlier litigation between the Fair Employment Agency (FEA) and the Society. He claimed that the Society had been ordered by the Court of Appeal to issue a number of special permits in order to give access to fishing to those who had not established a tradition of holding a licence. According to Mr Kirkpatrick, the Society had never complied with the directions given by the Court of Appeal.

[10] Mr Close does not accept the suggestions made by Mr Kirkpatrick as to the reasons that he has not obtained a licence. In an affidavit filed on behalf of the Society, Mr Close trenchantly defends its position. He asserts that the wild eel population of Lough Neagh is a natural resource of finite limits. It is replenished naturally by the birth of elvers that mature into brown eels and later silver eels during a life cycle of twelve to fourteen years. The maintenance of the eel stock while providing an acceptable standard of living for its members has been the principal reason for restricting the number of licences issued. A number of factors have influenced the need for careful conservation. Over the last decade the total amount of eels caught by the Society has been about 3000 boxes of silver eels and 18000 boxes of brown eels per annum. To sustain this level of catch at least eight but preferably twelve million elvers need to enter the Lough each year. Since 1983 the figure of eight million has only been achieved once. The Society has had to supplement the natural supply of elvers by purchases from abroad. Grant aid towards these purchases was available for two years but the Society must now meet the cost from its own resources. The Society, according to Mr Close, also faces increasing competition from other eel producing countries especially those that have developed farming techniques. Moreover advances in technology have made it much easier for fishing boats to catch their full daily quota. All of these factors, while increasing the pressure on the Society to conserve stocks and restrict the issue of licences have also depressed the earnings of existing licence holders.

[11] Mr Close has also explained that the number of licence holders has fallen consistently to its current level of approximately 170 from a maximum of 210. The Society has welcomed this reduction because of the continuing challenges of eel stocks and changing market conditions. He claims that the views of the Society in this regard are well known throughout the region and in the fishing community particularly. In consequence many people do not apply for licences and those who have applied and been refused feel aggrieved.

[12] The claim made by Mr Kirkpatrick that many of the licences issued were not used was vigorously disputed by Mr Close. He produced a table that he claimed illustrated the fact that only a very small percentage of licences had not been used over the previous ten years. Those who did not use their licences tended to be those who did not have their licences renewed. In recent years the number of non-users has increased but Mr Close suggests that this is due to the reduction in income from eel fishing. In any event, if a licence is not used, the holder will find it difficult to have it renewed and the society is sanguine about a further reduction in the number of licence holders.

[13] In his affidavit Mr Close also set out an elaborate explanation of the internal structure and procedures of the Society designed to demonstrate that the opportunity for discrimination against applicants for licences did not exist. In particular the processing of applications is carried out by a licensing panel that is, Mr Close claimed, wholly independent of other committees in the Society. The licensing panel comprises persons who are not shareholders or management. They have no connection with fishing on Lough Neagh nor, so far as Mr Close is aware, any fishing family.

[14] Mr Close also sought to defend the emphasis in the criteria on previous connection with eel fishing. The right to fish is, he says, "not a purely transient one". He suggests that the Society has a responsibility to its members not to abruptly remove their livelihood, especially because many of the licence holders have recurring financial commitments such as mortgages. He also claims that the Society prefers that applicants should have a thorough knowledge of the Lough and boat safety; these are inevitably reflected in its preference for those who have held licences in the past. The system of transferring licences was also explained in Mr Close's affidavit. Most frequently this occurs when a father transfers the licence to his son who will usually have been a boat helper of many years experience.

[15] The religious make up of licence holders was also discussed in Mr Close's affidavit. Although the Society does not seek information about the religion of its licence holders, he disputed the suggestion that these were all Catholic. He gave statistics which indicated that a very small percentage of Protestants have held either boat owners or boat helpers licences in recent years. Although Fr Kennedy did not himself make an affidavit in these

proceedings, Mr Close also disputed the version of the conversation that Mr Kirkpatrick claims to have had with the priest. He also disputed Mr Kirkpatrick's claim that he had been discriminated against because he had lodged a number of complaints against the Society with FET. He suggested that the licensing panel was unaware of the complaints when they reached their decision on Mr Kirkpatrick's application. He stated that the panel was also unaware that the applicant had been a water bailiff and there was therefore no possibility that the prosecution of other members of the Society played any part in their decision.

[16] Finally Mr Close vigorously challenged Mr Kirkpatrick's claim that the Society had failed to comply with directions given to conclude the litigation with the FEA. He described in not a little detail the exchanges that there had been with the FEA and the effect of the ruling in the earlier litigation and claimed that agreement was reached as to the implementation of the court ruling. In the event, however, no special licences were issued but Mr Close claims that this is because the number of licence holders has decreased and the requirement to issue special licences only arose if the number of existing licensees rose.

[17] The affidavit of Mr Close prompted an extensive reply by way of a second affidavit from Mr Kirkpatrick in which many of his averments were robustly challenged. In this affidavit Mr Kirkpatrick raised a substantial number of queries about what he suggested were anomalies in the account given by Mr Close. He also queried the statement that preference would be shown to existing licence holders because of financial and family commitments that they had taken on by reason of being licence holders and claimed that this represents the introduction of a further criterion of which he was unaware and on which he was given no opportunity to make representations. Very many other discrete points of challenge were adumbrated in this affidavit that need not be rehearsed here.

[18] An affidavit was also filed on the applicant's behalf from Sir Robert Cooper, former chairman of FEA. In this the account given by Mr Close of the outcome of the litigation between FEA and the Society was disputed. Sir Robert believed that the system of issuing special licences should also have been implemented where transfers from father to son were taking place.

[19] The applicant's second affidavit and Sir Robert Cooper's heralded yet a further affidavit from Mr Close in which their averments were subject to an elaborate and painstaking analysis and refutation. Each claim was examined seriatim and countered. It is unnecessary for me to set out here the detail of the conflict between Mr Close's case and that made by Mr Kirkpatrick and Sir Robert. It is sufficient to record that virtually every assertion that had been made by or on behalf of the applicant was roundly disputed.

[20] The applicant made an application for discovery in advance of the substantive hearing of this judicial review. This brought about the disclosure of a substantial number of documents, many of which were the subject of detailed analysis and comment in the course of the hearing.

The issues

[21] On behalf of the applicant Miss McGrenara QC suggested that five issues arise on this application. These are: -

> (i) Is the dispute between the applicant and the respondent one of public law?
>
> (ii) Does the applicant have an alternative effective remedy?
>
> (iii) Has the respondent acted unlawfully in refusing to issue a licence to the applicant?
>
> (iv) Was the respondent guilty of procedural impropriety?
>
> (v) Was the respondent guilty of unreasonableness in refusing a licence to the applicant?

[22] For the respondent Mr O'Hara QC argued that the case did not give rise to an issue of public law and was not amenable to judicial review. Alternatively, he submitted that the applicant had an alternative remedy which was not only capable of accommodating all the issues that arose on the application but was much more suited to the litigation of those issues.

Public law

[23] In 1993 Christopher O'Neill and John Coney applied for judicial review of the Society's decision to refuse them licences. In an unreported judgment Nicholson J dismissed their application ruling that judicial review was not available to challenge decisions of the Society to refuse licences. The learned judge relied principally on *R v Disciplinary Committee of the Jockey Club ex parte the Aga Khan* (1992) unreported. In that case Sir Thomas Bingham MR, after reviewing a number of authorities, said: -

> "[The courts have] declined to set firm bounds to the grant of public law remedies but did not extend them beyond acts of government

> performed by a creature of executive government."

[24] The debate about whether a particular dispute gives rise to a public law issue has moved on from this traditional formulation, however. In *Re Phillips application* [1995] NI 322 Carswell LJ considered the approach of the Divisional Court to the question whether an issue was one of public law in the case of *R v Lord Chancellor's Dept, ex p Nangle* [1992] 1 All ER 897. At page 332 Carswell LJ said this about the *Nangle* decision: -

> "The court went on to consider an alternative approach to the jurisdiction question, which in many ways I find more attractive than an attempt to classify the nature of the employment. It looked at the nature of the dispute to see if a sufficient public law element was involved, accepting the Crown's argument that it is necessary to find this to ground jurisdiction in judicial review, and that the mere fact that a person may not have a private law remedy does not mean that he has one in public law."

and at page 334: -

> "For my own part I would regard it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus upon the classification of the civil servant's employment or office."

[25] I had occasion to deal with this subject in *Re McBride's application* [1999] NI 299 where I said at page 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."

[26] Lough Neagh is the largest inland waterway in the United Kingdom. The conservation of its natural resources is a matter of intense public interest in my view. 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 regulating of fishing activities by bailiffs. But for the historical accident that fishing rights are privately owned by the Society one would expect that such an important natural resource would be controlled by a public agency accountable to government and ultimately the public. I am satisfied, therefore, that the licensing system for eel fishing in Lough Neagh is a matter of public law.

Alternative remedy

[27] This subject has two aspects. First, do the proceedings that are pending in FET afford the applicant a sufficient alternative remedy and second, would those proceedings be more appropriate for the litigation of the dispute between the parties?

[28] The applicant's principal argument on the first of these aspects highlighted what were said to be the shortcomings of the proceedings before FET as a means of securing the applicant's principal objective *viz* the obtaining of a licence to fish for eels in Lough Neagh. Miss McGrenara also claimed that the proceedings before the tribunal would not examine the issue of procedural impropriety on the part of the Society. Mr O'Hara pointed out, however, that an order directing the respondent to issue a licence to Mr Kirkpatrick had not been sought in the Order 53 statement. Moreover, he suggested that this court was not competent to make an order requiring the Society to grant a licence. Such an order could only be made, Mr O'Hara argued, if the court was in a position to make a finding that Mr Kirkpatrick's application was bound to succeed. There was not enough evidence available to the court to reach such a conclusion in confidence.

[29] In addressing the question whether the proceedings before FET provide a suitable alternative remedy for the applicant one must examine the nature of the judicial review proceedings with particular reference to the scope and capacity of the FET proceedings to accommodate the various arguments that the applicant wishes to deploy.

[30] The essence of the applicant's judicial review claim, as revealed by his affidavits, is that he has been discriminated against by the respondent. He suggests that the Society is a Catholic dominated organisation that has either deliberately and directly discriminated against him on account of his religion and/or his political belief or that it has been guilty of indirect discrimination by the application of a requirement or condition to the applicant which is

such that the proportion of persons of the same religious belief or of the same political opinion as the applicant who can comply with it is considerably smaller than the proportion of Catholics who are able to comply with it. That this is the thrust of the applicant's case in the judicial review proceedings is also evidenced by the grounds that appear in paragraph 4 (a) of the Order 53 statement (although the references therein to the Fair Employment (Northern Ireland) Act 1989 are erroneous, that legislation having been replaced by the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO)). All of these grounds refer to breaches of the Fair Employment legislation and are all matters that fall comfortably within the jurisdiction of FET which, as Mr O'Hara pointed out, is a dedicated and specialised tribunal designed and particularly suited to deal with cases of this type.

[31] The Order 53 statement does set out a claim that the respondent was guilty of procedural impropriety but, properly analysed, this claim is no more than a series of allegations that the Society engaged in a system of licensing that was designed to or had the effect of placing the applicant at a disadvantage and favouring already existing licence holders. All of the grounds under this head could be examined by FET in the context of the discrimination complaints. If established all of these complaints are relevant to the question whether the Society either deliberately or unwittingly discriminated against the applicant. Likewise the final ground relied on by the applicant *viz* that the Society's decision was unreasonable in the *Wednesbury* sense is also relevant to the issue whether that decision discriminated against the applicant.

[32] It is, of course, true that the procedural impropriety and unreasonableness claims are capable of having a freestanding significance in the pure judicial review realm. But when they are allied to the averments in the affidavits of the applicant, it becomes clear that they are presented to support the claim of discrimination and their role as an authentic public law challenge is entirely secondary.

[33] Having concluded that all the matters adumbrated in the Order 53 statement can be canvassed in FET proceedings, it is necessary now to examine the extent of the remedies available to FET to meet the applicant's claims.

[34] Article 39 of FETO provides: -

> "(1) Where the Tribunal finds that a complaint presented to it under Article 38 is well-founded, the Tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under Article 40;

(c) a recommendation that the respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any unlawful discrimination to which the complaint relates;

(d) a recommendation that the respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on a person other than the complainant of any unlawful discrimination to which the complaint relates."

[35] Thus the tribunal can make a declaration that the refusal to issue a licence to Mr Kirkpatrick was unlawful; it can order that the Society pay him compensation; and it can make a recommendation that he be granted a licence. In the event that the Society failed to implement the tribunal's recommendation, paragraph (5) of article 39 becomes operative. It provides: -

"(5) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by the Tribunal under paragraph (1)(c), then, if it considers it just and equitable to do so—

(a) the Tribunal may increase the amount of any compensation required to be paid to the complainant in respect of the complaint by an order made under paragraph (1)(b); or

(b) if an order under paragraph (1)(b) was not made, the Tribunal may make such an order."

[36] It can be argued that this is not quite as efficacious as an order for mandamus requiring that the applicant be granted a licence but, as I have already observed, the applicant does not seek such an order in his Order 53 statement. Moreover, I accept the submission of Mr O'Hara that it is most unlikely that the court would be in a position to make such an order. Even if it were found in the judicial review proceedings that the applicant had been discriminated against or that the Society had been guilty of procedural impropriety or unreasonableness it does not follow that an order of mandamus would be made. Judicial review being a discretionary remedy it appears to me highly improbable that such an order would be appropriate. In the first place, simply because the applicant has been the victim of discrimination or procedural impropriety it does not mean that he should be granted a licence. The court is unlikely to be able to conclude that but for the discrimination or the procedural impropriety he would have been allowed a licence. Secondly, the effect of the default on the part of the Society, if found by the court, might well have repercussions for other candidates for a licence who had superior claims to that of the applicant. If that was a real possibility I believe that it is virtually inevitable that the court would refrain from making an order of mandamus.

[37] I have concluded therefore that the range of remedies available to the applicant in the proceedings before the FET is at least as wide as those that could be obtained if he were successful in his judicial review application. On that account I consider that he has a suitable alternative remedy.

[38] In *R v IRC, ex parte Opman International UK* [1986] 1 WLR 568 at 571, Woolf J said that the fact that there was an alternative procedure available in revenue matters did not mean that an application for judicial review of a decision in relation to such matters should never be made. Applicants should bear in mind, however, that

> "… an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim".

[39] The general rule that an applicant for judicial review should demonstrate that there is no effective alternative remedy is subject to some important qualifications, however. These were discussed by the Court of Appeal in this jurisdiction in the case of *Re Director of Public Prosecutions for Northern Ireland's application* [2000] NI 174. At page 178 the Court said: -

> "The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial

review and resort to an alternative remedy: see, eg, *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58 at 63, per Glidewell J. That approach was expressed in paras 14 and 15 of a valuable article by Beloff and Mountfield in [1999] JR 143, in which the learned authors attempted the same type of principled analysis (the general dearth of which is lamented in Supperstone and Goudie *Judicial Review* (2nd edn), p 15.27) as was made in the context of immigration cases by Laws J in *R v Secretary of State for the Home Department, ex p Capti-Mehmet* [1997] COD 61. They considered the case-law and referred to the effect of the new [English] Civil Procedure Rules:

> '14. On the one hand, the "overriding objective" is to enable the court to deal justly with the cases before it. This would suggest that technical questions of whether some other avenue ought to have been pursued will not be viewed favourably if there is little detriment to the respondent in the case proceeding along the existing route, there is a public interest in the matter being determined by way of judicial review, and pursuit of the alternative route would cause further cost and delay.
>
> 15. On the other hand, what is the most efficient and convenient remedy will be determined having regard to the interests of other litigants and the overall administration of justice, not just the interests of the applicant and respondent before the court. Thus, convenience to instant litigants should not be permitted to disrupt the apt distribution of cases.'

The authors summarise their conclusions in para 18 of the same article, in a passage with which we fully agree:

> '(a) The existence of an alternative statutory machinery will mean that courts will look for "special circumstances" before granting an alternative remedy.

(b) There are, however, a number of factors which may amount to "special circumstances", and the court should be astute not to abdicate its supervisory role.

(c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.

(d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.

(e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.

(f) Expense of the alternative remedy or delay may constitute special circumstances.'

[40] The first question thrown up by the discussion of the issue by Beloff and Mountfield is whether there is a public interest that demands that this dispute be dealt with by way of judicial review. In my judgment there is not. On the contrary, I think that there would be a conspicuous disadvantage in proceeding by way of judicial review. An examination of whether there has been direct discrimination; whether the application of a requirement or condition to the applicant amounted to indirect discrimination and, if so, whether it could be justified; whether the reasons advanced by the Society for adopting its current arrangements can be accepted; whether it has failed to implement the directions given in the proceedings between the Society and

FEA; and many more issues are intensely fact dependent. A resolution of many sharply conflicting versions of the material facts would be required before conclusions on many of the issues would be possible. It is impossible to envisage how that might be achieved without extensive oral evidence.

[41] It is well recognised that judicial review is wholly unsuited to disputed issues of fact: *R v Horsham District Council, ex p Wenman* [1995] 1 WLR 680 per Brooke J. Although there have been a few examples in this jurisdiction of protracted judicial review hearings with an abundance of oral testimony, on the whole this is to be deprecated. Besides this, as Mr O'Hara has said, FET is specifically designed to deal with issues precisely such as arise in the present case. I am satisfied that FET is the appropriate forum for the applicant's claim having regard "to the interests of the parties before the court, the public interest and the overall working of the legal system". In this context it is of course relevant that the Society has indicated that it will not object to the late lodging of a complaint by the applicant to cover the period 2000/2001. In any event, it seems likely that the issues that arise in the present case are mirrored in the complaints made in the cases pending before the tribunal.

The outstanding issues

[42] In light of my conclusion that the applicant has an effective alternative remedy before FET and that that tribunal is much more suited to the litigation of the issues between the parties, it would not be appropriate for me to express any view on the merits of the outstanding issues. The application for judicial review is dismissed.