

THE HIGH COURT

[2009 No. 705 S.P.]

IN THE MATTER OF O. 93 OF THE RULES OF THE SUPERIOR COURTS 1986 AND

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 11(1) (d) OF THE FISHERIES (CONSOLIDATION) ACT 1959

BETWEEN

JAMES McARDLE AND PATRICK SLEVIN (SENIOR)

APPLICANTS

AND

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 6th day of March 2012

In the Special Summons in this case, issued on the 12th June, 2009, pursuant to the provisions of s. 11(1)(d) of the Fisheries (Consolidation) Act 1959, the applicants, - though the second applicant took no part in the proceedings, - seek an order annulling the Conservation of Eel Fishing Bye-Law No. CS 303/2009 and, the Conservation of Eel Fishing (Prohibition on Issue of Licences) Bye-Law No. 858/2009, published and promulgated on the 19th May, 2009.

By s. 9(1) of the Fisheries (Consolidation) Act 1959, (as amended) the respondent Minister, with responsibility for fisheries in the State, may, subject to the provisions of the Act, 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, without prejudice to the generality of this power, the subsection provides that the respondent may make Bye-Laws in respect of all or any of 8 specified matters numbered (a) to (h). By s. 3(b) of the Fisheries (Amendment) Act 1962, an additional paragraph (gg) was inserted into subs. 9(1) of the Act of 1959. This additional paragraph provides as follows:-

"(gg) 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."

Bye-Law No. CS 303/2009, which came into operation on the 16th June, 2009, and, which will cease to have effect on the 30th June, 2012, provides that:-

"2(1) Notwithstanding anything contained in any Bye-Law fixing the annual close season, it is prohibited for a person-

(a) to take, or attempt to take, or to fish for or to attempt to fish for, or to aid or assist in the taking or fishing for, eel, [species *Anguilla anguilla*] or

(b) to be in possession of or sell or offer for sale eel caught by any means, in any fishery district."

Bye-Law No. 858/2009, which came into operation also on the 16th June, 2009, but in respect of which no termination date is fixed, provides that:

"Notwithstanding anything contained in any Bye-Law a Regional Board shall not issue any licence for fishing for eels of the species *Anguilla anguilla* by any fishing method in any fishery district."

Each of these Bye-Laws is stated to be made, in exercise of power conferred on the Minister by s. 9 (as amended) of the Fisheries (Consolidation) Act 1959, s. 33 (as amended) of the Fisheries (Amendment) Act 1962, SI No. 30 of 1977, as adapted by SI No. 706/2007 and for the purpose of giving full effect to the Eel Management Plan made and implemented by the State in compliance with the provisions of Council Regulation (EC) No. 1100/2007 of the 18th September, 2007.

Section 8(1) of the Fisheries (Consolidation) Act 1959, provides that the Minister may from time to time cause an inquiry to be held in any fishery district in relation to the fisheries therein or any of them and, the best means to be adopted for the regulation, improvement or protection thereof and, for this purpose may appoint one of his officers to hold such an inquiry. Section 33(a) of the Fisheries (Amendment) Act 1962, enables the Minister to make a Bye-Law under the Act of 1959, without previously having held an inquiry into the feasibility of making that Bye-Law.

The preamble to Council Regulation (EC) No. 1100/2007, of the 18th September, 2007, which came into force on the 25th September, 2007, recites that the International Council for the Exploration of the Sea (ICES) has recommended that a recovery plan be developed for the whole stock of European eel, [*Anguilla anguilla*] as a matter of urgency and that exploitation and other human activities affecting the fishery or the stock be reduced as much as possible. Member States of the European Union should as a matter of priority draw up Eel Management Plans adjusted to regional and local conditions and, these plans must receive the approval of the Commission of the European Union following a technological and scientific evaluation by the Scientific Technical and Economic Committee for Fisheries (STEF). The eel recovery measures adopted, should be both effective and equitable Member States must identify the measures they intend to take and, the areas to be covered and, this information should be communicated widely and the effectiveness of the measures evaluated.

Article 2(3) of Council Regulation (EC) No. 1100/2007 of the 18th September, 2007, requires each Member State to prepare an Eel Management Plan for each eel river basin in the national territory or, if appropriate justification is provided, for an existing regional administrative unit or, for the whole of the national territory as one eel river basin. Article 2(4) identifies the purpose of such plan as to achieve a reduction, in the long term, of the impact of anthropogenic influences on European eel stock so as to permit, with a high degree of probability, the escapement to the sea of at least 40% of the silver eel biomass as would on a best estimate escape in the absence of such influences. Article 2(9) requires that each Eel Management Plan contain a timetable for the attainment of this target and, specify the measures that will be applied in the first year of the plan. Article 2(10) requires each Member State in its Eel Management Plan to implement where necessary, appropriate measures as soon as possible to reduce eel mortality from causes outside the fishery including hydroelectric turbines, pumps or predators. Article 2(8) provides that an Eel Management Plan may contain, but is not limited to measures reducing commercial fishing activity, restricting recreational fishing, restocking measures and five other additional measures specified in the subsection.

Article 4 of the Regulation requires each Member State to submit an Eel Management Plan to the Commission not later than the 31st December, 2008, or, in default, to implement from the 1st January, 2009, a minimum 50% reduction in eel catches or fishing effort relative to 2004-2006 average, by shortening the eel fishing season or by other means. Article 5 provides for the approval by the Commission of the National Eel Management Plan of each Member State. It further provides for a situation where following a technical and scientific evaluation, the Commission declines to approve the Eel Management Plan submitted by a Member State.

Article 9(1) of the Regulation requires each Member State to make a report to the Commission initially every third year, with the first such report to be presented on the 30th June, 2012, outlining monitoring, effectiveness and outcome and, in particular, providing best estimates of a number of matters including the level of fishing effort that catches eel each year and, the reduction in that effort effected in accordance with Article 4(2) or, Article 5(4), (a similar provision to Article 4(2) but to be implemented within three months of a decision by the Commission not to approve a submitted Eel Management Plan). The frequency of this reporting shall decrease to once every sixth year after the first three tri-annual reports have been submitted.

I find that the following facts were proved or admitted at the hearing of this application.

Since 2002, contacts have taken place between eel fishermen and their representatives and experts advising the respondent and his predecessors in Office, including contacts between Dr. Russell Poole and Mr. Seamus Mulvihill, Chairman of the Shannon Eel Fishermen's Association of which the applicant is a member. The reason for and the topic of these contacts was and is the serious depletion in the stock of European Eel species, *Anguilla anguilla*, throughout this and other Member States of the European Union and the options available to seek to redress this grave situation.

In 2006, a Joint Working Group was established during the negotiations which led to the adopting of Council Regulation (EC) No. 1100/2007. This group consists of representatives of the respondent's Department, the Central Fisheries Board, Regional Fisheries Boards, the Marine Institute, Bord Iascaigh Mhara, the Electricity Supply Board and University College Galway. A detailed investigation of the status of European eel stocks in this State was carried out principally by the Marine Institute. In March 2008, a Fact Sheet was distributed to each of the Regional Fisheries Boards in the State indicating that an urgent situation had arisen regarding European eel stocks which were found to be outside safe biological limits and, identifying an urgent need to prepare a National Eel Management Plan and to have this submitted to the Commission of the European Union by the 31st December, 2008.

In May 2008, a Bye-Law was brought into force by the respondent restricting the duration of the eel fishing season in that year.

On the 1st August, 2008, notice was given in the news media and on the website of the respondent's Department of the preparation of a Draft Eel Management Plan for each river district in the State. The notices advised that a Public Consultation Document and a copy of this Draft National Eel Management Plan and a Draft Eel Management Plans for each river basin district were available on the Department's website. It was not contended by the applicant that he was unable to obtain access to these documents. A closing date for the receipt of submissions respecting this Draft Eel Management Plan was declared to be the 15th September, 2008. The applicant accepts that in the events which occurred, this closing date for the receipt of submissions was not rigidly enforced.

The Joint Working Group had been advised that according to the scientific model used to assess the river basins in the State, silver eel biomass escapement in the Shannon River Basin District was only 8% by comparison with the 40%, assuming no anthropogenic influences, as required by Article 2(4) of Council Regulation (EC) 1100/2007. However, it was accepted in the Public Consultation Document that there were deficiencies in the data and information available and that the methodologies employed in the preparation of the Draft Eel Management Plan were at a preliminary stage. The Public Consultation Document indicated that the Minister would therefore adopt a "Precautionary Approach", in considering the various management options put before him and, eel fishing might be severely curtailed or even ended. This "Precautionary Approach" which is embodied in Article 191.2 of the Treaty on the Functioning of the European Union, requires that where there are threats of serious or irrevocable damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

On the 15th August, 2008, Mr. Eamon Cusack, Chief Executive Officer of the Shannon Regional Fisheries Board, by a letter of that date, invited the applicant and other eel fishermen and interested parties to a meeting to be held at Athlone on the 28th August, 2008. The purpose of the meeting was to discuss the Draft Eel Management Plan and to hear the views of eel fishermen and other persons who might be affected by the plan. A copy of the Public Consultation Document on the Draft National Eel Management Plan was enclosed with this letter.

Somewhat unfortunately, but entirely unintentionally, the date fixed for this meeting coincided with the last "sales day" for brown eel in 2008. The Shannon Regional Fisheries Board was only advised of the eel collection day a few days before the date set for this meeting and, the Electricity Supply Board was unable to change the "collection day". There is an issue between the parties as to whether or not this meeting was well attended by eel fishermen.

The applicant did attend the meeting as did Mr. Brendan Connell, another eel fisherman in the Shannon Regional Fisheries Board area. Mr. Michael Flanagan, the elected representative of the was not present at the meeting, but Mr. Seamus Mulvihill, chairman of the Shannon Eel Fishermen's Association was present at the meeting. A presentation was made at the meeting by Lorraine O'Donnell of the Shannon Regional Fisheries Board as to how the Draft Eel Management Plan would relate to and impact on the Shannon River Basin District. The meeting was addressed by Dr. Russell Poole, senior biologist and section manager of the Marine Institute, Newport, Co. Mayo. The applicant accepts that Dr. Poole spoke for a very considerable time explaining the data, research, scientific models and, other material underpinning the Draft Eel Management Plan and, the possible options available to address the problem. At this

stage the Draft Eel Management Plan did not include what subsequently became chapter 8 of the Plan dealing with management measures. The applicant does not contend that he did not generally understand what was being said at the meeting. However, Dr. Poole accepts that this material was difficult, especially for a non scientist, to understand and that consequently he had spent an additional two hours in an unscheduled informal discussion with the eel fishermen present explaining matters and responding to their queries and concerns. The applicant alleges that Dr. Poole and Mr. Eamon Cusack told the meeting that it had already been decided to close the fishery. Both these gentlemen assert that each had stated that this was just one of several options being considered at the time by the Joint Working Group.

On or before the 11th September, 2008, Mr. Mulvihill as Chairman of the Shannon Eel Fishermen's Association lodged a succinct but most comprehensive submission on behalf of that Association with the Joint Working Group. The applicant accepts that he did not make a separate submission. Sixteen submissions were received by the Joint Working Group. In September 2008, three eel fishermen were invited to join the Joint Working Group and Mr. Seamus Mulvihill, Mr. Pat Diggins and Mr. Anthony Wilde were co-opted on to the Group. On the 20th October, 2008, Dr. Russell Poole gave a scientific briefing on the Draft National Eel Management Plan to Mr. Mulvihill, Mr. Diggins and Mr. Wilde and other representatives of eel fishermen countrywide. The co-opted representatives of the eel fishermen attended and participated at all meetings of the Joint Working Group during October and November 2008.

In December, 2008, the Joint Working Group submitted a Draft Eel Management Plan to the respondent. This Draft Eel Management Plan now included chapter 8, specifying the "management measures" to be adopted. It provided at measure No. 1 (A) that there be an immediate complete cessation of all eel fishing in the State and that the market for eel in the State be closed. It is accepted that the representatives of the eel fishermen on the Joint Working Group were totally opposed to this recommendation. The Minister for State with responsibility for Eel Fisheries in the State met with representatives of the eel fishermen and was informed of their views as to the management measures contained in the Draft Eel Management Plan before this plan was submitted to the Commission of the European Union for approval.

A Critique of the total ban on eel fishing in Ireland proposed in the National Report for Ireland on Eel Stock Recovery Plan was published by Dr. Brian Knights. The date of this publication is a matter of dispute, but the Report the subject of the Critique was not published until the 1st August, 2008.

On the 11th January, 2008, the National Eel Management Plan was submitted by this Member State to the Commission of the European Union as required by the provisions of Article 2 of Council Regulation (EC) 1100/2007 of the 18th September, 2007. This plan was approved by the Commission on the 30th July, 2009.

The parties in comprehensive written and oral submissions make the following arguments.

The applicant claims that s. 9(1) of the Fisheries (Consolidation) Act 1959, (as amended) relied upon by the respondent, does not empower him to impose a total ban on eel fishing in the Shannon Region Eel Fishery which is permanent or even indefinite in its duration. This was particularly so having regard to the provisions of s. 67 of that Act. The applicant claims further or in the alternative, that fair procedures were not observed by the respondent in arriving at his decision to close the fishery. The applicant submits that the cumulative effect of Bye-Law 858/2009 and Bye-Law CS/2009 is to permanently close the fishery and not as was authorised by the legislature by inserting para. (gg) into subs. 9(1) of the Act of 1959, to close it for not more than one year as an emergency measure.

The applicant submits that fair procedures required that before the respondent arrived at a decision regarding the best means to be adopted for the more effectual government, management, protection and improvement of the fishery so as to comply with the requirements of Council Regulation (EC) 1100/2007, he should have held a public inquiry invoking the powers conferred on him by s. 8 of the Fisheries (Consolidation) Act 1959. While accepting that a very serious situation had arisen with regard to the stock of European eel, the applicant submits that the respondent could have imposed an emergency prohibition on eel fishing in the State for one year to enable such a public inquiry to take place without further jeopardising this European eel stock. The applicant claims that the proper exercise of his statutory powers rendered it incumbent on the respondent to undertake a proper and effective consultative process involving him and other eel fishermen before deciding to close the Shannon Region Eel Fishery. This was necessary having regard to the manifest impact such a ban would have on the incomes, - often the sole incomes, - of eel fishermen, on the continued survival of generations old eel fishing skills and on the future of other enterprises associated with eel fishing here. The applicant contends that the holding of a public inquiry was necessary in order to properly determine the cause or causes and the extent of the decline in the European eel stock and to arrive at an equitable and effective solution to the problem particularly in light of the very many factors which affected the stock of European eel, such as modern agricultural practices, hydroelectric generation, industrial weirs, pumping stations, diminution and degradation of suitable habitats, loss of migration corridors, the every increasing use of fertilisers and pesticides, various forms of agricultural industrial and urban pollution, predation and, extra territorial hazards.

The applicant claims that the decision of the respondent to close the fishery was altogether unreasonable and disproportionate and was not objectively justifiable having regard to the paucity and unreliability of the data upon which the recommendation was based. An equitable solution would have been to reduce commercial fishing activity in accordance with Article 4 of Council Regulation (EC) 1100/2007, by shortening the season or by other means to enable a properly informed decision to be made based on more comprehensive and reliable data. The employment of the "precautionary approach" even if justified, - which it was not, could not be employed in such a manner as to override the express requirement of the Regulation that the recovery measures adopted should not only be effective, but also equitable. The decision of the respondent to close the fishery and deprive him and other eel fishermen of their livelihood was not equitable and did not carry a high degree of probability of achieving the target escapement of silver eel to the sea.

It was submitted on behalf of the respondent that the Council of the European Union accepted by the adoption of Council Regulation (EC) No. 11000/2007 of the 18th September, 2007, that the situation regarding the stock of European eel within the Union were at a critical stage. Member States were therefore only allowed until the 31st December, 2008, to formulate and submit a National Eel Management Plan to the Commission for approval. There was no obligation on the respondent in s. 9 of the Act of 1959 (as amended) to hold any public inquiry before making a ByeLaw pursuant to that section. Section 67 of the Act of 1959, created no proprietary rights and, fishing licences issued pursuant to that section were subject to the right of the respondent to make provision for the lawful regulation of eel fishing in the State. The increasing problem with regard to the stock of European eel in the State and in the Shannon River Basin had been the subject of discussion between Dr. Poole and other experts advising the respondent and his predecessors and eel fishermen and their representatives since 2002. Eel fishermen were further warned of the escalating seriousness of the problem by the Fact Sheet distributed to the various Regional Fisheries Boards in March, 2008 and by the Bye-Law of May

2008, which limited the eel fishing season in that year. The applicant and other eel fishermen had ample opportunity to obtain their own scientific and legal advice and to make whatever submissions and representations they thought fit to the Minister and to the Joint Working Group from 2006 onwards. There was no legal obligation on the respondent to advise the applicant and other eel fishermen or their representatives or Associations to seek such scientific or legal advice or to give financial or other assistance to them in that regard. From the 1st August, 2008, onwards the Draft National Eel Management Plan and a Public Consultation Document were available to all on the website of the respondent's Department and notice to this effect was published in the national news media. On the 15th August, 2008, a copy of this Public Consultation Document was sent to the applicant.

The applicant and such other eel fishermen in the Shannon Regional Fisheries Board area and their elected representatives as chose to attend, were given a very full briefing on the contents and modelling of the Draft National Eel Management Plan at the meeting at Athlone on the 28th August, 2008. Sixteen submissions were received from eel fishermen and other concerned persons. The applicant did not make a submission. Mr Mulvihill, as Chairman of the Shannon Eel Fishermen's Association made a succinct and focused submission on behalf of all the members of that Association including the applicant. All these submissions were carefully considered in drafting chapter 8 of the Eel Management Plan. Mr Mulvihill and two other eel fishermen from the Shannon Regional Fisheries Board area were co-opted onto the Joint Working Group before the plan and in particular chapter 8 of the plan was finalised. They therefore became part of the body charged with drafting the National Eel Management Plan and were entitled to and did contribute fully to the deliberations of the Joint Working Group. They were therefore in the best possible position to express and advance their own and their members and colleagues opinions and concerns regarding the proposals for a solution to the European eel stock crisis to be included in the National Eel Management Plan to be submitted to the Commission of the European Union. In these circumstances the applicant was not deprived of fair procedures and he and other eel fishermen were afforded ample and sufficient opportunities to put forward all their concerns and observations with regard to the terms of the National Eel Management Plan and, in particular, the management recommendations to be contained in it. There were no special factors arising which would render the holding of a public inquiry necessary in the wider interests of justice and fairness.

It was further submitted on behalf of the respondent that the effect of the Bye-Law sought to be impugned by the applicant was not to close down the fishery either indefinitely or permanently as alleged by the applicant. It was submitted on behalf of the respondent that it was implicit in these Bye-Laws that the ban on eel fishing must be and would be constantly reviewed in line with the provisions of Article 9 of Council Regulation (EC) No. 1100/2007 of the 18th September, 2007 and in this regard the situation would be reviewed no later than the 30th June, 2012. What happened then would depend upon the measures adopted by the Council of the European Union having regard to the data gathered in the interim as to stocks and escapement. Bye-Law 858/2009 had to drawn open-ended because the respondent could not predict what might be the situation in that regard following on this review. Bye-law CS 303/2009 which prohibits taking, fishing for, possessing, selling or offering European eel for sale ceases to have effect on the 30th June, 2012, to coincide with this review date. The respondent denies that there was no sufficient engagement or consultation with interested parties including the applicant prior to the completion and submission to the Commission of the European Union of the National Eel Management Plan. The respondent further denies that the measures contained in the Bye-Laws are excessive or disproportionate and claims that these measures are both necessary and justifiable in the circumstances however regrettable their impact on the plaintiff and other eel fishermen.

Conclusion

Unfortunately, this latter problem is not a new one. Peter Ackroyd, in his study of the river Thames, "THAMES", -(London, Chatto and Windus", 2007,) p. 276, cites William Harrison, writing in 1587 in, "AN HISTORICALL DESCRIPTION OF THE ISLANDE OF BRITAYNE" as lamenting, "Oh that this river might be spared even one yeare from nets et cetera! But alas, then should manie a poor man be undone".

I find that the applicant is mistaken in his contention that the respondent has permanently or even indefinitely closed the Shannon Regional Fisheries Board area or the Shannon River Basin to fishing for European eel. In my judgment the respondent could not legally in the present state of the legislation close these eel fisheries either permanently or indefinitely.

Section 9(1) of the Fisheries (Consolidation) Act 1959, (as amended) empowers the respondent, subject to the provisions of that Act to make Bye-Laws "for the more effectual government, management, protection and improvement of the fisheries of the State". I find that it would be doing impermissible violence to the plain language employed by the legislature to stretch these words to encompass the permanent or indefinite closure of the fishery. Each of the four specified purposes for which such Bye-Laws may lawfully be made by the respondent pursuant to s. 9(1) of the Act of 1959 indicates that the fishery remains extant. One cannot govern (regulate), manage (operate and administer), protect (preserve), or improve (make better) a fishery which has been entirely abolished or closed down for some unknown period and with no commitment to its being reopened. Further, a consideration of the several specific matters in relation to which Bye-Laws may be made by the respondent by virtue of s. 9(1) of the Act of 1959 as amended by s. 3 of the Fisheries (Amendment) Act 1962, but without prejudice to his general power in that regard, provides internal support for this construction. Each of these matters clearly presupposes the continued existence of the fishery. This is further emphasised by the terms of para. (gg) of s. 9(1) of the 1959 Act, as inserted by s. 3(b) of the 1962 Act, which gives the Minister special power to impose prohibitions or restrictions of an emergency character on the taking of fish but only for a specified period not exceeding one year in duration.

In *Needham v. The Western Regional Fisheries Board and Others* (Unreported, High Court, 6th November, 1999), Murphy J. was dealing with a challenge to a Bye-Law which was to come into force on the 11th July, 1994 and to cease to have effect on the 31st December, 1994. This Bye-Law prohibited drift-net fishing for salmon and trout in designated parts of the Western Regional Fisheries Board area. The Court accepted that the Minister in that case, unlike in the present case, had made this Bye-Law as an emergency measure pursuant to the provisions of s. 9(1)(gg) of the Act of 1959 (as amended). At p. 33 of the report of his judgment, Murphy J. held as follows:-

"The terms 'government, management, protection and improvement' must be interpreted in the context of the purpose for which those functions are to be exercised. The purpose is not the preservation of an endangered species but the protection and improvement of a food supply, an industry, a leisure pursuit and generally an activity in which many citizens (as well as foreign tourists) have an interest to which proper regard must be given in formulating any management policy. Sub-section 9 in that sense requires, as I see it, a 'political' decision which reconciles existing and to some extent conflicting interests. It seems to me that on appeal the judge must review the decision taken by reference to those criteria and not by reference to some academic standard of Commercial excellence divorced from the needs and interests of the public concerned with the problem."

I adopt this passage from the judgment of Murphy J. as correctly identifying the intention of the legislature in enacting s. 9(1) of the Act of 1959. There is a great difference between legislation designed to protect an endangered species of fish and, legislation designed to establish measures to reduce as much as equitably possible, exploitation and other human activities affecting a particular fishery, even though the problem giving rise to the need for intervention is a serious decline in the stock of that particular fish. In my judgment this latter is the purpose of s. 9 of the Act of 1959 (as amended) and is also the stated object of Council Regulation (EC) No. 1100/2007 of the 18th September, 2007. Paragraph 4, of the preamble to the Regulation refers to the planning and execution, through the drawing up of Eel Management Plans adjusted to regional and local conditions, of measures to ensure the protection and sustainable use of the stock of European eel. This also appears from the information requirement of Article II of the Regulation with regard to commercial and recreational fishing for eel in each Member State.

Council Regulation (EC) No. 1100/2007 does not require a cessation of eel fishing in any river basin of any Member State nor does it mandate the closure of any eel fishery. On the contrary, depending upon local circumstances in individual Member States or in particular eel river basins, it allows for year round fishing, (Article 5, para. 3), restricted or reduced fishing (Article 2, para. 8, Article 4, para. 2 and Article 5, para. 4), fishing season curtailment (Article 4, para. 2 and Article 5, para. 4), or reduction in eel catches by other means, (Article 4, paras. 2 and 3, and Article 5, paras. 4 and 5). Further, whatever measures are adopted by Member States and approved by the Commission of the European Union must, by virtue of Article 9, para. 1 of Council Regulation (EC) No.1100/2007 be re-evaluated by the Commission between the 30th June, 2012 and 31st December, 2013. The Commission may then (Article 9, para. 3), propose to the European Council and Parliament any measures it considers appropriate to achieve, with a high probability, the recovery of the stock of European eel. The Council of the European Union may, having considered this report from the Commission, direct such alternative measures as it considers necessary to achieve the target level of escapement of silver eel biomass as set out in Article 2, para. 4, or a reduction in fishing effort in accordance with Article 4, para. 2, and Article 5, paragraph 4.

The sole reason for the making of Bye-Law No. 858/2009 and Bye-Law CS 303/2009 is expressly stated in the preamble to each of those Bye-Laws to be, "for the purpose of giving effect to the State's Eel Management Plan under Council Regulation (EC) No. 1100/2007 of the 18th September, 2007". Chapter 8.1 of the National Eel Management Plan sets out as Management Action No. I "Reduction of fishing to achieve EU target" and identifies the measures to be taken as to, "cease fishery and close eel market in 2009: Review 2012, 2015 and 2018". Paragraph 8.2 of the National Eel Management Plan notes that, "according to the stock assessment of Astrom and Dekker (2007) the levels of anthropogenic mortality are consistent with a recovery time of 80 years assuming equivalent EU wide action". However, this is an assessment only and however carefully made, given the paucity of accurate scientific data reflected in the necessity to adopt a "precautionary approach" in the matter, might prove justified or unduly pessimistic or even hopelessly optimistic. However, this is not just some bio-environmental programme conceived by the European Parliament and the Council to protect the European eel from extinction. The purpose, as stated in the preamble to Council Regulation (EC) No. 1100/2007 is to devise and implement measures to, "ensure the protection and sustainable use of the population of European eel", -in other words, to protect and improve a food supply, an industry and a leisure pursuit. Even though the Regulation as so stated in the preamble is concerned with the long term management of eels in Europe, nonetheless given the review provisions contained in Article 9 of Council Regulation (EC) No. 1100/2007 and, reflected in the National Eel Management Plan, it could not be correctly stated that the effect of the impugned Bye-Laws and in particular Bye-Law 858/2009 is to close these fisheries even for a finite 80 years. I accept the submission on behalf of the respondent, that it was these various uncertainties and the proven need to protect the fishery from opportunistic and catastrophic over-fishing in an interval in which it was not protected, that led to the decision to set no fixed and immutable date on which Bye-Law 858/2009, would cease to have effect by comparison with Bye-Law CS 303/2009, which ceases to have effect on the 30th June, 2012, the date on which the first report must be presented to the Commission pursuant to the provisions of Article 9, para. 1, of Council Regulation (EC) No. 1100/2007.

Senior counsel for the applicant submitted that Article 9, of Council Regulation (EC) No. 1100/2007 provides for reporting and evaluation only and, does not contain any provision enabling this Member State of the European Union to alter or depart from Management Action No. 1 posited in chapter 8 of the National Eel Management Plan as approved by the Commission. I am unable to agree with this submission. Article 9, para. 3, of the Regulation leaves the Commission quite unfettered as to what new measures (if any), it might propose and the Council quite at large as to what new measures, (if any), it might decide to adopt at any review date in order to achieve the target levels of silver eel biomass escapement or a reduction in fishing effort. In my judgment the National Eel Management Plan would have to be revised or altered to reflect any such changes. This is particularly so as the entire purpose of the Regulation is as stated in the preamble, to ensure that eel recovery measures are not only effective, but also equitable, (the emphasis is mine). The importance of having regard to the preamble in construing European Union legislation was emphasised in *Director of Public Prosecutions v. O'Connor* [1998] I.E.H.C. 220.

National Law whether enacted before or after the 18th September, 2007, must be interpreted by this Court, as far as possible in a manner consistent with Council Regulation (EC) No. 1100/2007, (see *Minister for Justice v. Altaravictius* [2006] 3 I.R. 148). In my judgment it is possible to interpret the provisions of s. 9(1) of the Fisheries (Consolidation) Act 1959, (as amended), in a manner entirely compatible with this Regulation. The Regulation does not require the permanent or indefinite closure of any eel fishery in this Member State, something which I have already found would in any event be *ultra vires* the powers conferred on the respondent by s. 9(1) of the Act of 1959. It might become arguable at some later date on the particular facts then prevailing that a continued operation of Bye-Law No. 858/2009 should that be the case, was *ultra vires* the powers of the Minister as conferred by s. 9(1) of the Act of 1959, but this is something on which I express no opinion. For the reasons stated, the applicant's challenge to the legality of Bye-Law No. 858/2009 and Bye-Law CS 303/2009 must therefore fail.

In *Teahan and Others v. The Minister of Communications, Energy and Natural Resources and the South Western Regional Fisheries Board* [2009] I.E.H.C. 399, Hedigan J. at p. 411, para. 33, of the report of his judgment held as follows:

"33. The respondent, like all organs of state, is obliged to adhere to certain principles of natural and constitutional justice in the exercise of administrative power. Indeed, his failure to so adhere in advance of the introduction of the original bye-law prompted the High Court to invalidate that particular provision. It is well-established, however, that the exigencies of fair procedures are not uniform and instead vary considerably according to the circumstances of an individual case. In *International Fishing Vessels Limited v. Minister for Marine* (No. 2) [1991]2 IR 93, McCarthy J. stated at page 102:-

'Neither natural justice nor constitutional justice requires perfect or the best possible justice; it requires reasonable fairness in all of the circumstances; often it is a matter of impression as to whether or not there was unfairness'."

Hedigan J. also referred at para. 35 to the well known passage in the judgment of Walsh J. for the Supreme Court in *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 at 343/4 where he held as follows:-

"All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he

shall think proper' or if he so thinks fit' are powers which may be exercised only within the boundaries of the stated object of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits to hear that the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."

The instant application is in the nature of an appeal to this Court pursuant to the provisions of s. 11(1)(d) of the Fisheries (Consolidation) Act 1959 for an order annulling instruments (defined in s. 11(2) as including a Bye-Law) made by the respondent. The jurisdiction of this Court on such an application has been addressed on a number of occasions for instance, in *Dunne v. The Minister for Fisheries and Forestry* [1984] I.R. 230 per. Costello J. (as he then was), in *Needham v. The Western Regional Fisheries Board, the Minister for the Marine, Ireland and the Attorney General* (above cited) per. Murphy J. and in *Maxwell and Others v. The Minister for the Marine and Natural Resources* and *Hughes v. The Minister for The Marine and Natural Resources* (Unreported, High Court, 13th December 2000), per McCracken J., each of which was cited during the course of argument in the present case. For the purpose of this judgment I consider it sufficient to set down what was held by Murphy J. in the Needham case (above cited), at pp. 15 to 17 of the report of his judgment in that case:-

"Mr. Justice Costello pointed out (in *Dunne v. The Minister of Fisheries and Forestry*) that where, as in the present case the legislation grants a statutory right of appeal, it is unhelpful and unnecessary to apply by analogy the rules of judicial review. The legislature must have intended that the court would have powers in addition to those already enjoyed at common law. [Mr. Justice Costello's] decision turned in fact upon the decision in relation to the appellate provisions granted by the Fisheries Act 1925 and considered in *Dodd v. Minister for Fisheries*, [1934] I.R. 291, the detailed analysis of that judgment made by the learned judge may be summarized in a quotation taken from the end of p. 239 of the report as follows:-

'The latter part of the judgment makes it clear that, in deciding whether to annul or confirm a Bye-Law the Court (like the Minister) must be satisfied that the Bye-Law was expedient for the more effectual government, management, etc. of the fisheries in question. It seems to me that the Court in Dodds case declined to limit its jurisdiction under Section 28 of the Act of 1925, in the way the Respondent Minister suggests that the Court's jurisdiction under Section 11 of the Act of 1959 should be restricted. In that case, the Court reached its conclusion notwithstanding the fact that the Court's power on an appeal under the Act of 1925 to confirm or annul a Bye-Law was more restricted than the power of the Privy Council (under earlier legislation) which could vary as well as annul or confirm a Bye-Law.'

The conclusion of the Judge was important also for the guidance it gave in relation to the onus of proof in the following terms:-

'Therefore, I conclude that, in hearing this appeal, I have jurisdiction to annul the bye-law of 1981 if, in my opinion, the bye-law is not expedient for the more effectual government, management, protection and improvement of the fisheries of the State. I should add that, where an appeal relates to a bye-law which has been preceded by a public enquiry, as a general rule it is desirable that the appeal should be heard (a) on the evidence given before the public enquiry and (b) on all the other materials which the Minister had before him when making the bye-law. However, the Court has power, if it thinks fit, to hear additional evidence either by way of affidavit or oral testimony. I think the Court should exercise this power if the Minister declines (as happened in this case) to make available to the Court the report of the inspector who held the enquiry and the other materials on which the opinion of the Minister was based. Whilst not suggesting that the onus of proof rests on an applicant, it seems to me that the Court should be slow to substitute its own opinion for the opinion of the Minister in cases in which his Department's experience and knowledge of the matter in issue would be an important element in reaching its formulation."

In the instant case it was strongly urged on behalf of the applicant that the process which led to the decision by the respondent to accept the Draft Eel Management Plan and to submit it for approval to the Commission was not reasonably fair. The applicant claims that he and his fellow eel fishermen in the Shannon Regional Fisheries Board Area and/or the Shannon River Basin were not given any sufficient or proper opportunity to adequately address the issues raised in the Draft Eel Management Plan and in particular the management measures posited in that plan, both generally and particularly by reason of the failure on the part of the respondent to hold a public inquiry in the fishery district as to the best means to be adopted to regulate, improve and protect the fishery so as to meet the requirements of Council Regulation (EC) No. 1100/2007 of the 18th September, 2007. Because of what he claims was the hurried and totally inadequate opportunity afforded him and the other eel fishermen in the Shannon Regional Fisheries Board area to address this vital issue, closure of the fishery became the primary management recommendation in the Eel Management Plan and was acted on by the respondent without giving independent and proper consideration to the matter. The applicant submits that the Bye-Laws are consequently unreasonable, unjustly disproportionate and lack objective justification. The applicant claims that the respondent in making these Bye Laws unfairly interfered with his constitutional right to earn a livelihood from eel fishing. The applicant also claims that the respondent acted without authority in making the impugned Bye-Laws in that they are wholly inconsistent with the provisions of s. 67(1) of the Fisheries (Consolidation) Act 1959, (as amended).

With respect to both these latter submissions similar arguments were made to this Court in *Maxwell and Another v. The Minister for the Marine and Natural Resources*, (Unreported, High Court, 13th December, 2000), and both were rejected by McCracken J. In relation to the submission based upon the provisions of s. 67(1) of the Act of 1959, McCracken J. in the report of his judgment at pp. 5 and 6 held as follows:-

"The Plaintiffs place great emphasis on the provision of Section 67 (1) of the 1959 Act, which provides:

'Every board of conservators shall, in accordance with this Section, issue/fishing licences (in this Act referred to as ordinary fishing licences) in respect of scheduled engines.'

The argument is made that this provision is mandatory, and in effect, that if an application is made for a licence, the board of conservators has no discretion to refuse it. In one sense this is certainly correct. However, it is only mandatory to issue the licences in accordance with the provisions of Section 67, and subsection (14) of that Section provides:

'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.'

Part of the provisions of the Act is the authority under Section 9 for the Minister to make bye-laws, and one of the instruments made under the Act is the bye-law in question in this case. Therefore, the board's power or authority to issue licences is subject to the provisions of this bye-law, and was always intended to be subject to any bye-laws made by the Minister under Section 9. Indeed, if this were not so, the provisions of Section 9 would be pointless."

With regard to the other argument concerning the applicant's constitutional right to earn a livelihood from eel fishing, McCracken J. at p. 7 of the report of his judgment in the Maxwell case (above cited) stated as follows:-

"An argument was also addressed to me that the effect of this bye-law was to interfere with the livelihood of the Plaintiffs, which is of course to some degree correct in the individual cases. However, the clear function of the Minister under Section 9 is to manage, protect and improve the fisheries of the state in general, and this he has sought to do. It is of course unfortunate for the Plaintiffs if, in doing this, he does interfere with their livelihood, but his regard has to be for the greater good and for the preservation of fisheries for the future. In my view the bye-law clearly and in accordance with the expert advice given to the Minister, has this effect. If it were sought to challenge the constitutionality of the whole fisheries scheme, it is not the bye-law which should be challenged, but the provisions of Section 9 which give the Minister the power to control the industry. This is a not a matter which is before me, and I make no comment on it."

I adopt what was held by McCracken J. in that case and since the arguments in the instant case are essentially the same and there is nothing in the material facts of the instant case which would render it distinguishable from the Maxwell case, I believe that this disposes of these two points raised by the applicant.

In the course of his judgment in the Maxwell case (above cited), McCracken J. also correctly pointed to the fact that whiles. 8(1) of the Fisheries (Consolidation) Act 1959, confers power on the Minister to appoint an Officer of his Department to hold a public inquiry before making a Bye-Law, the holding of such an inquiry is not a mandatory requirement. It will be noted that the words of the section are:

"The Minister may from time to time cause an inquiry to be held in ..."

This is clearly an enabling provision and the applicant has not satisfied me that there is something in the circumstances of this case which would turn that discretion into an obligation on the part of the respondent to hold such a public inquiry. On the contrary, having read the National Report for Ireland on Eel Stock Recovery Plan (including River Basin District Eel Management Plans),-

December 2008, and having read the submission made on or about the 11th September, 2008, to the Joint Working Group on behalf of the Shannon Eel Fishermen's Association, and having regard to the opportunities provided to the applicant and other eel fishermen in this State to advance their concerns, arguments and ideas concerning the Draft Eel Management Plan and, to submit to the Joint Working Group or to the respondent's Department whatever scientific or other material they thought fit, in my judgment it was reasonably open to the respondent to conclude that no useful purpose would be served by holding such a public inquiry in the Shannon Regional Fisheries Board area. No evidence was adduced at the hearing of this application that some point which the applicant might have wished to make was not and could not have been made either formally through submissions or informally through exchanges with the experts advising the respondent in relation to the European eel stock crises, since 2002 and, involved in the preparation of the Draft National Eel Management Plan from 2006 onwards. Apart from the respondent's own Department, the several bodies represented on the Joint Working Group, the eel fishermen and their representatives, there was no evidence before the court at the hearing of this application of any significant wider or general public involvement with or interest in the eel fisheries on the Shannon River Basin and the impact of the Draft Plan on that area, such as would render it unjust and unfair for the respondent not to exercise his discretion to hold a public inquiry in that fisheries area.

I am satisfied that the applicant by himself and through the Shannon Eel Fishermen's Association was given sufficient and reasonable opportunity to make whatever reasonable representations he wished and to become involved in the process of formulating the National Eel Management Plan and in particular the management measures to be adopted in this plan. The applicant did not receive copies of the other submissions made to the Joint Working Group. However, I am satisfied that he was not placed at any disadvantage by reason of this because the chairman and two other members of the Shannon Eel Fishermen's Association of which he was and is a member were co-opted onto the Joint Working Group and thereafter fully participated in its deliberations and decisions. Given the long gestation period of this problem, since prior to 2002, the applicant and his fellow eel fishermen of the Shannon Eel Fishermen's Association and other eel fishermen throughout the State, had ample time to obtain whatever expert advice and assistance they thought necessary. If the establishment of the Joint Working Group in 2006 did not impress them with any sense of the seriousness and urgency of the matter as perceived by the European Union and the Minister, the curtailing of the eel fishing season in 2008, ought to have done so. The publication of the Draft Eel Management Plan on the 1st August, 2008, given the previous history of the matter could not reasonably be said to have come as a surprise to and to have been unforeseeable by the applicant and other eel fishermen in the Shannon River Basin.

As the National Report for Ireland on Eel Stock Recovery Plan, - December 2008, is based upon all of the material that was before the Joint Working Group and the decision of the respondent to make the Bye-Laws was based on the terms and recommendations in this document, - and the contrary has not been suggested, - having carefully considered that document and formed my own opinion in the matter as I am entitled to do in an application of this nature, I am satisfied that the Bye-Laws sought to be impugned, as I have interpreted them, are not unreasonable excessive, disproportionate or incapable of objective justification by reference to the scientific evidence, however lacking in certainty that may be.

Even if the respondent had concluded that commercial eel fishing in the Shannon River Basin area was not to any significant extent responsible for the serious decline in the stock of European eel in that area and, even if he also considered that the accepted base data for silver eel biomass escapement of 8% was a conservative and ultra cautious under-estimation of the true figure, it would still have been open to him, in my judgment, to take the course which he did in order to protect the fishery. Faced with an undoubted serious problem affecting the European eel fisheries in this area, the respondent's first concern had to be to take immediate measures to prevent any further decline in the stock of European eel by adopting such course of action, recommended to him by experts whose qualifications and impartiality has not been shown to be wanting, as he considered to be lawful and most appropriate in the circumstances, I do not accept that it was sufficient for the respondent merely to maintain the status quo while the precise causative factors for the decline were definitively ascertained and ranked and, effective solutions formulated and put into effect. Whether or not the applicant and his fellow commercial eel fishermen in the Shannon River Basin area were blameless in the matter,

the respondent was reasonably and rationally entitled to decide that to permit any commercial eel fishing to continue in the Shannon River Basin area pending mandatory review as therein provided, would be in breach of the stated purpose and the terms of Council Regulation (EC) No. 1100/2007 and, would amount to a failure on his part to properly manage this valuable resource of the State for which, as Minister, he was responsible by virtue of Article 10 of the Constitution.

I will therefore refuse the relief sought by the applicants in the Special Summons.