Neutral Citation Number [2008] IEHC 194

THE HIGH COURT

2008 No. 434 SP

IN THE MATTER OF THE SOUTH WESTERN FISHERIES REGION NO. 7 OR KERRY DISTRICT CONSERVATION OF SALMON AND SEA TROUT BYE-LAW NO. 839, 2008.

AND IN THE MATTER OF SECTION 9 (AS AMENDED BY SECTION 3 OF THE FISHERIES (AMENDMENT) ACT, 1962) OF THE FISHERIES (CONSOLIDATION) ACT, 1959 AND THE EUROPEAN COMMUNITIES (NATURAL HABITATS) REGULATIONS, 1997

BETWEEN

DENIS TEAHAN, PATRICK TEAHAN, JOHN PATRICK TEAHAN, MICHAEL SCANNELL, JOHN STEPHEN O'CONNOR, WILLIAM CASEY, JOHN O'CONNOR, TEDDY TEAHAN, MONTY O'NEILL, PATRICK O'SULLIVAN AND GERARD O'REILLY

APPELLANTS

AND

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

RESPONDENT

THE SOUTH WESTERN REGIONAL FISHERIES BOARD

NOTICE PARTY

Judgment of Ms. Justice Laffoy delivered on the 18th day of June, 2008.

The Proceedings

1. The appellants, who are draft net fishermen living in the Cromane and Killorglin areas of County Kerry, bring these proceedings by way of statutory appeal under s. 11 of the Fisheries (Consolidation) Act, 1959 (the Act of 1959) seeking to annul the South Western Fisheries No. 7 or Kerry District Conservation of Salmon and Sea Trout Bye-Law No. 839, 2008 (the Bye-law), which was made by the respondent on 13th May, 2008. The notice party is the regional board, established under the Fisheries Act, 1980, for the fisheries region which, broadly speaking, includes County Kerry. The power to grant fishing licences in accordance with s. 67 of the Act of 1959 is now reposed in the notice party. Each of the appellants is the recipient of a salmon fishing licence for a draft net issued by the notice party on 8th May, 2008.

2. The evidence adduced by the appellants in support of their application is contained in affidavits sworn by the ninth named appellant (Mr. O'Neill).

3. Before considering the factual background to the granting of the appellants' licences and the making of the Bye-law, I propose considering other relevant secondary legislation put in place by the respondent governing salmon fishing during the 2008 season and in the future.

Relevant secondary legislation

4. On 20th December, 2007, the respondent made the Wild Salmon and Sea Trout Tagging Scheme Regulations, 2007 (S.I. No. 849 of 2007) (the 2007 Regulations). As the explanatory note states concisely, those Regulations provide for, *inter alia*, the quotas of fish that can be harvested by commercial fishing engines, which include draft nets, from the rivers identified in Schedule 2. Regulation 9 provides for the establishment in relation to each fishery district of a fishery district committee, to consist of the elected members of the regional board representing commercial fishermen, salmon rod anglers and rated occupiers in the district and a nominee of An Bord Iascaigh Mhara. Regulation 10 provides that the CEO of a regional board, on the recommendation of the district committee concerned, shall decide the allocation of the total allowable catch applicable to a river of the fisheries region between the holders of commercial fishing licences and rod and line fishing licences, as he or she sees fit. A maximum bar is placed on the "total allowable catch" by reference to Schedule 2. Regulation 11 empowers the CEO, on the recommendation of the fishery district committee concerned, to decide the quota applicable to the holder of a commercial fishing licence in respect of a river of a fishery district referred to in Schedule 2. As appears in Schedule 2, the Kerry fishery district comprises a number of rivers. Those in issue in these proceedings, which flow into the Castlemaine Harbour, and the total allowable catch in relation to each are the following:-

(1) Caragh River, with a total allowable catch of 1,121 wild salmon or sea trout;

(2) Laune River, with a total allowable catch of 7,265 wild salmon or sea trout;

(3) Maine River, which has zero total allowable catch;

(4) Behy River, which has zero total allowable catch; and

(5) Emlagh River, which has zero total allowable catch.

5. A point which puzzles me is that the respondent, in a letter dated 9th May, 2008, informed the notice party that the prosecution of a fishery in the common estuary of Castlemaine Harbour is not provided for in Schedule 2. This assertion is repeated in the replying affidavit sworn by Frank Sheridan, a Principal Officer in the respondent's department, on 29th May, 2008, in these proceedings. Mr. Sheridan averred that, in accordance with the scientific advice available, no provision whatsoever was made for an allowable catch on the common estuary at Castlemaine for the 2008 season. I will return to this aspect of the matter later.

6. On 9th April, 2008, the respondent made the Control of Fishing for Salmon Order, 2008 (S.I. No. 98 of 2008) (the 2008 Regulations) and notice of its making was published in Iris Oifigiúil on 11th April, 2008. As the explanatory note indicates, that order authorises the issue of commercial fishing licences by regional fisheries boards and sets out the criteria under which those licences may be issued and prescribes the maximum number of commercial licences which may be issued by regional boards. In the case of No. 7 or Kerry District, the maximum number of draft net licences which the notice party is empowered to issue is seventeen (Regulation 5 and Schedule 1).

7. It is clear from the evidence before the Court that there are two distinct areas within the Kerry District in which draft net fishing is carried on: Castlemaine Harbour and a public fishery at the Owenmore River in the Brandon region, which is a distance of some fifty miles from Castlemaine. On the evidence before the Court, the assertion in Mr. Sheridan's affidavit that the licences granted by the notice party to the appellants "are not null and void in effect", having regard to the existence of the draft net fishery in the Owenmore River, carries no weight, because there has been no tradition of draft net fishermen moving between the two distinct areas.

Factual Background
8. On 23rd April, 2008, the notice party wrote to all potential public or private draft net licence holders for the 2008 season, including Mr. O'Neill, a letter the purpose of which was expressed to be to give information so that the addressee might be better equipped at making his decision as to whether to accept the offer of a draft net licence for the 2008 season. It was stated in the letter that the quota recommended by the District Committees had been accepted by the CEO, as provided in the legislation. The quota for Caragh River was 980 and for Laune River was 6, 261, those quotas to be shared between public and private draft net licences on a competitive basis. In relation to Castlemaine Harbour, the letter stated that special conditions would apply. It was stated that fisheries within the Maine River would remain closed for the year as no quota exists. The letter continued:-

> "Fisheries within the mouths of the Laune and the Caragh will be allowed to operate as heretofore. Fisheries outside of the mouths of the Laune, the Maine and the Caragh (and the prohibition zone of a half a mile from each) but inside the boundary seaward of the common estuary, i.e. inside Castlemaine Harbour, will be allowed fish but only for the period to the 16th June, in one designated area and for the period to the end of July in the two other designated areas".

9. Maps were attached to the letter. It was also stated that there would be a requirement for those fishing in Castlemaine Harbour to take scale samples of each fish captured, which would be analysed, to confirm that fish from the Maine were not being encountered. If genetic analysis should demonstrate that a significant interception of Maine fish was occurring, the Castlemaine fishery would close with immediate effect.

10. Mr. O'Neill and the other potential licence holders were subsequently furnished with an information leaflet which set out the systems which would be employed for allocating quota and distributing tags. A staged process was envisaged. The fisherman was required to declare the river catchment quota he intended fishing for. The next step was that the notice party would allocate approximately twenty per cent of the quota for each open river catchment. Where at least fifty per cent of the allocated quota had been caught, the fisherman could apply to have the quota increased and that process would continue until all the quota was exhausted.

11. Mr. O'Neill applied for a licence and, by letter dated 24th April, 2008, he was informed that he would be granted a licence subject to payment of sum of €398.00, made up of licence fee and conservation contribution. Mr. O'Neill duly paid that sum. A draft net licence in his favour was issued on the 8th May, 2008, which was expressed to be valid to the end of season in respect of the Kerry Fishery District only. By letter dated 12th May, 2008, the notice party informed Mr. O'Neill that, following consultation with the Kerry District Fisheries Committee, the preliminary allocation of quota for Laune River catchment (including Castlemaine Harbour) had been set at 2,466 fish and the quota applicable to his licence was 20. The season was to open on 13th May, 2008, and close on 31st July, 2008.

12. It appears from Mr. Sheridan's affidavit that the catalyst for a review by the respondent of the notice party's proposals for the Kerry District for the 2008 season was a Parliamentary Question which was put down on 24th April, 2008 and which queried whether the respondent would allow draft net fishermen of Cromane to fish for any period during this season. The respondent's reply was given on 29th April, 2008, and merely recorded the respective functions of the respondent (the making of the secondary legislation referred to earlier) and the notice party and its CEO, in consultation with the District Committee (to determine allocation of quota).

13. More significantly, Mr. Sheridan averred in his affidavit that the respondent immediately sought advice of the Standing Scientific Committee of the National Salmon Commission (SSC) on the proposals of the notice party. That advice was contained in a letter dated 8th May, 2008 from Dr. N. Ó Maoiléidigh on behalf of SSC. In that letter, it was stated, that, as had been previously advised by the SSC, "mixed stock fisheries pose particular threats to the attainment of CLs in all rivers". The reference to "CLs" is to conservation limits. Dealing specifically with Castlemaine Harbour, the letter continued:-

> "… a draft net fishery operating in Castlemaine Harbour outside of the river estuaries must be considered a mixed stock fishery as it is potentially exploiting fish from 6 individual rivers which flow into the harbour. Specifically, the operation of drafts outside of the estuaries of the rivers shown to be above CLs (i.e. the Caragh and Laune) will still pose a direct threat to the objective of attaining CLs in rivers within the bay which are most likely not meeting CLs currently (i.e. the River Maine, Emlagh and Behy). Therefore, the advice of the SSC remains as before, i.e. that fisheries should only take place in estuaries or rivers on single river stocks which are shown to [be] exceeding CLs (i.e. where there is a surplus over the CL)."

14. The letter went on to state that, while no direct analysis of stock status in the Emlagh and Behy rivers had been carried out, the SSC considered that no exploitation should occur on such stocks until such time as their status is confirmed for the reasons of maintaining biodiversity, as required by European Habitat Directives. It was stated that rod catch statistics from the Maine indicated that the stock is below conservation limits, as did Redd counts taken by the notice party, although it was acknowledged that questions had been raised in relation to each of those analyses. The letter noted that the CEO of the notice party had proposed the operation of the Castlemaine mixed stock draft net fishery and commented that "this is his prerogative". It was also noted that the fishermen were to be required to provide samples, a set of scales, from all fish taken in the fishery for more rigorous analysis. While this was seen as useful, the final comment was that –

> "due to the potentially large number of contributing stocks it will remain difficult in the future to consistently mitigate the risk of adversely impacting on stocks or compromising recovery of the stocks below CL".

15. The letter of 9th May, 2008 from the respondent to the notice party, to which I have already referred, followed receipt of that advice and the message which was sent to the notice party in that letter was that the operation of a fishery in the common estuary of Castlemaine Harbour was not permitted. The reason I find that statement puzzling is that the SSC seems to have considered that it was permitted. It is clear from the response of the 10th May, 2008, from its CEO that the notice party considered that it was permitted, but a query was raised as to whether the respondent "would consider issuing a direction, or some other instrument which would change the legal parameters on the issue". Mr. Sheridan's response on behalf of the respondent, in a letter dated 12th May, 2008, was that "for the avoidance of doubt" it was the respondent's intention to introduce a bye-law, as a salmon conservation measure, which would prohibit fishing for salmon and trout downstream of the defined mouth of the rivers Laune and Caragh.

16. As I have stated, the Bye-law was made on 13th May, 2008. It was expressed to come into operation on the 14th May, 2008. It was published in Iris Oifigiúil on 16th May, 2008. Its substantive provision stipulated as follows:-

> "Notwithstanding anything contained in any other Bye-law it is prohibited for any person to take or to fish for, or attempt to take or fish for, salmon or sea trout with a draft net or rod and line from the waters described in Article 3."

17. The waters described in Article 3 included the areas in respect of which licences had been granted by the notice party to the appellants.

18. Mr. Sheridan has averred that the respondent accepted the advice of the SSC. He was of the view that no fishing should be allowed in the area of Castlemaine Harbour as it constitutes a mixed stock fishery and that, in addition, the respondent considered that the decision to make the Bye-law was consistent with the State's obligations under the Habitats Directive, Government policy on the conservation of fish stocks and scientific evidence available from the SSC.

19. The notice party is prepared to refund the payments made by the appellants in consideration for the awarded licences.

The Act of 1959

20. In making the Bye-law, the respondent invoked s. 9 of the Act of 1959, as amended by s. 3 of the Fisheries (Amendment) Act, 1962 (the Act of 1962), and also s. 33 of the Act of 1962. Section 9 empowers the Minister to make "such bye-laws as are in his opinion expedient for the more effectual government, management, protection and improvement of the fisheries of the State" and goes on to specify matters in respect of which he may make regulations. None of the specific matters has been pointed to as being relied on by the respondent in this case. However, in general, it seems to me that the type of restriction imposed by the Bye-law comes within the ambit of s. 9.

21. The appellants' appeal is brought under s. 11(1)(d) of the Act of 1959, which provides as follows:-

> "any person aggrieved by [any instrument to which this section applies] may, within twenty-eight days after the publication in the *Iris Oifigiúil*, appeal against such instrument to the High Court, and the following provisions shall apply in relation to any such appeal—
>
> (i) the appeal may be heard by one or more judges of the High Court as may be convenient,
>
> (ii) the High Court may on the appeal confirm or annul such instrument, but if such instrument is annulled such annulment shall be without prejudice to the validity of anything done under or in pursuance of such instrument before such annulment,
>
> (iii) the decision of the High Court on the appeal shall be final and conclusive,
>
> (iv) the order made by the High Court on such appeal shall be published in like manner as such instrument is required by paragraph (b) of this subsection to be published and shall be deposited in like manner as such instrument is required by paragraph (c) of this subsection to be deposited."

22. Sub-section (2) provides that this section applies to a variety of instruments, including any bye-law made under the Act.

23. A provision of the 1959 Act on which counsel for respondent laid emphasis, s. 67(14), provides as follows:-

> "Every ordinary fishing licence (other than a salmon rod ordinary licence) shall operate to authorise the use, during the period specified therein and in the fishery district specified therein, of a fishing engine of the kind specified therein, but subject to the provisions of this Act and any instrument made thereunder."

24. The notice party accepted that by virtue of s. 67(14) an instrument made by the respondent under the Act of 1959 could override a fishing licence granted by it.

The appellants' case

25. The appellants adopted a narrow approach on the appeal. They attacked the Bye-law on the basis that it was made by the respondent without due regard to fair procedures and, accordingly, should be annulled. The appellants' case was predicated on two basic propositions. The first was that the right to fish under a licence constituted part of the means of earning a livelihood in the case of each of the appellants. The second was that, in making the Bye-law, the respondent effectively forfeited, or nullified, or undid the licence which had been granted to each appellant by virtue of which he had an entitlement to earn part of his livelihood. It was not the appellants' case that they had an absolute right to fish but their contention was that, at a minimum, they were entitled to fair procedures and this involved that they be notified in advance of the making of the Bye-law, that they be given an opportunity to make representations to the respondent, and that the respondent give reasons for making the Bye-law. In support of the contention that the appellants were entitled to be notified and have their views taken into account by the respondent, it was submitted that the Bye-law was not of general application but was targeted at the appellants. The decision to make it, it was contended, was a focused decision the purpose of which was to reverse the effect the decision of the notice party to grant the licences.

26. Counsel for the appellants pointed to the 2007 Regulations as being a statutory acknowledgement of the importance of the views of the local fishing interests "on the ground", the rod and line anglers and the commercial fishermen, being taken into account and expressed astonishment that the respondent, in making the Bye-law, acted without involving their representatives and seeking their views.

27. The respondent should have given reasons for making the Bye-law, it was submitted, but did not do so until Mr. Sheridan's affidavit, which was sworn on 29th May, 2008, was filed in these proceedings. The respondent is not entitled to have the Bye-law confirmed, it was argued, because he did not act lawfully in making it.

28. Counsel for the appellants relied on a number of authorities to illustrate the entitlement of the appellants to fair procedures and the failure of the respondent to act in accordance with fair procedures, namely;-

- *International Fishing Vessels Limited v. Minister for the Marine* [1991] 2 I.R. 93.
- *Murphy v. Minister for Marine & Ors*. [1997] 2 I.L.R.M. 523.
- *Galway-Mayo Institute of Technology v. Employment Appeals Tribunal* [2007] I.E.H.C. 210.
- *Tiernan v. North Western Regional Fisheries Board* [1997] 2 I.R. 104.
- *Guiry & Anor. v. Minister for the Marine & Ors*. (Unreported, High Court, 24th July, 1997).

29. Counsel for the appellants submitted that the existence of the statutory appeal being pursued in this case is no answer to the appellants' contention that their entitlement to fair procedures has been infringed. They were entitled to fair procedures in the decision making process which resulted in the Bye-law and they should not be constrained to bring an appeal after the event, particularly, given that their resources are disproportionate to the resources of the respondent.

30. That it is open to the Court to annul the bye-law for breach of fair procedures is the kernel of the appellants' case. If it is annulled, what happens next is a matter for the respondent, it was submitted by counsel for the appellants. It would be open to him to start again, it was suggested, but he would have to hear what the appellants have to say. The Court does not have to assess the merits of the respondents' decision, it was submitted.

The respondent's response

31. In answering the narrow case made on behalf of the appellants, counsel for the respondent emphasised that the proceedings here are by way of statutory appeal under s. 11 and not by way of judicial review. He submitted that what arises on the statutory appeal is an assessment of the merits of the decision and nothing else. The Court's function is to determine whether the Bye-law is expedient for the more effectual government, management, protection and improvement of the fisheries of the State.

32. It was submitted that the authorities relied on by counsel for the appellants are pertinent to the quashing of a decision on judicial review grounds. The applicants, it was submitted, are seeking a judicial review remedy without saying why they should be afforded such a remedy, as they would have to on a judicial review application. It was suggested that the appellants had not indicated what sort of material they would want to put before the respondent. I do not accept that that contention is correct. In his replying affidavit sworn on 30th May, 2008, Mr. O'Neill, albeit in a general way, referred to matters on which the appellants would have made representations to the respondent had they been given the opportunity to do so. One matter was that reliable records of fish numbers have already been compiled by the notice party. Another was that they take issue with the figures obtained from the rod anglers, given the conflict of interest between the rod anglers and the draft net fishermen. Mr. O'Neill also contended that both the notice party, which granted the licences, and the appellants have a greater knowledge of local conditions than the respondent.

33. In essence, the answer made on behalf of the respondent to the appellants' case that the Court could annul the Bye-law without considering it on the merits, was that, in order to make the case that the respondent's decision was unlawful, rather than wrong, the appellants were obliged to go by way of judicial review and not by way of the statutory appeal process.

34. Counsel for the respondent also pointed to certain procedural distinctions between the appeal provided for in s. 11(1)(d) of the Act of 1959 and conventional judicial review. First, there is an appeal to the Supreme Court from a decision made in a judicial review application, whereas there is no appeal from a decision of this Court under s. 11(1)(d). Secondly, if the Bye-law is annulled under s. 11, such annulment is without prejudice to the validity of anything done under or in pursuance of it before such annulment. Thirdly, there is no provision in s. 11 for remittal of the matter back to the respondent.

35. As I have stated, the respondent also relied on s. 67(14) of the Act of 1959 and made the point that the licences granted to the appellants were always subject to any secondary legislation which the respondent might bring into operation by virtue of his powers under the Act of 1959.

36. In support of his arguments on the scope of s. 11, counsel for the respondent relied primarily on the decision of this Court, Costello J., in *Dunne v. Minister for Fisheries* [1984] I.R. 230. He also relied on the judgment of this Court (McCracken J.) in *Maxwell\Hughes v. Minister for the Marine and Natural Resources* (Unreported, High Court, 13th December, 2000).

Conclusions on the scope of Section 11

37. Whether it is open to a person to challenge the validity of a bye-law on the ground that it was made in breach of the person's right to fair procedures on an appeal under s. 11, without going into the merits of the decision, is a question of construction of s. 11.

38. The scope of the Court's appellate jurisdiction under s. 11 was considered by Costello J. in *Dunne v. Minister for Fisheries*. Having referred to a statement in Wade's "Administrative Law" (5th Ed., p. 34), to the effect that, when hearing an appeal, the Court is concerned with the merits of the decision under appeal, whereas, when subjecting some administrative act or order to judicial review, the Court is concerned with its legality, so that on an appeal the question is "right or wrong?", whereas on review the question is "lawful or unlawful?", Costello J. continued (at p. 237):-

> "However, this does not mean that in every case the Court's jurisdiction on a statutory appeal is the same; in every case the statute in question must be construed. In construing a statute it does not seem to me to be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the Court would have powers in addition to those already enjoyed at common law."

39. The appellant in the *Dunne* case was arguing that the scope of s. 11 is sufficiently wide to empower the Court to substitute its own opinion for that of the Minister for Fisheries as to whether a bye-law made under s. 9 was expedient for the more effectual government, management, protection and improvement of the fisheries of the State, if, on the evidence before it, the Court considered that the bye-law was wrong on the merits and not merely wrong in law. In concluding that s. 11 provided for an appeal on the merits, Costello J. stated (at p. 240):-

> "First, it seems to me that the Oireachtas must have intended that the Court's jurisdiction on an appeal should be wider than its powers when exercising its inherent jurisdiction at common law. Secondly, the right of appeal is not expressly limited to an appeal on a point of law which, for example, is the limitation imposed on an appeal under s. 45 of the Social Welfare Act, 1952. Thirdly, the Court's power to confirm or annul an instrument to which s. 11 of the Act of 1959 applies can arise, as I have already pointed out, in a number of different circumstances; in some of them the party aggrieved may have had an opportunity to present a case to the Minister before the impugned instrument was made, and in some of them he may not have had that opportunity. To be effective, therefore, the Court may well have to allow an appellant to give evidence and then decide the matter on material which was not available to the Minister. This would indicate that, in cases where new evidence is given and also in cases where the appeal is decided on the same material as was before the Minister, the Court is empowered to annul a bye-law or other instrument if the Court reaches a decision on the merits which is different to that of the Minister."

40. Most of that last passage was quoted by McCracken J. in *Maxwell\Hughes v. Minister for the Marine and Natural Resources.* Having referred to the fact that in *Maxwell\Hughes*, the applicants had not had an opportunity to put their case before the Minister, McCracken J. continued:-

> "Indeed, one of the grounds of their appeal is that, not only was an enquiry not held, but they were not consulted. The holding of an enquiry is not a mandatory provision, but it is undoubtedly correct that no consultations appear to have been held with the industry. The plaintiffs seek to make the case that the failure to consult was unfair and failed to take into account their constitutional right to earn a livelihood. This might be a reasonable argument if there were no right of appeal to the Court, but in the circumstances of this appeal it appears to me to have no validity in itself. However, the fact that there was not an enquiry, and that no consultations were held, leaves the Court at large in considering the validity of the bye-law, and the Applicants are certainly entitled to make any relevant submissions to the Court which they could have made to the Minister had they been consulted. It is quite clear from the judgment in the Dunne case that the Court is conducting its own hearing, and is not in any way restricted to matters which may have been considered by the Minister in deciding to make the bye-law."

41. In that case, the applicants were seeking the annulment of a bye-law which restricted the number of eel fishing licences for a long line which might be issued in each fishery district in any year. McCracken J. assessed the affidavit evidence including studies and research papers conducted and written by experts in the field, which had been taken into account by the Minister before making the bye-law, he concluded, on the basis of the evidence, that there was good reason to make the bye-law and he dismissed the applications.

42. Turning to the proper construction of s. 11(1)(d), I can see nothing in it which would justify confining its application to a dispute as to the merits of the decision, nor do I see anything in either the *Dunne* case or the Maxwell\Hughes case which indicates that that is its proper construction. I agree with counsel for the appellants that the language used in the provision is the language of a public law challenge: the reference to "any person aggrieved"; the reference to the person being aggrieved by the coming into operation of an "instrument" such as a bye-law which constitutes secondary legislation; and, more significantly, that one of the remedies that the Court can afford is to annul the instrument, which is similar to quashing it when an order of *certiorari* is made. The distinctions between the type of appeal provided for in s. 11(1)(d) and the judicial review jurisdiction of this Court adverted to by counsel for the respondent are not determinative one way or the other. They merely illustrate that the Oireachtas decided that a form of procedure should be available which, on the clear wording of the provision, has its own distinctive features.

43. There is nothing in the language of the provision which suggests that, if the aggrieved person's complaint is that the respondent infringed his legal rights, but he does not want to incur the additional cost of adducing evidence to challenge the decision on the merits, he cannot avail of the statutory appeal procedure but must go the judicial review route. There is no need to resort to a purposive approach to the construction of the provision, which is neither obscure nor ambiguous, nor does a literal interpretation yield an absurd result or a failure to reflect the plain intention of the Oireachtas. On the contrary, it is absolutely clear on a plain reading of s. 11(1)(d) that it was the intention of the Oireachtas to establish a special procedure whereby all complaints of whatever nature in relation to instruments to which the section applies may be adjudicated on by the High Court with a view to either confirming or annulling the instrument.

44. Accordingly, in my view, it is open to the appellants in these proceedings to challenge the validity of the Bye-law on the grounds that it infringed the appellants' right to fair procedures.

Validity of Bye-law

45. As I stated, the respondent has not pointed to any of the specific matters stipulated in s. 9(1) of the Act of 1959 in respect of which the respondent may make bye-laws as being relied on in this case. It is clear from the judgment of McCracken J. in *Maxwell\Hughes* that there had been confusion in that case as to whether the bye-law in issue had been made under paragraph (gg) of s. 9(1)(inserted by s. 3 of the Act of 1962) or under the general power conferred by s. 9. In the event, the Court accepted that it was made under the general power. Para. (gg) relates to:-

> "the imposition of prohibitions or restrictions of an emergency character on the taking by any specified engine or engines of the several species of fish or of any of those species for a specified period not exceeding one year in duration where, in the opinion of the Minister, such prohibitions or restrictions are necessary."

46. The bye-law challenged in *Maxwell\Hughes* was not an emergency measure and the proceedings took a leisurely course through the Court, in that the bye-law was made in 1998, the proceedings were commenced in early 1999, or so the record number would suggest, but they were not resolved until the end of 2000. All of that may have had some bearing on the conclusion of McCracken J. that, in the circumstances of that case, the existence of an appeal negatived the failure to consult the applicants before the bye-law was made. The circumstances of this case are radically different in that the appellants were already licensed and ready to commence fishing when the season opened on 13th May, 2008, and immediately sought redress in this Court to preserve what they understood was their entitlement to fish during the 2008 season.

47. In this case, counsel for the respondent, referring to the respondent's power under s. 9(1) to make such bye-laws as are in his opinion "expedient", submitted that expediency enables the respondent to introduce an effective measure at short notice. The *ex post facto* remedy afforded by the Act of 1959, an appeal under s. 11, is part and parcel of the expediency, it was submitted, in that holding a public inquiry could result in delay and could be to the detriment of the fisheries of the State. Notwithstanding that argument, it would appear that the respondent did not invoke paragraph (gg) in making the bye-law because it prohibited fishing not only with engines in the form of draft nets but also rod and line fishing.

48. A major difficulty which I have encountered in determining this matter flows from the difficulties I have already alluded to in understanding the application of the 2007 Regulations and the 2008 Regulations to Caragh and Laune rivers. On foot of the 2007 Regulations and the 2008 Regulations, which were put in place by the respondent, the public body charged by the Act of 1959 with issuing draft net licences, the notice party, on the recommendation of the District Committee, issued licences and allocated quota to the appellants. Whether it was empowered to do so has not been specifically addressed in counsels' submissions and has been left up in the air. The respondent's initial stance (in the letter of 9th May, 2008) was that it was not. However, the respondent, without standing over that approach, made the Bye-law, apparently for the avoidance of doubt (*per* the letter of 12th May, 2008).

49. The only reasonable inference which can be drawn from the evidence before the Court referred to earlier is that the notice party was not *ad idem* with the respondent on the crucial question of the power to grant the licences. While the notice party made it clear in its letter of 14th May, 2008 to the respondent that it would implement the law as it then stood, following the making of the Bye-law, in a letter of even date to the licensees, the notice party expressed "its own disappointment" that in the new circumstances it was not in a position to apply the terms of the licences.

50. On the basis of the evidence before the Court and the submissions made by the parties, it is not possible, and it would not be appropriate, to express any definitive view on whether the notice party had power to grant, and the appellants were granted, valid

licences by the notice party on 8th May, 2008. However, I am satisfied that the issue raised by the appellants can be determined without doing so.

51. If they were granted valid licences, then, on the authorities cited by counsel for the appellants, it seems to me that, as a matter of basic fairness, the respondent should have informed both the notice party and the appellants of his intention to make the Bye-law and should have given them an opportunity to make submissions to him, before making the Bye-law, as to whether the making of such bye-law was expedient for the more effectual government, management, protection and improvement of the salmon and sea trout fishery in the Kerry District.

52. Even if it were to transpire, following further submissions and, perhaps further evidence, that the appellants were not granted valid licences by the notice party on 8th May, 2008, it seems to me that as the position stood between all of the parties as of 13th May, 2008, given that it was represented by the notice party to the appellants that they were getting valid licences, as a matter of basic fairness, the appellants should have been given advance notice of the intention to make the Bye-law and should have been given an opportunity to make representations in respect of it.

53. Accordingly, whether the appellants obtained the benefit of valid licences or not, their right to fair procedures has been violated and the Bye-law should be annulled.

54. Because of the very unusual circumstances of this case, in my view, the fact that an appeal, including an appeal on the merits, is available to the appellants under s. 11 of the Act of 1959, has not rendered the respondent immune from a charge of failure to comply with fair procedures in the process leading to the making of the purported Bye-law which results in invalidity. In the unusual circumstances which prevail, it could not be the case that the appellants should have to resort to a costly High Court procedure to protect either their rights, or what was represented by the notice party as being their rights, against the actions of the respondent after the event. In short, a *post facto* remedy of the type afforded by s. 11(1)(d) does not relieve the respondent of the obligation to observe fair procedures before making a bye-law in every circumstance.

55. Section 67(14) does not avail the respondent if the bye-law is not a valid bye-law, which I believe to be the case.

The Merits
56. As it is not necessary to consider the case made by the respondent on the merits as a basis for either confirming or annulling the bye-law, I express no view on it save to make one comment. In Mr. Sheridan's affidavit a number of expert reports have been exhibited including a draft of a report of the SSC entitled "The Status of Irish Salmon Stocks in 2007 and Precautionary Catch Advice for 2008". The draft is dated 29th May, 2008. As such, it cannot have been taken into account by the respondent in the decision making process which led to the Bye-law.

Order
57. There will be an Order annulling the Bye-law.