[2009] IEHC 114

THE HIGH COURT

2004 635 JR

BETWEEN:

DESMOND CROFTON

APPLICANT

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 10th day of March, 2009

1. The applicant is the Director of the National Association of Regional Games Council ('the NARGC'). The NARGC is Ireland's largest shooting and conservation organisation, with some 26,000 members. It is an umbrella organisation representing local and regional game clubs around the country. It was established in 1968, with the aims and objectives of inter alia: the preservation of certain lands for the purposes of the hunting of game; the development and improvement of game stocks on these lands; and the promotion of the conservation of wildlife and its habitat on these lands.

2. The respondent is a public official, charged with the protection of the natural environment, as well as wildlife conservation.

3. The applicant seeks the following reliefs:

(a) An order of certiorari, quashing the decision of the respondent, communicated by letter dated the 29th of January 2004, to maintain as a matter of policy a prohibition on hunting of State lands acquired for nature conservation purposes;

(b) A declaration that the decision to maintain a blanket ban on shooting on State lands constitutes a failure on the part of the respondent to exercise a discretionary decision making power;

(c) A declaration that the decision to maintain a blanket ban on shooting on State lands constitutes an unreasonable exercise of the discretion vested in the respondent;

(d) A declaration that there is no sufficient statutory or lawful basis for the application of a blanket ban on shooting on State lands as a matter of policy;

(e) A declaration that the decision to maintain a blanket ban on shooting on State lands was unreasonable having regard to the weight of material before the respondent to the effect that parcels of State land should be considered on a case by case basis;

(f) A declaration that the applicant enjoyed a legitimate expectation that the right to fair procedures and/or constitutional justice of the member of the NARGC would be observed in the decision making process and that the respondent would consult with the NARGC in respect of the findings of a jointly funded research project; and

(g) A declaration that the decision of the respondent to advise that he was not prepared to consider further correspondence on the issue of shooting on State lands constitutes a failure to observe the applicant's rights to fair procedures in any decision making process and represents a refusal to consider any further application on the merits of the application having regard to the State lands in question.

I. Factual and Procedural Background

4. For several decades, it has been official State policy in Ireland to prohibit shooting on State lands. The applicant submits that this policy has only become problematic in recent times, by virtue of the acquisition by the State of substantial tracts of land which would previously have been available to members of the NARGC for shooting and conservation purposes. The applicant contends that these recent acquisitions have led to a significant diminution in the shooting land available for members.

5. For a number of years now, the NARGC has actively sought a review of the policy prohibiting shooting on State lands. In November 1999, the Minister for Arts, Heritage, the Gaeltacht and the Islands announced a review of the existing policy. This review was undertaken by the Heritage Council, with the assistance of a firm of UK ecology consultants called 'Just Ecology', and a report entitled 'Review of the policy of hunting on state-owned lands managed by the Minister for Arts, Heritage, Gaeltacht and the Islands' was produced. In September 2000, the Heritage Council primarily recommended, on foot of this report that the blanket ban should be maintained. However, it accepted that a partial relaxation of the ban, in respect of certain activities, could be a viable alternative.

6. The NARGC was dissatisfied with both the nature and the presentation of the findings in the Heritage Council's report.

It engaged Dr. Brian Madden, a conservation expert who manages a consultancy called Biosphere Environmental Services, to carry out an independent critique of the report and recommendations of the Heritage Council. It is worth noting that Dr. Madden is also the Independent Scientific Adviser to the Special Area of Conservation Appeals Advisory Board ('the SACAAB'). The SACAAB was established by the respondent to advise him on appeals by landowners against the designation of their lands as Special Areas of Conservation under Council Directive 92/43/EEC of the 21st of May 1992, commonly known as 'the Habitats Directive'.

7. Dr. Madden's critique, which was submitted to the NARGC in January 2001, expressed a number of concerns in relation to the procedures employed by Just Ecology and also the manner in which information had been compiled. In particular, Dr. Madden pointed to the conclusion, which he felt was erroneous, that allowing hunting on all types of State lands would be incompatible with the Habitats Directive as well as Council Directive 79/409/EEC of the 2nd of April 1979, commonly known as 'the Birds Directive'.

8. The respondent decided on the 4th of January 2002, having regard inter alia to the criticisms made by Dr. Madden on behalf of the applicant, to establish the Scientific Review Group on Hunting ('the SRG') which comprised representatives of the National Parks and Wildlife Service ('the NPWS') as well as members of the NARGC. The terms of reference of the SRG were to examine the no-hunting policy on those lands which were now the property of the NPWS, but which had previously been used for hunting purposes, "from a scientific perspective only". The SRG thus produced a report on that issue in June 2002.

9. The SRG Report recommended, inter alia, a complete review of hunting on all State-owned lands. The SRG also prepared a document entitled "An Approach to the Development of a Methodology for Identifying the Issues in Relation to Decision Making about Hunting at Individual Sites". Initially, the NPWS was unwilling to accept the SRG Report, on the basis that it had not been signed by its representatives. This problem was subsequently rectified and the report was circulated in or about January 2003.

10. It is the respondent's position that neither he, nor the previous official with responsibility for the prohibition - the Minister for Arts, Heritage, the Gaeltacht and the Islands - ever committed themselves to a specific consultation procedure, either with the applicant or the NARGC, regarding the findings of the SRG report. Nonetheless, the respondent scheduled a consultation with the applicant on the 5th of February 2003 to consider those findings, in addition to more general considerations concerning any potential review of the existing policy. At this consultation however, the respondent indicated that he had not yet considered the SRG Report in detail.

11. By letters dated the 7th of May 2003 and the 13th of June 2003, the applicant wrote to the respondent seeking a further consultation on the subject of the SRG Report. The respondent sought further time to consider the matter. The applicant sent a further letter on the 14th of November 2003, suggesting a discussion of a management regime for shooting on State lands. When no response was received, the applicant re-iterated this request on the 12th of January 2004.

12. The respondent ultimately replied on the 29th of January 2004 and advised the applicant that the existing prohibition on shooting on State lands was to continue. The respondent further stated that he did not think that there was anything further to be gained by engaging in further correspondence on the matter. A number of reasons were provided rationalising the continuation of the prohibition. These were:

(a) The insufficiency of available data as to the sustainability of hunting on particular lands - the SRG Report was said to be insufficient in this regard;

(b) The previous conclusion of the Heritage Council in September 2000 that the policy ought to be maintained;

(c) The lack of evidence to show that the policy was in fact a significant constraint on the lands available for hunting, having regard to the availability of Coillte lands as well as those of private owners;

(d) Public safety;

(e) The fact that NPWS sites were acquired using public funds for the purpose of nature conservation;

(f) The public perception of the NPWS as having the role of protecting wildlife, as opposed to promoting hunting;

(g) The potential for hunting to disturb "non-quarry" species and their habitat, thereby reducing the value of the sites as refuges for wildlife generally; and

(h) The potential exposure of the State to claims for damages by persons harmed or otherwise adversely affected by hunting on NPWS property.

13. On the 26th of July 2004, the applicant was granted leave by O'Neill J. in the High Court to apply by way of judicial review.

II. The Submissions of the Parties

(a) Fettering of Discretion

14. The applicant submits that the respondent's imposition of a strict uniform policy against hunting on State lands has the effect of neutralising the discretion which he possesses to grant shooting permission to members of the NARGC. The applicant contends that what is required of the respondent is an assessment of each request for shooting permission on its own merits, having particular regard to the conservation requirements of the relevant piece of land. In order for the exercise of the administrative discretion vested in the respondent to be proper, the applicant submits that he must act in a genuinely independent way and not feel constrained by a particular policy.

15. The respondent argues that the applicant's submissions on the issue of discretion are based on a false premise which assumes that the members of the NARGC are in possession of some actionable legal right to bear firearms and/or use

firearms for recreational purposes. The respondent contends that in fact no such right exists under the Constitution, the European Convention on Human Rights or otherwise. The activities of the NARGC are, in the respondent's submission, carried out on foot of a specific privilege which is afforded to its members by the respondent.

16. The respondent disputes any suggestion that he has abdicated his decision-making responsibility. He submits that the decision of the 29th of January 2004 was made following a wide-ranging and lengthy period of monitoring and review. The respondent also emphasises that nothing in that decision would prevent him from re-evaluating the policy in the event of new evidence being put before him.

(b) The Legal Basis for the Prohibition

17. The applicant submits that the respondent lacks the necessary legal authority to impose a radical restriction on the use of State lands, the acquisition of which was funded by the public purse. The applicant further insists that such a material infringement of the civil liberties of a wide number of interested citizens could only be done by legislation, not by the exercise of executive power. He contends that in the present circumstances, the respondent has acquired control over the lands fortuitously and should not be permitted to abuse this authority to the detriment of the members of the NARGC.

18. The respondent argues that he is specifically empowered by legislation to determine whether the public generally or any particular class or section of the public may have access to lands within his control. Specifically, he relies on section 11(2) of the State Property Act 1954 which provides inter alia that the relevant State authority shall have the power to restrict access to State lands "either generally or for any particular purpose, on such terms and conditions as such State authority shall determine." In the present case, the respondent submits that the restrictions imposed on the lands are comparatively limited; the respondent has simply prohibited one particular activity which is engaged in by a small minority of the population who are nonetheless welcome to use the lands for other non-restricted activities.

19. It is further submitted by the respondent that he is entitled to take such measures as he feels necessary in order to protect the safety and welfare of the population as a whole. He argues that although the risk of loss of life or serious injury from hunting accidents is relatively low, a no-risk policy is entirely reasonable in light of the State's stringent obligations under Article 40.3.2º of the Constitution and Article 2 of the European Convention of Human Rights. The respondent emphasises that serious injury and even death resulting from the applicants proposed activity is not unprecedented, in particular having regard to an accidental but fatal shooting by a deer hunter in Curtlestown Wood, County Wicklow in November 1981. The latter incident, he submits, was one of the principal reasons for the review of the hunting policy undertaken in 1982.

(c) Unreasonableness

20. It is the applicant's case that the respondent could not reasonably adopt the attitude, on the basis of the evidence before him, that the absolute prohibition ought to continue in its present form. The applicant further submits that the reasons expounded in the letter of the 29th of January 2004 do not withstand scrutiny and are inherently flawed. In particular, the applicant contends that factors such as the availability of private land for shooting should not be permitted to have any impact on the respondent's determination. The respondent also asserts that the conclusions of the SRG have been disregarded and that the purported risk to public safety is not supported by evidence.

21. The respondent contends that the policy adopted is entirely reasonable in the circumstances and is objectively justified for many reasons. The respondent also emphasises the fact that the land covered by the prohibition amounts to no more than 1.5% of the total landmass of the State, whereas the lands managed by Coillte - which are also owned by the State but on which hunting is permitted - amount to over 6% of the national territory. The respondent therefore maintains that the policy in question does not in any way prevent or preclude the lawful pursuit of the activity of hunting within the State.

22. In the respondent's submission, he is entitled to afford precedence to the general public interest in communing with nature as well as his conservationist mandate, over the recreational interests of a small minority of the public. He argues that it is reasonable for him to conclude that the activities of the general public should be permitted to occur without the risk, however small, of death or serious injury. The respondent finally contends that it is an acceptable exercise of his authority, which requires the proper management of the finite NPWS resources, to refuse to establish a system which would involve individualised consideration of hunting applications followed by an indeterminate period of regulation and policing thereafter.

III. The Decision of The Court

(a) Fettering of Discretion

23. The law imposes a number of requirements on those who are vested with discretionary administrative powers. It requires inter alia that the individual in question should not unlawfully delegate his responsibility, that he should act in accordance with principles of constitutional justice and that he should behave in a manner which will not prevent him from re-calibrating his approach as circumstances may require. The present case concerns only the last of these obligations; there can be no argument that the applicant was not afforded fair procedures throughout the decision-making process, nor can there be any allegation that the respondent has wholly passed his responsibility to an unauthorised third party. As such, the issue before the Court is whether the respondent has fettered his discretion to the point of closing his mind to the alterations in the factual landscape which may arise.

24. The applicant has placed considerable reliance on a number of decisions affirming the importance that the persona designata for the purpose of a given legislative provision should, in practice, be the one who exercises the relevant discretion. Particular emphasis is laid on the decisions of the Supreme Court in Murphy v. Dublin Corporation [1972] IR 215 and Dunne & Ors. v. Donohue [2002] 2 IR 533. It seems to me, however, that these cases were more concerned with the issue of unlawful delegation in circumstances where the respective respondents had abdicated their statutory responsibilities to lower or higher authorities. There can be no question in the present case but that it was the respondent who formulated the impugned policy, therefore I find these authorities to be of limited assistance.

25. More pertinent to the present circumstances is the question of the extent, if any, to which the respondent is permitted to act on foot of a general policy. In British Oxygen Co. Ltd. v. Board of Trade [1971] AC 610, the House of Lords considered the lawfulness of the policy of the Minister of Technology to grant approval of capital expenditure in

respect of equipment for particular purposes, as opposed to considering each putatively eligible product in isolation. The Court held that the Minister had discretion and was not bound to pay a grant to every person who was potentially eligible to receive one. He was permitted to formulate a policy or make a limiting rule as to the future exercise of his discretion if he felt that good administration required it and provided that he was amenable to changing his position on the presentation of new evidence by an applicant. Lord Reid stated at page 625:

> *"What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing."*

26. In Mishra v. Minister for Justice [1996] 1 IR 189, Kelly J. endorsed this principle in the context of applications for naturalisation and citizenship. He stated at page 205:

> *"In my view there is nothing in law which forbids the Minister upon whom the discretionary power … is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."*

However, he went on to emphasise, at page 206, the importance of the distinction between:

> *"the exercise of a true discretion as distinct from one which has become somewhat atrophied by reliance upon a policy or rules, which although useful and permissible, may, if care is not taken, have a stultifying effect."*

27. As noted above, section 11(2) of the State Property Act 1954 permits the respondent to determine the extent, if any, to which access to and activities on NPWS lands should be restricted. It seems to me that there is no evidence in the present case which tends to suggest that the respondent has irrevocably closed his mind to the issue of hunting on this territory at some future date. He has simply decided, for a multitude of reasons, that the workability of the administrative regime under his control, as well as the limited resources available to him, would best be preserved by the introduction of a generalised policy prohibiting shooting by any person. I am therefore unable to accept that the respondent has fettered, in an unlawful manner, the discretion vested in him by the relevant legislation.

(**b) The Legal Basis for the Prohibition**

28. The doctrine of the separation of powers imposes a number of strict limitations on the conduct of an official such as the respondent, in the exercise of his discretionary authority. In Cassidy v. Minister for Industry [1978] IR 297, the Supreme Court considered the applicable principles in respect of this doctrine. O'Higgins C.J. stated the following at pages 305-306:

"Under the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas and there is no other legislative authority. As a consequence where, as in this case, a statutory instrument made by a Minister is impugned, the Courts have the duty to enquire whether such instrument has been made under powers conferred, and for purposes authorised, by the Oireachtas. If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised."

29. This principle of executive restraint has been applied on many occasions in order to impugn the exercise of excessive jurisdiction by a party such as the respondent. In O'Neill v. Minister for Agriculture [1998] 1 IR 539, the Supreme Court struck down as ultra vires a scheme adopted by the Minister whereby he implemented a policy of exclusivity in the issue of licences to artificial insemination centres. Specifically, the Court held that the scheme was so radical in qualifying some persons while disqualifying others that it constituted an intrusion on the rights of citizens which could not have been within the contemplation of the Oireachtas.

30. It seems to me, however, that there are a number of distinctions which can be drawn between the facts of that particular decision and those which pertain in the present case. Firstly, and as noted above, the policy being maintained by the respondent does not, on any view, have the effect of absolutely preventing the members of the NARGC from engaging in shooting. Many alternative outlets for this pastime are available such as private lands and those managed by Coillte, both of which are far more substantial than the land within the control of the NPWS. This may be contrasted with the situation in O'Neill whereby unsuccessful applicants had no alternative way to carry out the practice in question. Furthermore, the fact that the present case concerns a recreational activity as opposed to the maintenance of a livelihood ought not to be underestimated. Overall, I cannot accept that the same level of over-reaching occurred on the part of the respondent as was performed by the Minister for Agriculture in O'Neill.

31. Secondly, and perhaps more importantly, the Supreme Court authority is distinguishable on the basis of the particular legislative provisions at issue. Section 3(1) of the Livestock (Artificial Insemination) Act 1947, provides that the Minister for Agriculture may make regulations for controlling the practice of artificial insemination of animals to which the Act applies and, in particular, for prohibiting the distribution and sale of semen of animals to which the Act applies except under and in accordance with a licence. It was clear in O'Neill from the generality of this provision that the Oireachtas could not have contemplated such a radical and severe approach to the issue as that which was ultimately adopted by the Minister in that case. The legislation provided for a simple licensing framework while the Minister had engaged in a mass overhaul of the operative method of the entire industry.

32. By way of contrast, the respondent in the present case is charged, by virtue of a number of distinct legislative provisions, with the responsibility of balancing a variety of interests in deciding what practices should be permitted on

NPWS lands. The power to regulate the activities on NPWS lands under section 11(2) of the State Property Act 1952 has been discussed already. Furthermore, section 11(1) of the Wildlife Act 1976, as amended, specifies that it shall be "a function of the [respondent] to secure the conservation of wildlife and the conservation of biological diversity." Section 56(1) of the same Act provides that the lands acquired by the respondent may be used for any of the following purposes: (a) the conservation of wildlife; (b) the management and exploitation of hunting and fishing resources; and (c) other purposes ancillary to these, including the growth of forest crops, the promotion of scientific knowledge and amenity/recreational/educational purposes. It is therefore quite evident that the respondent does have the power to restrict or prohibit a given activity on NPWS lands. It will therefore more often be the exercise of that power, as opposed to the existence of same, which will be subjected to judicial scrutiny.

(c) Unreasonableness

33. In considering the decision of the respondent in the present case, the Court must be careful not to engage in a critique of the substantive merits of the decision or the outcome achieved by it. Such is not my function on an application for judicial review, nor is it something which I am entitled to do. In Humphrey v. Minister for the Environment [2001] 1 IR 263, Murphy J. warned against the unilateral assumption by the Court of such an appellate jurisdiction. He stated:

> *"The court has to be mindful that, in judicial review proceedings it is not a court of appeal. Moreover, no matter how compelling the economic arguments are, the issues being reviewed are fundamentally political decisions made within the parameters of legislative discretion. Judicial review is, of course, not a matter of reviewing the decision itself but rather of the power to decide and of the procedure adopted in making that decision. The court has only a supervisory as opposed to an appellate jurisdiction. It is concerned with the powers conferred by the Oireachtas and the manner by which the Minister has exercised those powers rather than with the merits of the decision itself."*

34. In O'Keeffe v. An Bord Pleanála [1993] 1 IR 40, Finlay C.J. described the parameters of the Court's function on judicial review in a passage which has become one of the touchstones of the Court's jurisdiction to grant this unique and special remedy. He stated at page 71:

"It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene. The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."

35. The question before the Court, therefore, is whether there was any evidence before the respondent upon which he could reasonably conclude that the maintenance of the prohibitory policy was the appropriate course of action. It seems to me to be quite clear, both from the letter of the 29th of January 2004 and from the respondent's general conduct throughout the review process, that his decision was predicated on a number of valid, pressing and substantial considerations. The individual weight afforded to these factors is not something which ought to concern the Court. On this basis, I cannot accept the applicant's submission that the determination of the respondent is void for unreasonableness.

IV. Conclusion

36. In light of the foregoing, I am satisfied that the respondent acted properly in considering whether to maintain the prohibition against shooting on NPWS lands. He did not fetter his discretion, nor did he act ultra vires in deciding to uphold the restrictive policy. Furthermore, the respondent made his determination on foot of a substantial amount of objective evidence and there is no aspect of the decision which would seem so unreasonable as to fly in the face of reason and common sense. I will therefore refuse the relief sought.