



THE HIGH COURT

[2026] IEHC 558

Record No. H.JR. 2023.1344

BETWEEN

**JOHN BUTLER AND NATIONAL ASSOCIATION OF REGIONAL GAME
COUNCILS**

APPLICANTS

AND

**MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

**JUDGMENT of Mr. Justice Barr delivered electronically on the 14th day of
August 2026.**

Introduction.

1. At the time of the institution of the proceedings herein, the first applicant was the chairperson of the second applicant. The second applicant is a sporting organisation which is involved primarily in the hunting of wild birds and animals.

2. It has been pleaded that the second applicant is the second largest voluntary sporting organisation in Ireland. It has 26,000 members, across 1,050 clubs spread throughout the country. It is a nominating body to Seanad Éireann on the agricultural panel. It was established in or about 1968.

3. These proceedings challenge the lawfulness and validity of the Wildlife (Wild Birds) (Open Seasons) (Amendment) Order 2023 (SI 421/2023) (hereinafter “OSO”). That amendment was made by the first respondent under s. 24 of the Wildlife Act 1976, as amended, (hereinafter “*the 1976 Act*”) on 24 August 2023.

4. An open seasons order stipulates the species of wild bird and the dates during which they may be lawfully hunted within the State. The 2023 order amended the principal Open Seasons Order of 1979, by removing four species of duck: pintail; pochard; scaup and goldeneye (hereinafter referred to collectively as “*the relevant species*”). The effect of the amendment of the OSO was that it became unlawful in the State to hunt any of the relevant species from that date onwards.

5. The essence of the applicant’s case is that in making the decision to amend the OSO, the Minister acted unlawfully because he failed to have regard to the matters set out in s. 11(2)(bc) of the 1976 Act, and to the matters set out in Arts. 2 & 7 of the Birds Directive.

6. While it will be necessary to refer to these legal provisions in more detail later in the judgment, it can be noted that s. 11 of the 1976 Act provides that the primary function of the Minister is to secure the conservation of wildlife and promote the conservation of biological diversity. Under s. 11(2), the Minister may introduce a number of measures to give effect to that overriding function. Section 11(2)(bc) provides that the Minister may take the requisite measures to maintain the population of the species referred to in Art. 1 of the Birds Directive at a level that corresponds in

particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of the species to that level.

7. The essence of the applicant's case is that this provision in the 1976 Act required the Minister, before making the 2023 amendment to the OSO, to identify and consider: the level of the population of the relevant species that corresponded to ecological requirements; the level of the population of the relevant species that corresponded to scientific requirements; the level of the population of the relevant species that corresponded to cultural requirements; and each of the following taken together: economic requirements; recreational requirements; and whether the measures would adapt the population of the species to the identified level, having regard to the above factors.

8. The applicants submit that none of these elements was addressed in the briefing materials provided to the Minister. It is submitted that there is no reference in any of the briefing materials to s. 11(2)(bc) of the 1976 Act; nor is there any evidence that the Minister considered the requirements of that subsection.

9. It is submitted that in these circumstances, the Minister's decision to amend the OSO was unlawful for failure to consider the criteria set out in s. 11(2)(bc) of the 1976 Act, which implements Art. 2 of the Birds Directive.

10. In response, it was submitted on behalf of the respondents that on a correct reading of the provisions of the 1976 Act, as amended, the Minister was given the power under ss. 8 and 24 of the Act to make regulations; which he did. There was no reference in the Act to him being obliged to carry out any of the analyses alleged by the applicants prior to making that decision.

11. Without prejudice to that submission, it was submitted that when one had regard to the entire process undertaken by the Minister in advance of taking the decision to amend the OSO, it was evident that he did have regard in substance to the matters set out in s. 11(2) (bc) of the 1976 Act.

The Law.

12. Before turning to a consideration of the issues raised in these proceedings, it will be helpful to set out a brief summary of the relevant legal provisions. The main piece of domestic legislation is the Wildlife Act 1976, as amended. Section 8 of that Act provides that the Minister may make regulations for prescribing any matter referred to in the Act as prescribed. Section 8(1)(a) provides that the Minister may make such regulations as appear to him to be necessary or expedient to implement the provisions of the Wildlife Acts 1976 and 2000. Subsection (1)(b) thereof provides that any regulation made by the Minister under the Act may contain such incidental or consequential provisions as appear to the Minister to be necessary or expedient for the purpose of implementing the provisions of the Wildlife Acts 1976 and 2000.

13. Section 8(2) provides that, subject to sub-s. (3) of that section and to ss. 14(5), 15(5), 15(6), 16(4), 17(3) and 17(13) of the Act, the Minister may by order revoke or amend an order made by him under the Act.

14. Section 11(1) provides that it shall be the function of the Minister to secure the conservation of wildlife and to promote the conservation of biological diversity.

15. Section 11(2)(bc) is the critical subsection for the purposes of these proceedings. It is in the following terms:

“(2) Without prejudice to the generality of subsection (1) of this section, the Minister may in particular do all or any of the following:... (bc) take the requisite measures to maintain the population of the species referred to in Article 1 of the Birds Directive at a level that corresponds in particular to ecological, scientific and cultural requirements, while taking account of the economic and recreational requirements, or to adapt the population of these species to that level.”

16. Section 19 provides that wild birds and their nests and eggs, other than wild birds of the species mentioned in the third schedule to the Act, shall be protected.

17. Section 22(1) provides that, subject to subs. (2), the section applies to every wild bird other than a wild bird of a species specified in the third schedule to the Act. Subsection (3) of that section provides that a wild bird to which the section for the time being applies, is in the Act referred to as a protected wild bird. Subsection (4) provides that subject to the exceptions specified in sub-s. (5) of that section, any person who hunts a protected wild bird shall be guilty of an offence.

18. Section 24 of the 1976 Act deals with open seasons for certain protected wild birds. The section provides that the Minister may by order provide that any protected wild bird which is of a species specified in the order, may be hunted either throughout the State or in any part thereof specified in the order on a day or during a period of days so specified. The section further provides that an order made under that section may have different provisions for different species of birds and may apply to different areas in the country.

The Birds Directive.

19. Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds, was codified by Directive 2009/147/EC of the European Parliament and the Council of 30 November 2009 on the Conservation of Wild Birds (hereinafter “*the Birds Directive*”).

20. Recital 4 to the Directive provides that the species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage, and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities. Recital 5 provides that the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community’s objectives regarding the improvement of living conditions and sustainable development.

21. Recital 10 provides that, because of their high population level, geographical distribution and reproductive rate in the community as a whole, certain species may be hunted, which constitutes acceptable exploitation where certain limits are established and respected, as such hunting must be compatible with maintenance of the population of the species at a satisfactory level.

22. Article 1 provides that the Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of the species and lays down rules for their exploitation.

23. Article 2 is of particular relevance to this case. It will be seen that its provisions are transposed by s. 11(2)(bc) of the 1976 Act. It provides as follows:

“Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.”

24. Article 5 provides that, without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1 prohibiting, *inter alia*, deliberate killing or capture by any method.

25. Hunting of wild birds may be permitted under Art. 7. It provides that, owing to their population level, geographical distribution and reproductive rates throughout the Community, the species listed in Annex II to the Directive may be hunted under national legislation. It provides that Member States shall ensure that the hunting of the species does not jeopardise conservation efforts in their distribution area.

26. Article 7 goes on to provide that the species referred to in Annex II to the Directive at Part A may be hunted in the geographical sea and land area where the Directive applies. The species referred to in Annex II, Part B may be hunted only in the Member States in respect of which they are indicated.

27. Article 7.4 provides that Member States shall ensure that the practice of hunting as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that the practice is compatible as regards the population of the species, in particular migratory species, with the measures resulting from Art. 2. The article further provides that Member States shall see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages

of reproduction. For migratory species, the article provides that they are not to be hunted during their period of reproduction or during their return to their rearing grounds.

28. Article 9 provides for a derogation from the provisions of Arts. 5 to 8 which is necessary in the interests of public health and safety and on other specified grounds.

29. Article 12 provides that Member States shall forward to the Commission every three years a report on the implementation of national provisions taken under the Directive.

30. Finally, Art. 14 provides that Member States may introduce stricter protective measures than are provided for under the Directive.

Submissions on behalf of the Applicants.

31. On behalf of the applicants, Mr. Steen SC submitted that s. 11(2)(bc), was the means by which Art. 2 of the Birds Directive was transposed into Irish law. It was submitted that the 2023 OSO was a measure within the meaning of both s. 11(2)(bc) of the 1976 Act and Art. 2 of the Birds Directive. It had been introduced to maintain the population of the four relevant species; therefore it directly engaged the criteria in s. 11(2)(bc).

32. It was submitted that, when one looked at the briefing documentation that was submitted to the Minister for his consideration prior to the making of the amendment to the OSO, it was clear that there was no consideration of the criteria set out in s. 11(2)(bc) of the 1976 Act.

33. In support of that submission, counsel pointed to the following matters: it had been conceded by the Minister's representatives that they had neither sought, nor obtained, any legal advice prior to advising the Minister in relation to the decision to

amend the OSO. Secondly, there was no reference, explicit or otherwise, in any of the briefing documents to the relevant subsection in the 1976 Act.

34. Thirdly, it was submitted that even without any reference to the subsection itself, when one read the briefing documentation that was furnished to the Minister, it was clear that there was no consideration of the criteria that were set out in s. 11(2)(bc) of the 1976 Act.

35. It was submitted that the provisions of s. 11(2)(bc) were mandatory in nature. They were required to be considered prior to the Minister exercising his power under s. 24 of the 1976 Act to amend the OSO. It was submitted that there was no evidence that the Minister had considered any of the matters set out in that subsection.

36. It was submitted that none of the material provided to the Minister had discussed the level of the population of the relevant species that corresponded to ecological, scientific or cultural requirements. There was no consideration of economic requirements. Nor was there any account taken of the recreational requirements associated with hunting. It was submitted that hunting and shooting are activities of deep cultural, recreational and social significance, particularly in rural Ireland, where the local gun club was often central to the community.

37. It was submitted that the Minister had not considered the position of the relevant species in their distribution area, meaning the migratory flight path that they would use from their usual habitat to their wintering habitat.

38. It was submitted that it was widely accepted that as winters have become warmer due to global warming, the relevant species had less need to travel to Ireland to overwinter. It was submitted that the population of migratory birds in the State, which was at issue in the OSO, in any given year, was in large measure a direct product of the coldness of that year's winter. A consideration of the ecological requirements of these

migratory species would necessarily engage that question; yet there was no evidence that that question had been considered.

39. It was submitted that the distribution area for migratory species extended well beyond the State. The Minister had conceded that he had not taken any steps to engage with other Member States on the flyway of the relevant species. There was no evidence that recreational hunting in Ireland had jeopardised conservation efforts in the distribution area of the relevant species; nor could there be, given the extremely small number of the relevant species present in Ireland relative to their European population, being 1% or less.

40. Counsel submitted that the respondents had adopted a contradictory and illogical position in responding to the applicant's case. They had pleaded that the Minister was not obliged to have regard to the criteria set down in s. 11(2)(bc) of the 1976 Act, while at the same time, pleading that the Minister had in fact had regard in substance to the matters set out therein. It was submitted that it was illogical for the Minister to plead that he was not obliged to have regard to particular matters, while at the same time stating that he had had regard to those matters.

41. In summary, it was submitted that the applicants were concerned with the process as to how the Minister had gone about making the 2023 amendment to the OSO; where he had simply ignored the statutory requirements and considerations set out in s. 11(2)(bc).

42. It was submitted that the Minister's reliance on the "*precautionary principle*" did not rescue his position. The Minister was obliged to follow the criteria prescribed by the 1976 Act when exercising his powers under that Act. The precautionary principle could not be invoked to circumvent the statutory criteria which the Oireachtas had laid down; it was not a licence to a Minister to act contrary to the legislation.

Submissions on behalf of the Respondents.

43. On behalf of the respondents, Ms. Geoghegan SC submitted that, while the Wildlife Act 1976 had pre-dated the Birds Directive, it had subsequently been amended to transpose the provisions of that Directive into Irish law. Accordingly, it was appropriate to interpret the Act in light of the provisions of the Directive. She pointed out that in Art. 5 of the Directive, there was a clear prohibition on the deliberate killing of wild birds. That was subject to a limited exception provided for in Art. 7 in respect of hunting. However, that derogation was expressly discretionary. Member States were not obliged to authorise any hunting if they chose not to do so.

44. Counsel submitted that it had been repeatedly held by the CJEU that Art. 2 of the Directive did not provide an independent derogation from the prohibition on the killing of wild birds. In addition, Art. 14 expressly allowed Member States to provide for greater domestic protection than the Birds Directive itself required.

45. It was submitted that the CJEU had emphasised in respect of Art. 2 that the principal objective of the Directive was to ensure the conservation of wild birds. Recreational and economic considerations, while relevant in certain circumstances, are of a secondary importance: see *Commission v Belgium* (Case 247/85); Opinion of AG Kokott in *Umweltorganisation VIRUS v Land Niederösterreich* (Case C-131/24).

46. It was submitted that the central issue in this case was whether the Minister had the power under Irish law to make the amendment to the OSO in 2023. It was submitted that when one had regard to the provisions of ss. 8, 19 and 24 of the 1976 Act, as amended, it was clear that the Minister had the power to make the amendment to the OSO. Section 19 of the Act provided that wild birds “*shall*” be protected. Section 24 of

the Act provided a discretionary power to the Minister to permit hunting of certain wild birds on certain conditions.

47. It was submitted to that in amending the OSO in 2023, the Minister had acted within the scope of authority that was given to him under the Act. Furthermore, in so doing, he had acted on cogent scientific evidence which was to the effect that there had been a significant decline in the populations of the relevant species in Ireland over the preceding years. It was submitted that in these circumstances, the Minister had acted rationally and reasonably in taking the measures that he had done, namely removing the four species of duck from the OSO.

48. It was submitted that where the Minister had acted on the best scientific advice that was available to him, and where he had engaged in extensive public consultation, including with the second applicant, prior to making his decision, there was no basis at law on which his decision to amend the OSO should be set aside. It was submitted that ss. 8 and 24 of the 1976 Act, as amended, clearly gave the Minister power to amend the OSO. There was no basis on which his decision could be set aside.

49. Without prejudice to that submission, it was submitted that notwithstanding that the Minister had not been obliged to have regard to the matters set out in s. 11(2)(bc) of the 1976 Act, and while that subsection had not been referred to in the documents before him, he had in substance had regard to the matters contained therein.

50. It was submitted that the matters set out in that subsection were not of equal status. The essential requirement was for the Minister to maintain the populations of species of wild birds at a satisfactory level, which had been interpreted to mean the level at which favourable conservation status is achieved. In reaching a decision to amend the OSO to ensure that that was done, the Minister had, through the extensive

public consultation process that had been undertaken, had regard to cultural, economic and recreational aspects of the decision.

51. It was submitted that insofar as the applicants had asserted that the Minister had purported to make his decision in the absence of any evidence as to the level of hunting in the State, that was because the second applicant had what is known as “*bag data*” being information concerning the level of hunting carried out by its members, but had chosen not to make this available to the Minister. It was submitted that in these circumstances, in the absence of any data as to the level of hunting being undertaken in the State, the Minister was obliged to apply the precautionary principle and err on the side of caution in taking measures designed to protect the relevant species.

52. It was submitted that insofar as it had been asserted by the applicants that the Minister had failed to have regard to the population levels of the relevant species in their distribution area or flyway, that was contradicted by the evidence set out in the affidavit furnished by Dr. O’Brien, which clearly showed that the issue of flyway had been considered in the documentation referred to by him. His conclusions set out at paras. 66 and 67 of his affidavit were that in all the circumstances the removal of the four species of duck from the OSO had been entirely justified.

53. It was further submitted that the key issue was the decline in numbers in the populations of the relevant species in Ireland over the preceding years. Where there was evidence of such decline in numbers, the Minister was obliged to take steps to rectify that situation. It was submitted that the Minister was obliged to consider the populations of the relevant species within Ireland. He had done that, and had acted on the information that was available to him, which showed that there had been a significant decline in the numbers of the relevant species.

54. In summary, it was submitted that there was no legal basis on which the Minister's decision to remove the four species of duck from the OSO could be set aside. The process leading to that decision had been transparent and fair. The Minister had engaged in extensive public consultation. He had acted on reliable scientific advice that had been presented to him. The decision reached was reasonable and had been open to the Minister on the evidence before him. Accordingly, it was submitted that there was no basis to set the decision aside.

The Issues in this Case.

55. I am satisfied having considered the written and oral submissions of counsel that the following issues are the key issues in this case:

- (a) Was the Minister obliged to have regard to the matters set out in s. 11(2)(bc) of the 1976 Act, as amended, prior to making his decision to amend the OSO?
- (b) Did the Minister consider the substance of the criteria set out in s. 11(2)(bc) of the 1976 Act, when reaching his decision to amend the OSO?

Summary of Relevant Evidence.

56. No less than 13 affidavits were filed in this case. The affidavits, exhibits and pleadings ran to some 3,929 pages. The court has read all the affidavits and documents submitted. Much of it was argumentative, repetitious and irrelevant.

57. For example, reports were commissioned by the applicants from Mr. Czajkowski and Prof. Cameron, criticising the scientific data that was placed before the Minister. That in turn led to replying affidavits on behalf of the respondents countering the criticisms that had been made by the applicants' experts of the scientific and other data that had been placed before the Minister. Virtually all of that was irrelevant to these judicial review proceedings. These were experts' reports which challenged the findings made by other experts in various areas. None of these reports had been before the Minister. His decision cannot be criticised for failure to have had regard to these matters. It is not appropriate in judicial review proceedings to ask the court to enter into a merits-based analysis of the impugned decision. This is not an appeal.

58. The following evidence appears to be relevant to the issues that arise for determination in these proceedings. In her affidavit sworn on 28 March 2024, Ms. Cliona O'Brien, the manager of the Birds Unit in the Scientific Advice and Research Directorate within the National Parks and Wildlife Service (hereinafter "*NPWS*") set out the briefing documentation and process that had been undertaken prior to the Minister making his decision to amend the *OSO*.

59. Ms. O'Brien stated that she had chaired the internal *NPWS* working group which had been established to review and consider options in relation to the *OSO*. She drafted the background paper which was used for the public consultation. She prepared that using materials that had been prepared by the Birds Unit.

60. Ms. O'Brien stated that arising from the reports that had been furnished by the Member States pursuant to Art. 12 of the Birds Directive, the European Commission started to express concerns in 2020 and 2021 about the declining population trends observed in species included in Annex II of the Directive. These concerns were raised at meetings of the sub-expert committee on the Birds and Habitats Directive (*NADEG*).

It was noted at those meetings that out of 84 species listed in Annex II of the Directive, 42 were not in a “*secure*” status. It was noted that the proportion of species in Annex I “*which may not be hunted*” that were in a “*poor*” or “*bad*” status was lower than the Annex II species “*which could be hunted*”, meaning that those species for which hunting was permitted were broadly in a less secure status than those for which hunting was not permitted. This led the European Commission to question the general sustainability of hunting of the Annex II species. At the NADEG and task force meetings, the Commission had proposed that in the short term, hunting should cease of all Annex II species that were not in a “*secure*” status.

61. Ms. O’Brien stated that in addition to the concerns that were being raised at a European Union level, the Minister of State in the Department had identified a concern at the potentially unsustainable hunting of birds of conservation concern in Ireland particularly those on the red and amber lists as per Bird Watch Ireland’s recent “*Birds of Conservation Concern in Ireland*” (BOCCI) lists. The BOCCI list had been published in 2021.

62. On 11 August 2021, the NPWS sent a memo to the Minister which stated that in the absence of any decision at the national level to progress the matter, the EU process would nevertheless demand that action was taken to ensure the sustainability of hunting of Annex II species, and to prohibit same where sustainability could not be demonstrated, and to continue until the prohibition such time as it could be demonstrated. The memo went on to note that there were no comprehensive and accurate estimates of the number of birds hunted annually in the State. Nor was there any systematic approach to reviewing hunting effort, hunting returns, or the sustainability of the hunting of species on the OSO or other aspects related to wild bird hunting.

63. On 31 August 2021, Minister of State Noonan made an announcement that he was deeply concerned at the potentially unsustainable hunting of birds of conservation concern in Ireland. Ms. O'Brien stated that an internal working group, which was chaired by her, was established in the NPWS to *inter alia*, determine the steps to be taken to ensure that hunting of Annex II species on the OSO was sustainable. At the same time, an EU task force on the recovery of birds had been set up. It held its first meeting on 18 March 2022. The NPWS had three representatives on the task force, including Ms. O'Brien. She noted that the Commission had on several occasions advised Member States that action should be taken immediately if hunting could not be demonstrated to be sustainable.

64. Ms. O'Brien stated that during the course of its meetings, the NPWS working group discussed which species included in the OSO should be prioritised for attention in 2022, taking account of those that had been identified by the EU process and those listed as red or amber on the BOCCI list and those identified in Ireland's Art. 12 reporting from 2019. In the end, the working group identified 12 species of wild bird that required immediate attention.

65. Ms. O'Brien stated that she and her colleagues then prepared a discussion paper which would be used as the basis for a public consultation. The paper noted that there were 21 species on Ireland's OSO, of which 14 were the subject of national level concern on foot of the Art. 12 report furnished by the State in 2019; 9 of the 21 were identified as high or lower priority in the EU process; and 15 of the 21 were listed as amber or red on the BOCCI list.

66. The paper went on to outline Ireland's obligations under EU law. It then considered two options. Option A, was the application of what was known as the NADEG decision tree to all Annex II species on the OSO. That option would lead to a

recommendation of the removal of the species from the OSO, because the answers to the questions in the tree would arrive at “*unable to currently assess*”. That was due to lack of any information at the national level as to the hunting effort and hunting returns of these species. In such cases, the response proposed for those species would be for a cessation of hunting. The application of that option would result in the removal of 13 red or amber listed species of conservation concern from the OSO.

67. Option B outlined in the discussion paper was to remove specific species from the OSO on an interim basis. It was stated that this was being put forward on an interim basis only. It would not result in Ireland being demonstrably compliant with the Birds Directive. It was noted that the rationale for specific proposed amendments to the OSO was based on available bird monitoring data. It noted that there were significant data gaps existing for several relevant bird species and in understanding the intensity and extent of hunting in Ireland. It was also noted that no specific timelines were set for how long the interim amendments should remain in place.

68. Ms. O’Brien stated that Option B looked at two primary metrics for relevant bird species in order to allow the identification of the most vulnerable of the 21 species to hunting pressure in Ireland. The two metrics were: population size and population trend. The discussion paper went on to look at the available data in relation to population size and population trend in respect of seven relevant species. It was noted that the Irish population of all the relevant species were in decline. The paper noted that the four most abundant species of duck accounted for 92% of all individual ducks. Of the six “*non-dominant*” duck species: pochard, scaup and goldeneye were estimated to have experienced relatively acute population declines of 67-89% over the period 1996 to 2019. With the exception of pochard, all other “*non-dominant*” open season duck species populations were estimated to be less than 2,000 individuals in Ireland.

69. The discussion paper went on to recommend that until more data on population demographics and hunting intensity in Ireland became available to allow for a more robust assessment, six duck species were recommended to be suspended or removed from the 2022 OSO and were to remain unfit for hunting until such time as data and information was gathered that could demonstrate a sustainable level of hunting, and there was a system in place to manage and enforce same. The six duck species included the four relevant species, together with shoveler and gadwall.

70. The discussion paper concluded by noting that there was a lack of sufficient data to make a fully informed decision on what birds should remain on the OSO, or be removed from it. It was noted that it would take possibly five to seven years to gather the necessary information. The paper stated that the next step was the implementation of a full public consultation process on the proposed changes. This would include a facility for making online submissions and a townhall-type stakeholder meeting.

71. Following presentation of the discussion paper to the NPWS management board in September 2022, approval was given to the working group to proceed with a public consultation. That was done by means of an online questionnaire which was open for completion between 22 March 2023 and 3 May 2023.

72. On 21 April 2023, a stakeholder meeting was held in person in Dublin. Stakeholders from across the spectrum were invited to attend the meeting and make presentations. The second applicant made a presentation at that meeting.

73. Following the completion of the public consultation process, the NPWS requested Dr. Ciaran O’Keeffe, a retired principal officer in the NPWS Science and Biodiversity Section, to review and comment on the output from the public consultation process; to develop recommendations; and to outline what further capacity building was required. On 6 July 2023, Dr. O’Keeffe sent his report to the NPWS.

74. On 27 July 2023, an e-submission entitled “*Submission HLG00432-23: Review of the Open Seasons Order and Next Steps*” was prepared by Dr. Andy Bleasdale. The e-submission enclosed the NPWS discussion paper and Dr. O’Keeffe’s report. Among its recommendations was the removal of the relevant species from the Open Seasons Order. It was further suggested that noting the precautionary principle, consideration should be given to also removing red grouse, golden plover, common snipe and jack snipe from the OSO, while additional data was being gathered.

75. Thereafter, a meeting was held between the Minister of State at the Department and the NPWS to discuss the e-submission. The Minister of State then decided to remove the relevant species from the OSO. The Minister, Minister O’Brien, also agreed to that course of action. He gave his approval to the amended OSO on 9 August 2023. The formal amending order was signed by the Minister on 24 August 2023.

76. The report that was prepared by Dr. O’Keeffe summarising the public consultation process, being the online survey results and the public stakeholder meeting, had been furnished in July 2023. In relation to the public stakeholder meeting, Dr. O’Keeffe stated that it was very evident that most hunters had a genuine interest in conservation of habitats to support the species they hunted, and many were prepared to carry out practical work to that end. In relation to the online survey, he noted that there had been 2,559 responses; 71% of respondents were members of a hunting club or body. He stated that 1,033 respondents stated that they submitted bag data (57% of hunting members).

77. Dr. O’Keeffe reported that 57% of respondents thought that there should not be a change to the OSO; 27% of respondents thought that there should be a change to the OSO; and 12% of respondents were unsure or had no opinion.

78. He stated that the most hunted species were reported as being the cock pheasant, woodcock, mallard, snipe, wood pigeon and teal, in that order. The least hunted were the ruddy duck, scaup, pochard, goldeneye, golden plover and gadwall, in that order. He noted a somewhat contradictory finding had been received, in that 48% of respondents had noticed a decline in species on the OSO, but an almost equal number of respondents, 47%, noticed an increase in OSO species.

79. Dr. O’Keeffe summarised the key challenge as being to achieve meaningful conservation actions for species whose populations had declined dramatically in Ireland, while harnessing the very positive energy that existed in disparate groups who had a passion for birds and/or hunting, and often both.

80. In terms of recommendations, Dr. O’Keeffe recommended that there should be a retention of 17 of the 21 species on the OSO. He recommended removal of scaup, pochard and goldeneye from the OSO because of the very great decline in their numbers in Ireland. He also recommended the removal of the pintail due to their very small numbers in the State and uncertainty around the effective hunting on the population at that time. He recommended that there should be a further review in the following year to consider further changes.

81. He went on to recommend that there should be a systematic collection of hunting statistics, together with collection and analysis of population data on all huntable bird species. There should be prioritisation of evidence for five named species. He stated that as soon as more biological and hunting data became available on certain species, these could be used to support discussions on the start and end dates of open seasons. He recommended the commencement of the prioritisation of species and/or key site management plans. There were other recommendations made in his report which do not immediately impact the issues in these proceedings.

82. An affidavit was sworn by Dr. Sean Kelly on 26th March 2024, dealing with the I-WeBS survey of wild bird populations. This acronym stands for the Irish Wetlands Bird Survey. Dr. Kelly is a grade II wildlife inspector in the NPWS Birds Unit, Scientific Advice and Research directorate. He holds a Bachelor of Science degree in zoology and a PhD in ecology and evolution of birds.

83. Dr. Kelly stated that following a tendering process, Bird Watch Ireland was awarded the contract to carry out the survey of wild birds in Ireland. He stated that the I-WeBS employed a standardised internationally accepted and well established survey methodology to count wintering waterbirds present within a defined network of wetland sites across Ireland. He described the methodology of the survey as follows: authorised surveyors would visit up to 300 sites each winter. These would be surveyed on a monthly basis. There were approximately 700 sites surveyed within a given five-year period. The surveys were undertaken by a network of professional staff from the NPWS and from its contracted support at Birdwatch Ireland, supported by skilled amateur ornithologists. They recorded the numbers of various species of birds observed at the wetland on the dates on which they carried out the surveys.

84. Dr. Kelly stated that the survey had been in operation annually for almost three decades since the winter of 1994/1995. The survey represented the largest and longest-running programme for monitoring wintering water bird populations, their trends and distribution in Ireland. He stated that there was no other water bird monitoring programme in Ireland that operated at the same scale, or over the same time period. The I-WeBS survey database was the largest and most comprehensive database of wintering waterbirds in Ireland.

85. He stated that estimates of population size and population trend for each water bird species were determined by the application of sophisticated statistical

modelling. This ensured that the population trends were drawn from a sample of sites that were consistently covered. The analytical methods and associated outputs followed international standards. They were peer-reviewed by Crowe et al in 2008, and Burke et al in 2018, and were widely accepted and utilised. He stated that the data provided by the survey was an accepted industry standard in many regards, as well as being accepted for academic and scientific research purposes. He stated that there was wide acceptance of the I-WeBS data and its associated outputs as being reliable and robust.

86. He stated that the I-WeBS provided the best currently available data source for monitoring wintering water bird populations across Ireland. The survey produced population estimates based on the largest available sample of wetlands across Ireland.

87. Dr. Kelly went on to state that from the I-WeBS survey national trends had shown that for pochard there had been a decline in population of 79.1%; for scaup there was a decline of 89.2%; and for goldeneye the decline was 66.9%. These figures were for the period 1995 to 2019.

88. That completes the summary of the relevant evidence in relation to the documentation and scientific data that was before the Minister at the time of his decision in 2023.

“Bag data.”

89. “*Bag data*” is the term used to refer to data provided by a hunting organisation in relation to the numbers and species of birds shot by its members.

90. It was accepted by both parties that there was no bag data available to the Minister when he made his decision to remove the relevant species from the OSO.

91. Much of the affidavit evidence dealt with why bag data, which had been in the possession of the second applicant for the relevant years, had not been supplied by it to the Minister. It is not necessary for this court to go into the details of why bag data may not have been supplied by the second applicant to the Minister. It was accepted that such data was not before him when he made his decision to amend the OSO.

92. In his affidavit sworn on 13 June 2024, the first applicant gave the bag returns that were in the possession of the second applicant in relation to the relevant species for the years 2016 to 2021. These are set out at para. 53 of the affidavit.

93. The bag returns furnished by the second applicant suggest that for the years 2016-2021 the number of relevant species shot were as follows:

Annual Bag Returns					
	Pintail	Pochard	Scaup	Goldeneye	Total
2016/2017	7	-	-	66	73
2017/2018	2	-	-	15	17
2018/2019	4	4	1	6	15
2019/2020	2	-	-	26	28
2020/2021	23	1	1	2	27
Total	38	5	2	115	160

94. Mr. Butler went on to give an estimate of the overall national bag for the relevant years 2016-2021:

Estimate of National Bag from Hunting					
	Pintail	Pochard	Scaup	Goldeneye	Total
2016/2017	79	-	-	106	185
2017/2018	45	-	-	48	93
2018/2019	52	75	1	12	140
2019/2020	2	-	-	32	34
2020/2021	140	1	1	2	144
Total	318	76	2	200	596

95. It is important to note the limitations of this data: first, it is derived from bag returns made by nominated members of the second applicant, possibly up to 1% of the total membership. Secondly, it is not clear how often or from which sites the bag returns were made by the nominated hunters. Thirdly, it should be noted that the second applicant represents two thirds of the total number of hunters in Ireland; therefore it cannot be representative of all hunters in the State. Fourthly, the methodology used to extrapolate from the bag returns, the estimate of the national total annual bag returns for the relevant species, is not clearly stated. Therefore, one would have to approach the overall estimate with caution.

96. Having said all of that, it appeared to be common case between the parties that the removal of the relevant species from the OSO represented a removal of 8% of wild birds that could be shot during the open season; meaning that 92% of wild birds remained covered by the OSO.

Discussion and Conclusions.

97. The court makes the following preliminary remarks: first, the court repeats that these are judicial review proceedings. It is not an appeal from the merits of the decision reached by the Minister as to what amendment, if any, should be made to the OSO.

98. This court cannot stand in the shoes of the Minister to decide what decisions or policies ought to be adopted in furtherance of any particular goal that may be pursued by the government. It is entirely for the government to decide what policies shall be pursued and what decisions should be taken by the Minister in furtherance of those policies. It is not appropriate for this court to carry out a merits based analysis of the issues. Much less would it be appropriate for the court to have regard to expert's reports

on the substantive issues which were produced after the event: see dicta of Edwards J. in *Hosey & Others v Minister for the Environment, Heritage & Local Government & Others* [2010] IEHC 61 at p. 57.

99. In exercising its judicial review jurisdiction, this court can examine whether in taking a particular decision, the Minister has acted in accordance with the legal requirements of any applicable domestic and EU law. If the process adopted which led to the decision, is lawful, the decision can only be set aside if it is unreasonable in the legal sense as defined in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39.

100. Secondly, it is clear from the case law that the Minister enjoys a wide discretion as to the exercise by him of the powers conferred on him by the 1976 Act: see dicta of Hedigan J. in *Crofton v Minister for the Environment, Heritage & Local Government* 2009 IEHC 114 at para. 32.

101. Before coming to the two issues that arise for determination, it will be helpful to set out those matters on which there is no real dispute between the parties. First, it was accepted that the Minister did not have any bag data available to him in respect of the hunting of wild birds in Ireland. The second applicant had some data of that type, but did not make it available to the Minister.

102. Secondly, it was conceded that the Minister's officials had not sought, nor had they been given, any legal advice when preparing their briefing documents to enable the Minister to reach a decision as to what amendments, if any, should be made to the OSO.

103. Thirdly, it was accepted that there was no explicit reference to s. 11(2)(bc) of the 1976 Act in any of the briefing documents prepared for the Minister.

104. I turn now to the first issue which was whether the Minister was obliged to have regard to the matters referred to in Section 11 (2)(bc) of the 1976 Act when deciding to amend the OSO by removal of the relevant species therefrom.

105. I hold that in applying the principles for the proper interpretation of statutes as set down in *Heather Hill Management Company CLG v. An Bord Pleanála* [2024] 2 IR 222, the Minister was not obliged to specifically take account of the matters set out in s.11(2)(bc) of the 1976 Act prior to reaching a decision to amend the OSO in the way that he did in 2023.

106. I have reached that conclusion for the following reasons: s.8 of the 1976 Act provides that the Minister may make regulations for prescribing any matter referred to in the Act. Subsection 2 thereof provides that the Minister may by order revoke or amend an order made by him under the Act.

107. Section 24 of the Act provides that the Minister may make an order known as an open season order permitting the hunting of a protected wild bird under the conditions set out in that order.

108. When one reads the Act in the context of the obligations set out in the Birds Directive, to which it gives effect, it is clear that Member States, and in this case, the Minister, have the power to take whatever steps may be deemed necessary to maintain the populations of wild birds at satisfactory levels, meaning the level at which favourable conservation status is achieved.

109. The Directive prohibits the killing of wild birds within the territory of the EU. Under the Directive Member States are given the power to permit hunting of wild birds if they are satisfied that in so doing the population of the wild birds will be maintained at a satisfactory level.

110. The powers conferred on the Minister by the 1976 Act, as amended, mirror the provisions of the Directive. I hold that the Minister is entitled to amend the provisions of the operative OSO as and when he thinks it necessary to do so to maintain the population of species of wild birds at satisfactory levels. His power in that regard is not circumscribed by any requirement to take into account any economic or recreational factors in any particular way, prior to making the necessary decision.

111. If the Minister had to do that, both the Directive and the Act would clearly state that the Member States or the Minister, as the case may be, may only amend an extant permission to allow the hunting of wild birds, if the Minister is satisfied that it is appropriate to do so having considered other factors, such as economic and recreational interests. There is no such obligation in the Directive or in the Act. Indeed, as already noted, the Directive is to the opposite effect in that it prohibits the killing of all wild birds unless specifically permitted by the Member States. There is a similar prohibition in the 1976 Act.

112. In his second affidavit at paragraph 55, the first applicant submitted that the Minister had to consider the population of the species that corresponded to ecological requirements; the population of the species that corresponded to scientific requirements; the population of the species that corresponded to cultural requirements; economic requirements; recreational requirements; or whether the measures would adapt the population of the species to the population level having regard to these factors, before he could reach a decision to amend the OSO.

113. I reject that submission. I hold that once the Minister was presented with scientific evidence that there has been a decline in the population of particular species of wild birds in Ireland, he was entitled to take whatever steps appeared to him to be

necessary to halt that decline and to return the population of the affected species to a satisfactory level.

114. I hold that in exercising the powers conferred on him by ss. 8 and 24 of the 1976 Act, as amended, the Minister is not obliged to take into account the matters set out in s. 11(2)(bc) of the Act.

115. Even if I am wrong in coming to that conclusion, I find that on the evidence that is before the court, the Minister had regard to the substance of the matters set out in s. 11(2)(bc) when making the decision. The process leading to the taking of the decision has been summarised in detail earlier in the judgment. It is clear that the working group within the Minister's department had a deep knowledge of the issues concerning wild birds within the area of Ireland.

116. I accept the evidence of Dr. Kelly that the I-WeBS data, while not perfect, was robust and reliable data. It documented a significant decline in the populations of the relevant species over a number of years. That decline was mirrored to a greater or lesser extent in the data from other European countries. I find that there was credible scientific evidence before the Minister of a significant decline in the populations of the relevant species in Ireland.

117. I accept the evidence given by Ms. O'Brien that there was extensive public consultation in advance of the taking of the decision by the Minister. That was in the form of an online survey and public stakeholder meeting.

118. I accept the evidence of Dr. O'Keefe that of the 2,559 submissions received, approximately 71% came from hunting enthusiasts. Accordingly, I find that insofar as recreational and economic interests could have been impacted in any decision to amend the OSO, these would have been articulated in the online submissions made on behalf of hunters generally and other interested individuals.

119. The holding of the stakeholder meeting on 21 April 2023, at which the second applicant made a presentation, gave a further opportunity to interested parties to make whatever submissions they wished on any economic, cultural or recreational aspects of the OSO, that appeared to them to be relevant.

120. The provisions of Art. 2 of the Birds Directive were considered in *Commission v. Belgium*, where the court stated as follows at paragraph 8:

“In this context it is necessary to refer to Article 2 of the directive, which requires the Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation.”

121. I accept the submission made by counsel on behalf of the respondents that the decisions of the CJEU have clearly demonstrated that the provisions of Art. 2 of the Directive do not constitute a general derogation from the overall prohibition on the killing of wild birds. In particular, it has been established that the criteria mentioned therein are not of equal status. In this regard, I accept that the following portion from the opinion of AG Kokott in the *Welt Organisation* case contains a correct statement of the law at para. 42:

“In accordance with Article 2 of the Birds Directive, that level must correspond in particular to ecological, scientific and cultural requirements, while taking account of the economic and recreational requirements. However, the Member States are not permitted to weigh those factors against each other at will in order to determine the satisfactory level of a population. In accordance with Article 1, the main objective of that directive is, rather, to conserve all wild bird species native to the European territory of the Member States. The key criterion, therefore, much as with the conservation status of species, a core concept of the Habitats Directive, is whether the species forms a viable element of the natural habitat to which it belongs. The ecological and scientific requirements of the species in question are decisive in that regard. In particular, a sufficiently large habitat must be permanently available and the distribution area should at least remain stable. Cultural, economic and recreational requirements, on the other hand, can be taken into account only after and insofar as the long-term conservation of the species has been ensured.”

122. Article 2 of the Directive also must be read in the light of Art. 14, which provides that Member States may introduce stricter protective measures than those provided for under the Directive.

123. Thus, insofar as s. 11(2)(bc) of the 1976 Act provides that the Minister may take the requisite measures to maintain the population of the species referred to in Art. 1 of the Birds Directive at a level that corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of the species to that level; and in light of the fact that what is meant by “*taking account of*” various criteria is not defined; I hold that when faced with credible evidence of a serious decline in population numbers in the relevant

species; and by engaging in the extensive public consultation process that was carried out prior to the taking of the decision to amend the OSO; the Minister did in substance have regard to the matters set out in s. 11(2)(bc) of the 1976 Act.

124. Insofar as it was submitted by the applicants that the respondent's position as pleaded in the statement of opposition was contradictory or illogical because it was pleaded that the Minister was not obliged to have regard to the matters set out in s. 11(2)(bc), while at the same time pleading that the Minister had in fact had regard to the substance of those provisions; I hold that this submission is without substance.

125. It is entirely logical for a party to plead that they were not legally obliged to do a particular thing, while pleading that they did in fact do the particular thing. A simple example of this would be where there was a pleading in a road traffic case that a cyclist was obliged to wear a helmet and had not done so. It would be perfectly proper for the cyclist to plead that there was no obligation on him under Irish law to wear a helmet; while at the same time pleading that he had in fact been wearing a helmet at the time of the accident.

126. Accordingly, I hold that it was not contradictory for the Minister to plead that he was not required at law to have regard to the matters set out in s. 11(2)(bc) of the 1976 Act before making a decision to amend the OSO; while pleading that he had had regard to the substance of these matters in the course of his deliberations.

127. Insofar as it was pleaded that the actions of the Minister were unlawful because in the absence of bag data, it could not be established that the decline in the population of the relevant species was due to hunting, rather than to some other cause, such as climate change; I hold that in the absence of reliable scientific evidence as to the cause of the decline in the population numbers in the relevant species, the Minister was entitled to apply the precautionary principle and take a step that he knew would

definitely reduce the number of wild birds being killed in the State. The application of the precautionary principle in this case means that a higher standard of protection should be applied in cases of scientific uncertainty as to the risk to a particular species of wild bird.

128. The Minister could not alter the effects of climate change on the migratory habits of the relevant species, but he could alter the numbers of the relevant species that were shot for recreational purposes in this State. Given the evidence before him of population decline in the relevant species over a number of years, I hold that the Minister was entitled to take the step of removing the relevant species from the OSO.

129. Furthermore, I hold that it is not open to the applicants to complain about the absence of a consideration by the Minister of bag data before reaching his decision, when the second applicant had deliberately withheld such information from the Minister.

130. Insofar as it was submitted that the decision was unlawful because the Minister did not consider the distribution area or flyway of the migratory birds and that the Minister ought to have obtained data from other Member States along the migratory path before amending the OSO; I hold that there is no such obligation on the Minister to do so before implementing a measure designed to protect the species of wild birds within the territory of this State.

131. There are two reasons why this is not necessary: first, the Directive requires that in permitting hunting of a species of wild bird, the competent authority in the member state concerned must have regard to population numbers of that species in its distribution area. This is important because the species, being migratory, may fly across the territory of several member states when travelling from their usual habitat to their winter habitat. If hunting is allowed along the flyway, regard has to be had to the effect

that that will have on the population within the general distribution area. Article 7 specifically prohibits any hunting of migratory species during their return to their rearing grounds.

132. However, where hunting is being prohibited in a particular area, and in particular, in the ultimate wintering habitat, these considerations do not apply, because, by definition, the population of the species of wild bird will not be adversely affected by any prohibition on hunting.

133. Secondly, there is no requirement in either the Directive or in the Act for the Minister to consult with the competent authorities in any Member States prior to implementing a decision to prohibit hunting within the area of the State. Given that birds fly across a number of territories, if such a requirement were to be imposed prior to implementing a ban on hunting, that would make the taking of swift and decisive action to protect endangered species, much more difficult.

134. In conclusion, for the reasons set out herein, I hold that the Minister was not obliged to consider the matters set out in s. 11(2)(bc) of the Wildlife Act 1976, as amended, prior to making a decision to amend the OSO in the manner that he did.

135. For the reasons set out herein, I hold that the Minister did in fact have adequate regard to the matters set out in s. 11(2)(bc) prior to making the decision to remove the relevant species from the OSO.

136. Accordingly, I refuse the reliefs sought by the applicants in their notice of motion dated 15 December 2023 and in their statement of grounds.

Proposed Final Order.

137. Having regard to the findings set out in the judgment herein, it is proposed that the final order should be to refuse the reliefs sought by the applicants in their notice of motion dated 15 December 2023 and in their statement of grounds.

138. As this judgment has been delivered electronically, the parties shall have until 15 September 2026 to furnish brief written submissions of not more than 1000 words on the terms of the final order and on costs and on any other matters that may arise.

139. The matter shall be listed for mention at 10.30 hours on 15 October 2026 for the purpose of making final orders.