

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Mullholland's (David) Application [2010] NIQB 118

AN APPLICATION FOR JUDICIAL REVIEW BY  
DAVID MULHOLLAND

TREACY J

**Introduction**

1. By this application for judicial review the applicant challenges a decision of the Lough Neagh Fisherman's Cooperative Society Ltd ("the Society") refusing to grant him a relevant eel-fishing licence. He also complains generally about the policies and practices of the Society in relation to their decision-making processes in respect of the grant of eel-fishing licences for the 2009 season.

**Judicial Review**

2. In his Order 53 Statement the applicant challenges:
  - (a) the policy of the Society regulating the acceptance and consideration of eel fishing licences, as published in their circular of 18 February 2009 ; and
  - (b) the decision of 22 April 2009 refusing the applicant an eel-fishing licence.
3. His grounds for challenge are that:
  - (a) The policy was formulated unreasonably in that erroneous and mistaken factors were taken into account;

- (b) The refusal based on the policy was therefore also unreasonable;
- (c) The refusal was in any event unreasonable and unlawful, by virtue of complaints as to the nature of the application process;
- (d) The decision-making process was unfair.

## **Background**

4. The Applicant is David Mulholland aged 48 years who considers himself, by trade, a fisherman. He has fished on boats on Lough Neagh since his childhood. He and his family have always been involved in eel-fishing on Lough Neagh. As a child he would have been involved on the boats with his family and began as a full-time helper on leaving school at 16 years of age. Later on he worked as a boat-helper on boat G-49, his brother Pete's boat. Pete can no longer work due to lung problems.
5. More recently, he worked on boat G-19, the boat of his late brother Ned until 2003. In 2003 his brother Ned was ill and was unable to fish. He therefore took the boat out on his behalf and fished on his behalf. The Society refused to pay for this catch however and he became frustrated at this and stopped fishing for a time in 2003. He worked as a general labourer on building sites following this for a number of years.
6. In 2008 he processed an application for a Boat Owner's Licence in Ned's name. This application was refused. He and his brother Gerard were hoping that Ned would recover from his illness (alcoholism) and thought that Ned's fishing again would help this but this did not come to pass. When in 2008 this application was refused the applicant and his brother Gerard asked that Ned's licence be transferred to them. The applicant indicates that he felt justified in asking for this in that Ned had fished the Lough for many years as a boat owner, and the Mulholland family had a long history of fishing the Lough. Ned passed away on 24 September 2009.
7. At some time in mid-February 2009 the Applicant and his brother Gerard Mulholland requested copies of application forms from the Society for the issue of Boat Helper and Boat Owner licences to fish for eels in Lough Neagh in the 2009 season.
8. On 27 February 2009 they received a response to this request from Patrick Close, Secretary to the Society addressed to them both which stated:

**"I understand that you have requested that copies of the Application Forms for the issue of Boat Owner and Boat Helper licences for the 2009 season should be forwarded to you.**

The relevant forms are enclosed herewith.

I would, however, draw your attention to the accompanying Circular dated 18 February, 2009 and to the decisions taken at a recent meeting of the Management Committee concerning the issue of Licences for the 2009 Season.

The Management Plan for Lough Neagh/River Bann has been submitted to EU and the Society is awaiting a decision about the level of fishing which will be permitted on the basis of that Plan.

At a recent meeting with DCAL it would appear that the Society will not receive grant for the purchase of Elvers until April 2010. As a result the Society will not receive any grant-aid for elvers to be purchased in 2009.

It will not be possible to relax either the fishing Regulations or the issue of Licences in the light of these decisions."

9. The accompanying Circular notified potential applicants of the need to apply for licences and stated, in material part, as follows:

"Each year it has been the practice of the Society in early February to issue Application Forms to enable fishermen to apply for permission to fish for Brown Eels on Lough Neagh during the incoming season. Inevitably not all applications were successful.

It has been repeatedly pointed out that Lough Neagh is a finite resource and that it is no longer possible for it to accommodate all those who wish to fish for eels.

This has become increasingly obvious in recent years when, as a result of the drastic decline in the natural recruitment of elvers into the system in 1983 – over 25 years ago – the stock of maturing eels in the Lough has decreased.

In Continental Europe the elver recruitment is said to be now less than 1% of what it normally was. The local recruitment into the Lough Neagh system

has also declined although not necessarily to the same level.

The local elver recruitment into the Lough Neagh system in 2008 was just 77,700 – which is about 1% of the 8 million which was the normal annual recruitment.

Admittedly the Co-operative has, since 1985, purchased and transferred to Lough Neagh a total of over 80 million elvers at a cost to the Society of £ 2 ½ million sterling. Since grant was refused on these purchases, the Co-operative cannot continue the purchase of elvers indefinitely.

As a result of those purchases the stock of maturing eels in Lough Neagh is healthier than in other European waters and it has been possible to sustain fishing at a reasonable level.

The European Union, having at last become aware of the drastic reduction in elver recruitment and the effect which this will inevitably have on the stocks of maturing eels, decided to introduce restrictions on the commercial catch of eels throughout Europe. Some of the more drastic suggestions have since been rejected; the present situation being that each fishery has to consider its own position and adjust catches accordingly. At some stage a total ban on commercial fishing was considered.

It would appear that the Republic of Ireland is taking drastic action, which may result in a total ban on commercial eel fishing.

The Lough Neagh System has been required to submit to Brussels a Management Plan. If that Plan can establish that at least 40% of silver eels are allowed to escape to the Sargasso Sea to spawn, then fishing will be allowed to continue, but at a reduced level.

The relevant Management Plan has already been submitted through DCAL to DEFRA in London for onward transmission to Brussels by whom it will be assessed in due course and a decision taken.

When that decision will be known and what the effects of it will be it is impossible to foretell.

### OUTCOME

Fishermen already know:

1.that the elver recruitment last year at 77,700 was the worst ever,

2.that it is impossible to predict how many elvers may be caught or purchased in 2009 and at what cost.

3.that the Brown and Silver Eel catches in 2008 were poor and

4. that the Elver Recruitment and Brown and Silver eel catches are unlikely to improve in 2009.

5.that restrictions are therefore necessary.

These matters were all discussed at a recent meeting of the Management Committee. That meeting also took into account the present employment situation where many people will have difficulty obtaining regular work.

On balance it was decided that the only prudent option at this stage was to preserve the viability of the fishery as long as possible through the introduction of further restrictions.

The result of those decisions will be:

(a) that there will be no additional licences issued for the 2009 Season

(b) that application forms will only be sent to those who held licences in 2008

(c) that not all those to whom licences were issued last year will be allowed to fish

(d) that the circumstances of each individual case will be taken into account

(e) that licences which have not been *fished* in any of the previous 4 years will not be eligible for issue

(f) that the existing arrangements for the transfer of licences will continue in force, but not all requested transfers will be approved.

#### PANEL

A Panel will be constituted as in previous years for the consideration of all applications received.

In the processing of applications, consideration will be given to the regularity with which the Licence was previously used and to the total catch of eels sold under that Licence to the Society in each recent season.

The Panel and the Committee will consider in particular licences where the total quantities of eels marketed in any given season was less than 20% of the highest actual catch of any boat during that season.

All relevant facts known to the Society either by way of information contained in the Application Forms or in other records available to the Society shall be placed at the disposal of the Panel and the Committee in considering Applications received.

That information will include, where relevant, details concerning Owners' or Helpers' licences previously held by the applicant and records relating to the various boats in which the applicant fished.

Account will be taken, in the processing of Applications, of reports received of breaches of the Regulations and of Restrictions in force during the previous season by the Applicant concerned and of any Endorsements incurred ...

10. On 3 March 2009 the applicant completed an 'Application to Fish as a Boat Owner for Eels on Lough Neagh during the 2009 Fishing Season'. On the

same date a similar complementary application for a Boat Helper's Licence was submitted by Gerard Mulholland.

11. On 22 April 2009 the Society wrote to the applicant stating as follows:

**"The matter of the number of Boat Owner's Licences to be issued for the 2009 Season and the procedure to be adopted in the consideration of applications for the issue of such Licences was considered at meetings of the Management Committee of the Society.**

**The principles, procedure and criteria which the Management Committee decided to adopt, having obtained advice on the matter, was explained in the circular dated 18th February 2009 which accompanied the Application Forms which you requested to have forwarded to you and to which your attention was specifically drawn. The decisions taken at a then recent meeting of the Management Committee were summarised on page 2 of that circular.**

**It was agreed that the same procedure and the same criteria as had been applied in previous seasons should be adopted in respect of the 2009 Season in the consideration of applications for the re-issue of Licences held in 2008 and that there should continue to be a ceiling on the total number of Licences to be issued.**

**A Licensing Panel was constituted to consider all Applications received. In considering all applications received for the issue of Boat Owner's and Boat Helper's Licences, the Panel acted in accordance with the agreed procedure and 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 and procedure. 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.**

**Where relevant, consideration was given to the season in which an applicant last held a licence.**

**I regret to have to inform you that your application for the issue in your favour of a Boat Owner's Licence for the present season has not been successful.**

**Any appeal against the decision in this matter should be made in writing and addressed to the Secretary.**

**Any changes which a Boat Owner may wish to make with regard to the helper he proposes to engage for the incoming season, as a result of the above decision, should be notified to this office as soon as possible."**

12. On 27 April 2009 the applicant's solicitors wrote to Mr Patrick Close, Treasurer to the Society stating as follows:

**"We write to confirm that our above-named client has instructed us to appeal against your decision to refuse him his application for a Boat Owner's Licence for 2009 season as contained within your letter dated 22<sup>nd</sup> April 2009.**

**We look forward to hearing from you in relation to the next steps in the appeal process by return."**

13. On 5 May 2009 the Society wrote to the solicitors stating as follows :

**"I refer to your letter dated 27<sup>th</sup> April, 2009 in which you state that you had been instructed by the above-named David Mulholland to appeal against the decision by the Co-operative Society to refuse to issue him a Boat Owner's Licence for the 2009 Season.**

**A decision was taken by the Management Committee not to issue a Boat Owner's Licence to a person who had not held such a Licence in the 2008 Season. Although David Mulholland was advised of that fact, he was issued, at his specific request, with an Application Form.**

**It was also decided that a Boat Owner's Licence would not be issued to a person who had not actually fished his licence in any of the previous four seasons.**



**The Society has checked the records available to it and has no record of David Mulholland having previously held a Boat Owner's Licence to permit him to fish commercially for eels on Lough Neagh and furthermore that he has not held a Boat Helper's Licence in any of the last five seasons.**

**In the light of the current critical position with regard to commercial fishing for eels not only in Lough Neagh but also in Europe it is important that the Society exercise restrictions in the issue of Boat Owner's Licences."**

14. On 15 May 2009 the solicitors wrote to Society requesting various documents that they wished to consider in the context of the appeal and asked for confirmation of the next steps in the appeal process.
15. On 18 May 2009 the Society replied stating, inter alia, as follows:

**"...**

**The factual position is, as was explained to David Mulholland, that the E.U. propose to introduce Regulations to restrict the commercial fishing for eels throughout Europe. The E.U. decision on this matter is based on the dramatic decline in the recruitment of elvers throughout Europe since 1983.**

**The E.U. is considering measures which it will hope will restore recruitment of elvers to its normal amount.**

**In the meantime it has decided to restrict eel fishing throughout Europe. In Holland the recruitment is stated to be 1% of normal.**

**Understandably the Co-operative Society, which has submitted its Management Plan to Brussels must restrict commercial eel fishing in the Lough Neagh system.**

**It was therefore decided that for the 2009 season no licences would be issued other than those issued in the 2008 Season.**

David Mulholland's application was considered in the light of that decision;

(1) David Mulholland has never previously held a Boat Owner's Licence from the Society,

(2) David Mulholland did hold a Boat Helper's Licence for the 2003 Season - but did not fish that season.

(3) The Licence Number: G19 was previously held by Edward Mulholland, and has not been issued since the 2003 season.

(4) The catch of both Brown and Silver Eels in the Lough Neagh system has declined dramatically since 1983.

The recruitment of elvers is insufficient to maintain commercial fishing at its previous level.

Prior to 1983, the actual local recruitment of elvers was in excess of 8 million.

The recruitment in 2009 has been less than 1,000 elvers.

The Society cannot justify the issue of additional licences on this basis."

16. On 17 June 2009 the solicitors wrote again to the Society stating as follows:

"We write further to previous correspondence resting with your letter dated 18<sup>th</sup> May 2009. We note that you have not adequately answered the points that we have raised in our letter dated 15<sup>th</sup> May 2009 and we look forward to receiving your substantive response thereto within 7 days hereof."

17. On 1 July 2009 the solicitors wrote to the Society as follows:

"We write further to previous correspondence and we would be grateful if you would kindly let us have your response to our recent correspondence urgently by return."

18. On 10 July 2009 the solicitors wrote again the Society stating as follows :

"We write further to previous correspondence to you resting with our letter dated 1<sup>st</sup> July 2009.

In our view, you have still not adequately answered the points that we raised in our letter to you dated 15<sup>th</sup> May 2009 and thus you have not adequately dealt with our client's appeal. In particular we note that you did not provide our client with an appeal hearing. We therefore look forward to receiving your substantive response within 7 days hereof.

Please note that in the event that you fail to provide this information and documentation sought within this said period then we shall presume that the requested documentation is adverse to your case."

19. There was no substantive reply to this or any further correspondence thereafter.
20. On 9 September 2009 the solicitors forwarded a Pre-Action Protocol letter to Mr Close of the Society which stated as follows :

**"Dear Sir**

**RE: Our Client- David Mulholland**

We refer to our previous course of correspondence with you commencing on 27<sup>th</sup> April 2009, copies enclosed.

As you are aware we have been attempting to process an appeal for our client Mr. David Mulholland for some time and have been patiently awaiting your advices as to the steps necessary to progress same. No such advice has been forthcoming and the final nature of your replies, together with the lack of offer of an appeal process indicates to us that you consider that no appeal is available in the circumstances.

Please be advised that in the circumstances we have therefore received instructions from Mr. Mulholland to seek judicial review proceedings against your body the Lough Neagh Fisherman's Co-operative Society challenging the Society's current policy on the grant of licences in the 2009-10 season, the refusal to allow Mr. Mulholland's licence application and the failure to process a proper appeal.

**Mr. Mulholland believes that you have fixed relevant criteria for the issue of licences in the present season in an unreasonable fashion and taken into account erroneous and irrelevant factors such as a supposed reduction in catch to be imposed upon the Society by the European Commission, and a supposed lack of funding for elvers in the 2009/2010 season. Furthermore Mr. Mulholland believes that your practices in the grant of licences have been unfair and capricious and that relevant correspondence indicates that you have departed from your stated criteria in certain cases but not in others. Furthermore the lack of any appeal is seen as being unfair.**

**Please accept this letter as a formal Pre-Action Protocol letter issued by the Supreme Court of Judicature in Ireland in accordance with Practice Direction 1 of 2008, on Judicial Review.**

**Please be advised that if appropriate remedial action is not taken by your Society within a period of 14 days from the date of this correspondence our client would intend to initiate the aforementioned proceedings. Our client believes that appropriate remedial action would include the grant of a licence to him, or at least the provision of appropriate appeal proceedings."**

21. No acknowledgment or substantive reply was received to this correspondence.

### **Applicant's Submissions**

22. The applicant submitted that the matters under challenge were in the public law sphere and amenable to judicial review. The impugned policy is that set out in the circular dated 18 February 2009 which appears to have been reached following a meeting of the Society's 'Management Committee'. The applicant submitted that irrelevant or erroneous factors were taken into account by the respondent in setting the criteria and conditions in this policy thus vitiating it and its application to the applicant.
23. In support of this contention the applicant relied, inter alia, on the contents of the letter of 27 February 2009 where the Respondent stated:

**“At a recent meeting with DCAL it would appear that the Society will not receive grant for the purchase of Elvers until April 2010. As a result the Society will not receive any grant-aid for elvers to be purchased in 2009”**

24. The applicant asserted that it was thus to be presumed that this further refusal/failure to provide grant was taken into account in the fixing of the 2009 criteria and that it was not clear why this failure to grant was considered a relevant consideration at all in the 2009 season. If the fact was that grants were never or rarely available, then the lack of funding in 2009 was a neutral and irrelevant factor in the setting of criteria in 2009, it was submitted. More importantly however there was *no* refusal or failure to grant – a matter which the applicant asserted the Society appeared to accept the applicant also noting that the Society in its 2009 Annual Report advised members that :

**“It is understood that the most recent E.U. Regulations will make provision for the payment of grant on the purchase of elvers to restock existing systems.”**

25. Thus the applicant contended that the Respondent’s reliance on the lack of grant funding/refusal of grant in setting its 2009 criteria was erroneous in that it took into account and relied upon irrelevant factors.
26. It was further submitted that the Respondent should be taken to have considered, at the time of setting its 2009 criteria, that the European Union were intending to *reduce* the level of fishing in the Lough making (it was asserted) repeated references of this nature in the Circular and in correspondence. Thus they pointed out that in its Circular of 18 February 2009 the Respondent stated :

**“The Lough Neagh System has been required to submit to Brussels an Eel Management Plan. If the Plan can establish that at least 40% of silver eels are allowed to escape to the Sargasso Sea to spawn, then fishing will be allowed to continue, but at a reduced level.”**

27. They further pointed out that in its letter dated 18 May 2007 the Respondent stated :

**“The factual position is, as was explained to David Mulholland, that the E.U. propose to introduce Regulations to restrict the commercial fishing for eels throughout Europe.” (Toner, Bundle A(5), pg. 19, para 17; Bundle B(1), pg. 17)**

**“Understandably, the Co-operative Society, which has submitted its Management Plan to Brussels must restrict commercial eel fishing in the Lough Neagh System.” (Toner, Bundle A(5), pg. 20, para 17), Bundle B(1), pg. 17)**

28. The Applicant submitted that it was clear that the relevant EU Regulation relied upon by the Respondent in setting its criteria would *not* result in fishing at a reduced level in the Lough, if the Plan establishes all that it should, does not restrict fishing throughout Europe (and will not restrict fishing in the Lough in particular) and does not oblige the Respondent to restrict fishing the Lough at all.

29. In support of this contention the Applicant referred to the terms of the relevant Regulation, namely EC Regulation 1100/2007 which requires Member States to submit Eel Management Plans and requires of each Plan that :

**“Article 2(4) The objective of each Eel Management Plan shall be to reduce anthropogenic mortalities so as to permit with high probability the escapement to the sea of at least 40% of the silver eel biomass relative to the best estimate of escapement that would have existed if no anthropogenic influences had impacted the stock. The Eel Management Plan shall be prepared with the purpose of achieving this objective in the long term.”**

30. The target of 40% escapement set by the Regulation is achieved and comfortably achieved in Lough Neagh, as established by DCAL’s Plan and the studies it commissioned in this regard :

**“11.5.1 The above three means of estimating ‘undisturbed state’ potential escapement from Lough Neagh, which are based on the ‘use of data collected in the most appropriate period’, i.e. option a Article 2(5) (I and II), or ‘reference to data from other rivers systems with similar hydrography, i.e. option c, point to potential natural outputs in the range of 400 to 600 tonnes per annum given historical high natural glass eel supplies. This range would estimate the required 40% level at around 160t to 240t. Current annual average estimate over 2003 to 2008 is of escapement approaching of 360t, above the required range, and given that current management practices will be**

**formalised into an agreed management plan (see below), mean that Neagh / Bann RBD complies with the Regulation target."**

31. The Plan establishes, it was argued, that the Society had considerably more leeway from the EU Regulation than it appeared to appreciate.
32. In this regard the Court was asked to note the alleged refusal of Mr. Close to concede this point in these proceedings (*Bundle A(7), pg. 44, para 8*) notwithstanding the Society's 2009 Annual Report advising members that (emphasis added) :

**"Since the Society was assured by DCAL and DEFRA that it complied with the regulations proposed, it is concerned that it has not yet been advised of the decision which will affect both the Co-operative and individual fishermen."**

*Bundle B(3), pg129*

**"It is anticipated that whatever decisions are taken by EU will take effect in 2010 and will have taken account of the foresight of the Co-operative Society in the measures which it introduced to maintain the viability of the commercial eel fishery on Lough Neagh in the present critical situation."**

*Bundle B(3), page 130*

33. The applicant therefore submitted that in premising itself on the fact that EU Regulation 1100/2007 will result in a requirement to reduce or restrict the actual level of fishing in the Lough when the Regulation does not impose such a requirement the Respondent took into account irrelevant factors when setting its policy.
34. They further submitted that it could not be said that had the Respondent properly directed itself in fact, that it would have fixed the conditions and criteria for the 2009 applications in the manner that it did and accordingly that the policy containing those conditions and criteria should be considered invalid as a result and declaratory relief should issue. Furthermore insofar as the decision taken to refuse the licence was a decision premised on the validity and correctness of the policy that decision should furthermore be considered invalid, it is submitted.

### **Selection Process Unlawful**

35. The Applicant submitted that the selection process settled by the Respondent was processed inconsistently and is therefore unfair. In particular it was asserted that the clear inference from the decision letter dated 22 April 2009

was that some persons were granted licences in 2009 who had *not* held them in 2008.

36. The applicant also submitted that decision-making process in this case was unfair because having set the criteria it made clear that they would not be altered and provided no mechanism for the Applicant to address the need for the criteria in the processing of the application. The Society did not invite representations on the relevant criteria before setting them and failed to provide an appeal. The Societys evidence that the offer of an appeal was a mistake should be rejected. Furthermore the Respondent failed to determine and make transparent at what stage it would consider representations on its policies, contrary to the judgment in *Wylie* (para.43 read with 48).

### **Respondents Submissions**

37. The Respondent contended that the matters under challenge were not subject to judicial review. If subject to judicial review none of the grounds relied upon by the applicant has been made out, that erroneous and mistaken factors were not taken into account and that the impugned policy did not depend in any event on either the grant funding or the EU issue. They also rejected any suggestion of material unfairness in the process.

### **Is the Society susceptible to Judicial Review?**

38. The question of the society's susceptibility to Judicial Review has been the subject of previous judicial decision. The Respondent sought to maintain its position 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 that, accordingly, the impugned decision is not subject to judicial review. In *Re Kirkpatrick* [2004] NIJB 15 Kerr J held that the Society *was* susceptible to Judicial Review stating:

**"[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."

39. This decision was followed in *Re Wylie* [2005] NIQB 2 by Weatherup J [see paras 7-21]. He pointed out that the Court of Appeal has endorsed Kerr J's general approach [in *McBride* ] 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. In *Wylie* the judge noted:

"[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....

[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.**

40. I propose to follow these decisions with which I agree and accordingly hold that the impugned decision is subject to judicial review.

**(b) The Licensing Criteria**

41. The applicant's challenge to the licensing criteria for 2009 concentrated on two issues relating to the availability of grant funding and the impact of the intervention of the EU. I agree with the Respondent that the starting point for the consideration of the criteria must be the overwhelming evidence of the crisis facing the eel fishing industry, not just on Lough Neagh but across Europe. This had already been raised in *Kirkpatrick* at paras.10 - 11 though it was not necessary in the circumstances of that case to determine the issue:

**"[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."

42. It was raised again in *Wylie* and accepted by the Court [see paras.23 – 28]. The Court accepted that conservation was the basis of the approach of the society:

[23] At the heart of the respondent's approach to the grant of boat-owners licences accept 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.

43. At para.46 of the same judgment it was ultimately accepted that the refusal of new boat owners' licenses was "a necessary decision for the respondent in the present circumstances":

[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.**

44. *Wylie* related to licenses for 2003. The evidence is that since that time the natural run of elvers into the lough has continued to decline with the worst year ever being 2008 when the number fell below 100,000 for the first time. With or without grants or EU intervention, the deteriorating position in relation to eel stock became even worse in 2008. In these circumstances it was all but inevitable that this should be reflected in the criteria for licenses for 2009. If such restrictions were a necessary decision in 2003 then *a fortiori* the deteriorating situation required *at least* the maintenance of the existing restrictions, if not tightening them further.
45. The applicant seeks, *inter alia*, an order for mandamus and that the decision to refuse him a license for 2009 should be reconsidered. Leaving aside that at the time of hearing the season was over, his case was that although he did not even meet the criteria for licenses in 2008, and even though the stock of eels had fallen further, criteria should have been set for 2009 to allow more licenses to be issued to people such as himself. This could not have been done without allowing an increase in fishing at the worst time and thus acting incompatibly with the conservation policy which the society had been driven to follow for many years and which has been upheld by the courts.
46. So far as grant *funding* is concerned the Department confirmed in correspondence to the applicant's solicitor that the society correctly informed people of the position when it issued its February 2009 notice. This letter was written in response to an e-mail from the applicant's solicitor dated 21 August 2009 in which, having referred to the advice given by Mr Close on 27 February 2009, he said:

**"We wish to check the accuracy of this statement as it appears to conflict with statements made by DCAL in their December 2008 submission prepared for the benefit of the European Commission ..."**

47. The response from DCAL stated:

**“The advice your client received from Mr Pat Close in February 2009 was an accurate reflection of the Co-operative Society’s understanding at that time. Advice from DARD at that time was that elvers would have to be purchased between July 2009 (after the expected approval of the Neagh Bann EMP on 30<sup>th</sup> June 2009) and March 2010 to qualify for 2009/2010 EFF Funding.**

**The life cycle of the eel means elvers are only available to purchase at certain times of the year and it was not anticipated that elvers would become available between July 2009 and March 2010.”**

No funding was therefore available from the Government for the purchase of eels in 2009 thus defeating, as it seems to me, any argument based on the availability of grant funding.

48. The applicant also relied on the references to grant funding in the eel management plan submitted to the European Union. That plan was not approved in February 2009 and at the time of hearing had still not been approved. The mere possibility of grant funding in the future could not, in the circumstances, be seriously regarded as a reason which should have swayed the Society to *extend* fishing for the 2009 season.
49. I accept that so far as the EU issue is concerned the information given in the notice of 18 February was a fair and reasonable understanding of what the consequences of the European Regulation would be for eel fishing. There is no interpretation of the regulation or its implementation which supports the proposition that it will *not* impact on fishing in the lough. The regulation is after all aimed at helping the stock of eels to recover; the continued decline of the eel stock by the combination of a low elver run and the continuation of fishing will have to be addressed, despite the conservation measures already taken over a number of years by the Society.
50. Whilst there is some debate over the extent to which the required escapement of eels from the lough in compliance with EU regulation is in fact being achieved the evidence is clear that the stock is continuing to decline and that the regulation of fishing must take account of that fact.
51. It is in any event clear that the Society’s long established policy of controlling licenses which was continued in 2009 did *not* depend on either the grant funding or the EU issue. This is clear from a full reading of the February 2009 notice and particularly the five points emphasised under the heading “Outcome”. The EU regulation is not in itself the fundamental problem facing

the Society. That fundamental problem is and remains the decline in the number of eels.

52. Insofar as the applicant maintained the contention that licences had unfairly, inconsistently and in breach of the established criteria been granted to others this has not been established as a matter of evidence and I reject this head of complaint. Although the applicant accepted that he did not meet the 2009 criteria or indeed the 2008 criteria he submitted that it is wrong in law for the Society not to have allowed him to make representations against the 2009 criteria.
53. In my view it is not necessarily unlawful for the Society to determine criteria for granting licenses in line with previous years without inviting public debate or submissions or appeals – particularly where, as here, those criteria have been impliedly or expressly upheld in earlier public law challenges and the conservation considerations underpinning them had strengthened. The obligation is to set rational and fair criteria. In *Wylie* the Judge concluded at para.46 that:

***“The papers in this case indicate that not only was the refusal of new boat owner’s licenses 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.”***

54. The position has since deteriorated. In the circumstances any alleged procedural imperfections had no consequence for the applicant.

### **Conclusion**

55. For the above reasons the application must therefore be dismissed.