

**THE HIGH COURT**

[2021] IEHC 47

**RECORD NUMBER: 2021 2 JR**

**BETWEEN**

**THE IRISH COURSING CLUB**

**APPLICANT**

**AND**

**THE MINISTER FOR HEALTH AND THE MINISTER FOR HOUSING, LOCAL GOVERNMENT  
AND HERITAGE**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Niamh Hyland delivered on 25 January 2021**

**Summary of Decision**

1. This is an application for an interlocutory injunction directing the Minister for Health to make regulations providing for an exemption for the applicant from the current prohibition on sporting events until these proceedings are substantively determined. For the reasons set out in this judgment, I find that (a) at least certain of the grounds of challenge advanced by the applicant are sufficiently strong to meet the requisite test; (b) I have no jurisdiction to grant a mandatory injunction directing the Minister to legislate in prescribed terms; (c) even if I did enjoy such a power, the balance of convenience and risk of injustice dictate that no such power should be exercised on the facts of this case. Accordingly, I refuse the relief sought.

**Background**

2. By way of background, the Irish Coursing Club (“the applicant”) is an organisation designated by the Greyhound Industry Acts 1958-2019 as the controlling authority for the breeding and coursing of greyhounds in Ireland. Under the Wildlife (Wild Mammals) (Open Seasons) Order 2005, S.I. No. 550/2005, the sport of coursing can take place between 26 September and 28 February each year. The 2020/2021 season of coursing was affected by the arrival of the COVID-19 virus, and coursing is not currently permitted to take place, whether “behind closed doors” or otherwise. These proceedings concern the decision of the Minister for Health to remove the applicant and its sport of coursing from a list of sporting events permitted, by way of exemption, to occur behind closed doors during the current COVID-19 “lockdown” period.

**The Proceedings**

3. By Notice of Motion dated 6 January 2021 the applicant sought various reliefs including an Order of Certiorari setting aside the decision of the Minister for Health delisting the applicant and its sport of coursing from a list of sports permitted to occur. On 4 January 2021 Barton J. granted the application leave to issue the judicial review proceedings and directed that the applicant be given liberty to move relief no. (n) as per the Statement of Grounds having regard to the urgency of the matter.
4. There are various reliefs sought in the Statement of Grounds. For these purposes it is necessary to set out the following:
  - “A. *An Order of Certiorari by way of an application for judicial review setting aside the decision of the First Respondent to delist the Applicant and its sporting activities from the permitted list of sports as set forth at Article 10 in Statutory Instrument*

*No. 701/2020 and/or any replacement or equivalent regulations providing for such a list and made by the First Respondent pursuant to the Health Act 1847, as amended.*

*B. An Order of Mandamus by way of an application for judicial review requiring the First Respondent to reinstate the Applicant and its sporting activities in the list of sports permitted to operate, in the like manner as greyhound, horse racing and horse sports are presently so permitted.*

...

*N. An Interlocutory Injunction by way of an application for a judicial review requiring the First Respondent to permit the Applicant and its sporting activities to continue in operation in the like manner of greyhound racing, horse racing and horse sport (i.e. "behind closed doors") as so provided for at Article 10 of SI No 701/2020 pending the determination of the within application for a judicial review"*

5. A verifying affidavit was sworn by Mr D.J. Histon, CEO of the applicant on 4 January 2021. Replying affidavits were sworn by Mr John Fitzgerald, Principal Officer in the Department of Housing, Local Government and Heritage on 14 January 2021, Ms Eilis O'Connell, Assistant Secretary in the Department of Agriculture, Food and the Marine on 15 January 2021, Mr Seamus Hempenstall, Principal Officer in the Department of Health on 14 January 2021, and Dr Darina O'Flanagan, special advisor to the National Public Health Emergency Team on 15 January 2021. Mr. Hempenstall swore a supplemental affidavit on 20 January 2021. An undated second affidavit of Mr Histon was provided in response to the affidavits of the respondents and a third affidavit was sworn by Mr. Histon on 18 January 2021.

#### **Chronology of relevant events**

6. From 27 March 2020, the Irish Government introduced "stay at home" or "lockdown" measures across the State for the purpose of preventing, limiting, minimising or slowing the spread of COVID-19.
7. On 15 September 2020, the Government published a framework document "*Resilience and Recovery 2020-2021: Plan for Living with COVID-19*" which set out a number of proposed restrictions (dividing them into 5 Levels) based on public health needs. This document envisaged that no matches or sporting events were to be permitted in Levels 3, 4, or 5 but that there would be an exemption for certain professional and elite sports and horseracing to be carried out "behind closed doors".
8. On 5 October 2020, the Government decided that the State should be moved to Level 3 Restrictions. The regulations reflecting Level 3 adopted at this point in time prohibited sporting events but granted certain exemptions to various sporting events, including those where every person participating in the event was involved in the training and preparation of greyhounds for events held under the authority of Rásaíocht Con Éireann, the authority charged with regulating greyhound racing and who enjoys certain statutory

functions in respect of the applicant. The applicant took the view that it was permitted to continue to hold coursing meetings as it was doing so under the authority of Rásaíocht Con Éireann. However, the Department of Housing, Local Government and Heritage did not take the same view and correspondence ensued during the month of October between the applicant and the Department. Ultimately, after the Department temporarily suspended the licenses permitting coursing, the applicant accepted that it was not entitled to hold coursing meetings at that time.

9. Further regulations were adopted on 22 October after the country moved to Level 5 restrictions. No exemption was provided to the applicant under those regulations.
10. On 11 November 2020, the applicant made submissions to the Department of Agriculture, requesting that coursing be included when the country exited from Level 5 restrictions. As may be seen from the summary of regulations below, the applicant was in fact granted an exemption from the prohibition on holding sporting events when the country went into Level 3+ on 1 December 2020. The applicant accordingly organised its events for the remainder of the season. Twelve such events took place before Christmas. On 22 December 2020, a collective decision was made by the Government that the State should move to Level 5 restrictions per the "*Plan for Living with COVID*". The regulations reflecting that decision removed the applicant's exemption from the prohibition, meaning it could not hold any coursing events. Coursing has a short season, normally running from September to February. The last event of the season this year is scheduled to be the National Meeting in Clonmel, Co. Tipperary, on 28 February 2021. In circumstances where the applicant believes that it will not be permitted to hold any coursing events before the end of the season given the current regulations (and presumably any replacement regulations), it issued the within proceedings and brought this application for interlocutory relief.

#### **Summary of relevant legislation**

11. On 20 March 2020, the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 was enacted to combat the public health emergency caused by the spread of the COVID-19 virus. Section 10 of this Act inserted a new section 31A into the Health Act 1947 (the "Health Act") which allowed the Minister for Health to make regulations for preventing, limiting, minimising or slowing the spread of the virus. Section 31A(1) empowers the Minister for Health to introduce a wide range of measures, including *inter alia* prohibiting events (including sporting events) which could reasonably be considered to pose a risk of infection with COVID-19 to persons attending. Section 31A(1) provides as follows:

*31A.(1) The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of COVID-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimising or slowing the spread of COVID-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of COVID-19 and, without prejudice to the generality of the*

*foregoing, such regulations may, in particular, provide for all or any of the following:*

...

- (d) the prohibition of events, or classes of events, including (but not limited to) events—*
  - (i) which, by virtue of the nature, format, location or environment of the event concerned or the arrangements for, or the activities involved in, or the numbers likely to be attending, the event could reasonably be considered to pose a risk of infection with COVID-19 to persons attending the event,*
  - (ii) at specified geographical locations to which an affected areas order applies,*
  - (iii) at locations which by virtue of the nature, format, or environment of the locations concerned or the arrangements for, or the activities involved in, or the numbers likely to be attending the type of events at the locations, could reasonably be considered to pose a risk of infection with COVID-19 to persons attending at events at those locations,*
  - (iv) where the level of proposed attendance or likely level of attendance at the event could reasonably be considered to pose a risk of infection with COVID-19 to persons attending the event;*

...

- (2) When making regulations under subsection (1), the Minister—*

- (a) shall have regard to the following:*
  - (i) the fact that a national emergency has arisen of such character that there is an immediate and manifest risk to human life and public health as a consequence of which it is expedient in the public interest that extraordinary measures should be taken to safeguard human life and public health;*
  - (ii) the fact that a declaration of Public Health Emergency of International Concern was made by the World Health Organisation in respect of COVID-19 and that COVID-19 was duly declared by that Organisation to be a pandemic;*
  - (iii) the fact that COVID-19 poses significant risks to human life and public health by virtue of its potential for incidence of mortality;*
  - (iv) the policies and objectives of the Government to take such protective measures as are practicable to vindicate the life and bodily integrity of citizens against a public health risk;*
  - (v) the need to act expeditiously in order to prevent, limit, minimise or slow the spread of COVID-19;*

- (vi) *the resources of the health services, including the number of health care workers available at a given time, the capacity of the workers to undertake measures, to test persons for COVID-19 and to provide care and treatment to persons infected with COVID-19, the necessity to take such measures as are appropriate to protect health care workers from infection from COVID-19, and the capacity of hospitals or other institutions to accommodate and facilitate the provision of care and treatment to infected persons;*
  - (vii) *the resources, including the financial resources, of the State;*
  - (viii) *the advice of the Chief Medical Officer of the Department of Health,*
- and*

(b) *may, have regard to any relevant guidance (including, in particular, any guidance relating to the risk assessment for, and case definition relating to, COVID-19) provided by the World Health Organisation, the European Centre for Disease Prevention and Control, the Health Protection Surveillance Centre of the Health Service Executive and other persons with relevant medical and scientific expertise.*

(3) *Before making regulations under subsection (1), the Minister—*

(a) *shall consult any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, and*

(b) *may consult any other person as the Minister considers appropriate for the purposes of these regulations.*

(4) *The Minister may, having consulted any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, exempt specified classes of persons including, but not limited to persons, who perform essential services, including statutory duties or other specified public or other services, from regulations under subsection (1).*

12. Section 5 of the Health Act 1947 allows the Minister for Health to make regulations in relation to anything referred to in the Act.

13. The first set of regulations adopted pursuant to the Health Act was the Health Act 1947 (Section 31A - Temporary Restrictions) (COVID-19) Regulations 2020 (S.I. 121/2020) which were commenced on 8 April 2020. Subsequent regulations were made in the months leading up to October.

14. On 7 October 2020 the Health Act 1947 (Section 31A - Temporary Restrictions) (COVID-19) (No.6) Regulations 2020 (S.I. No. 413/2020) were commenced, pursuant to the Minister's powers under s. 31A and s.5 of the Health Act 1947. At this point the country was at Level 3 restrictions. These Regulations included a general restriction on the

organisation of sporting events with a certain number of exemptions including events organised under the authority of Rásaíocht Con Éireann.

15. On 22 October 2020 the Health Act 1947 (Section 31A - Temporary Restrictions) (COVID-19) (No. 8) Regulations 2020 (S.I. No. 448/2020) were commenced by the Minister for Health, reflecting the fact that the country had been moved to Level 5. Regulation 10 of S.I. 448/2020 continued the exemption for certain elite and professional sporting events including greyhound racing. Certain sports that had been included in previous regulations were removed. These regulations remained in operation until 1 December 2020.
16. On 30 November 2020 the Minister for Health made the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 9) Regulations 2020 (S.I. 560/2020) (“the Principal Regulations”) which reflected the Government decision to move the State to Level 3+ restrictions. These Regulations were commenced on 1 December 2020. These Regulations expanded the list of exempted sporting events permitted to take place and included the sport of coursing.
17. Regulation 9 of S.I. 560/2020 reads as follows:
  9. (1) *Subject to paragraph (2), a person shall not organise, or cause to be organised, a sporting event in a relevant geographical location.*
  - (2) *A person may organise, or cause to be organised, a sporting event in a relevant geographical location where the person takes all reasonable steps to ensure that every person participating in the event –*
    - ...
    - (e) *is involved in the training and preparation of racehorses for events held under the authority of Horse Racing Ireland,*
    - (f) *is involved in the training and preparation of sport horses for events held under the authority of Horse Sport Ireland,*
    - (g) *Is involved in the training and preparation of greyhounds for events held under the authority of the Irish Coursing Club or Rásaíocht Con Éireann, or*
    - (h) *is a coach or trainer in respect of a person referred to in any of subparagraphs (a) to (g).*
18. S.I. 560/2020 came into operation on 1 December 2020 and originally under Regulation 1(2) were due to come to an end on 17 December 2020.
19. On 17 December 2020, the Minister for Health made the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 9) (Amendment) Regulations (S.I. 653/2020) which extended the categories of exemptions as provided for by the Principal Regulations. These Regulations came into operation on 18 December 2020. S.I. 653/2020 amended

the Principal Regulations so that they became due to expire on 31 January 2021 instead of on 17 December 2020. There was no change to the exemption afforded to the applicant. Level 3+ was still the applicable level in the country at this point.

20. On 24 December 2020, the Minister made the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 9) (Amendment) (No. 2) Regulations 2020 (S.I. 695/2020), following the decision of the Government to move the country to Level 5. These Regulations shortened the list of sporting events permitted to take place by *inter alia* removing the sport of coursing while continuing to list horse racing and greyhound racing. Regulation 3 of S.I. 695/2020 further amended the Principal Regulations by altering the expiration date for the principal regulations from 31 January 2021 to 12 January 2021. Regulation 9 of S.I. 695/2020 provides that:

9. *Regulation 9 of the Principal Regulations is amended, in paragraph (2) -*

...

*(b) by the substitution of the following subparagraph for subparagraph (g):*

*"(g) is involved in the training and preparation of greyhounds for events held under the authority of Rásaíocht Con Éireann, or".*

21. On 30 December 2020, a further Government decision was made to impose additional public health measures while the country remained in Level 5. This was given effect by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 10) Regulations 2020 (S.I. 701/2020) which commenced on 31 December 2020. Regulation 10 of S.I. 701/2020 maintained the same position as S.I. 695/2020 by granting an exemption to *inter alia* greyhound racing and horseracing. No exemption was granted to coursing. Regulation 2 of S.I. 701/2020 revoked the Principal Regulations. Regulation 1(2) provides that the Regulations come into effect on 31 December 2020 and are to end on 31 January 2021.

## **Submissions of the parties**

### **The applicant's arguments**

22. In respect of its substantive complaints, the applicant submits that there was a failure on the part of the Minister for Health to consult other appropriate Ministers before making such a decision as was required by both s. 31A of the Health Act 1947 and by fair procedures generally; that the applicant and the sport of coursing have been discriminated against in a manner repugnant to the guarantee of equality before the law pursuant to the Constitution; that the decision to exclude the sport was unreasonable and/or unreasonable as no new evidence was available to Minister for Health at the time the decision was made; that it ought to have received reasons for its delisting on 24 December 2020 having requested same; and that the Minister for Health made the decision for an improper purpose and on grounds other than those of public health, including his personal attitude and the personal attitudes of those Ministers whom he consulted prior to making the Regulations, to the sport of coursing.

23. In respect of injunctive relief, the applicant argues that the balance of convenience favours the sport of coursing being permitted to continue (with safeguards) pending the determination of these proceedings. It accepts that at this interlocutory stage, it has a high threshold to reach (citing *Okunade* and *Friends of the Environment v. Minister for Communications* [2019] IEHC 555 while maintaining it has reached the necessary threshold.
24. Insofar as the jurisdiction of the court to grant the relief sought is concerned, the applicant argues that the court has power to grant this injunction as it is, in essence, seeking an Order restraining the prohibition applying to it and to return to the *status quo* as it existed prior to the S.I. 695/2020 of 24 December 2020 i.e. the continuation of the coursing season as was the position and expectation as of that date. It argues that nothing had changed at that date in relation to the way in which it was operating coursing and the COVID-19 compliant measures it was taking, of which there had been no complaint by any Department.

#### **The respondents' arguments**

25. In relation to the substantive arguments raised by the applicant, the respondents submit that there was no statutory obligation on the Minister for Health to consult either specific Ministers (including the Minister for Agriculture, Food and the Marine and/or the Minister for Housing, Local Government and Heritage) or to consult the applicant itself. Counsel for the respondents note that, in any event, S.I. 695/2020 and S.I. 701/2020 reflected collective Cabinet decisions and that there was informal consultation with the relevant Ministers. The respondents dispute any allegations of irrationality and point to the Government strategy for the public to stay at home and that therefore the general restriction on non-professional and non-elite sporting events is not irrational.
26. Counsel for the respondents submitted that there is no basis for the contention that any irrelevant considerations (including political considerations or bias) were taken into account in the decision-making process and points to the fact that the Government made these decisions collectively. It also argues that the applicant as a private members club does not have standing to invoke the rights of equality set out in Article 40.1 of the Constitution.
27. In relation to the balance of convenience, Counsel pointed to the affidavit of Dr Darina O'Flanagan, an expert and consultant in public health in which Dr O'Flanagan identified a higher risk of transmission of COVID-19 due to the manner in which coursing takes place, justifying the ban on coursing at Level 5. The respondents submitted that its duty to protect the health of its citizens is a vital matter in any analysis of the balance of convenience and that this balance strongly favours the refusal of relief.
28. Regarding the issue of jurisdiction, in oral submissions Counsel submitted that what the applicant was in fact seeking was for the court to direct the Minister for Health to make new law in a particular way, to exercise the power of making regulations so as to provide for the sport of coursing to be permitted to take place for the next six weeks until the end of the coursing season and argued that the court does not have jurisdiction to do this.

### **Strength of the applicant's case**

29. By the time the matter came on for hearing, there was agreement between the parties that because the applicant is seeking a mandatory injunction, it must establish, not just that it has a fair case or serious issue to be tried but that it has advanced strong grounds.
30. In my analysis of whether the applicant has demonstrated sufficiently strong grounds, I am conscious that I am not the trial judge and that this is simply an interlocutory hearing. I am also conscious that I have not had the benefit of a Statement of Opposition by the respondents, as is normal where the matter is being heard at an interlocutory stage. Therefore, my decision should not be taken as in any way conclusive as to the merits of the substantive arguments being raised. Rather, I am only analysing whether the applicant can be considered to have raised sufficiently strong grounds at this stage. This is in accordance with the traditional approach of courts when they are considering the strength of arguments at an interlocutory stage. For example, in *Savill v. Byrne* [2012] IEHC 415, Laffoy J. observed that the fact that she had found the plaintiff had reached the threshold as to the sustainability of his claim, was "*by no means definitive of the final outcome of the substantive proceedings which will in all probability involve difficult issues of fact and law...*" Comments to similar effect were made by Clarke J. in *Okunade v. Minister for Justice* [2012] 3 I.R. 152.
31. I should stress that because the legal issues and factual context in this case are complex, and because, as I identify below, the question of the balance of convenience is not finely balanced, this is not a case where it is appropriate to allow a view as to the strengths and weaknesses of the arguments to influence my decision whether to grant the injunction (as was envisaged as a possible factor in *Okunade*).

### **Argument on lack of consultation**

32. The applicant argues that the Minister for Health failed to consult with appropriate Ministers of the Government or with the applicant, prior to the making of S.I. 695/2020 and S.I. 701/2020 in breach of his obligations under s.31A(3) of the Health Act 1947. I consider that insofar as the argument relates to consultation with other Ministers, this is a sufficiently strong argument to meet the test identified in *Maha Lingham v. HSE* [2005] IEHC 186 for the following reasons.
33. First, the wording of the relevant section is somewhat ambiguous. As previously recited, it provides as follows:
- (3) *Before making regulations under subsection (1), the Minister –*
- (a) *shall consult any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government, and*
- (b) *may consult any other person as the Minister considers appropriate for the purposes of these regulations.*

34. Subsection (4) provides that the Minister may exempt persons from regulations under (1) *"having consulted any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government"*.
35. The applicant argues that there was a mandatory obligation to consult (a) the Minister for Agriculture, Food and the Marine given that it was the "parent" department for the applicant under s.26 of the Greyhound Industry Act 1958 and (b) the Minister for Housing, Local Government and Heritage, given that the latter Department ("DHLGH") licenses the activities of applicant in respect of the trapping and treatment of hares, and attends coursing meetings (including in December 2020) to observe adherence with the licence. It argues that there was no such consultation, as demonstrated by the fact that those Ministers were not identified in the Regulations as Ministers to whom the draft regulations were provided in advance as part of the consultation process identified in s.31A (3).
36. There are essentially three questions that will be required to be decided by the trial court in respect of this argument. First, it will be necessary to decide whether, as argued in oral submissions by counsel for the applicant, the Minister for Health can be obliged to consult with other Ministers. I think there are arguments going either way on that point. The wording *"as he or she considers appropriate"* would suggest that the Minister is entirely at large as to whether or not to consult with other Ministers of the government. However, the use of the word *"shall"* imports a mandatory nature to the Minister's duties in this respect. It is possible that *"shall"* in that context refers to the obligation to decide whether consultation is necessary with another Minister. That interpretation, if adopted, would permit the applicant to advance its argument that the Minister had to (a) consider which Ministers ought to be consulted and (b) in respect of those he identified, had an obligation to consult with those. The reference in ss.(3)(a) to *"having regard to the functions of that other minister of the government"*, is potentially of assistance to the applicant in this regard, given its prescriptive nature.
37. Moreover, if it was entirely optional as to whether consultation should take place with another Minister, then it is difficult to see why a section in the terms of ss.(3)(b) would not have been sufficient, providing as it does for such consultation as the Minister considers appropriate and using "may" instead of "shall". If necessary, the inclusion of a reference to a minister, when referring to "any other person" would have put the matter beyond doubt that the Minister making the regulations could consult with any other Minister.
38. Equally, the reference in ss.(4) to the Minister *"having consulted any other Minister of the Government as he or she considers appropriate having regard to the functions of that other Minister of the Government"* arguably makes it harder for the respondents to argue that the decision of the Minister as to consultation is a wholly optional one.
39. The second and linked question is whether, assuming the applicant succeeds in establishing a mandatory obligation of consultation, that requirement has been breached by the failure to consult the Ministers identified by the applicant.

40. I am conscious that Mr Fitzgerald avers at paragraph 4 of his affidavit sworn on 14 January 2021 that there was no good reason why the DHLGH ought to have been formally consulted in relation to the making of the regulations since, insofar as that Department has an interest or function in respect of coursing, it relates to the conservation status of the hare and it has no relevant role in relation to the organisation of coursing events and whether those events should be permitted to proceed having regard to current public health considerations. It is certainly true that in correspondence with the applicant about coursing meetings, that Department expressed the view that the Department of Agriculture and the Department of Health were the relevant authorities in that regard.
41. However, the DHLGH have a close involvement with the applicant. The licence of 16 September 2020 authorising the applicant to capture live hares issued by DHLGH includes 35 conditions. Those include detailed conditions in respect of the treatment of hares at the coursing meetings. The licence regulates the holding of meetings, requiring that only the coursing clubs listed in the schedule can hold coursing meetings during the period of the licence.
42. Further, the correspondence between DHLGH and the applicant, in particular during the month of October 2020, does demonstrate that DHLGH took an active role in ensuring that coursing was stopped by 22 October. In particular, by letter of 20 October 2020, it disagreed strongly with the applicant's proposal to continue coursing after Level 5 restrictions would come into place on 22 October 2020. It observed as follows:
- "This Department is not responsible for enforcing COVID-19 restrictions but does have an interest in this matter insofar as the Department's NPWS staff are charged with a range of responsibilities including monitoring activities in relation to the Wildlife Acts under which hares are netted and tagged under licence. You will be aware that it is a condition precedent of the licences to net and tag hares, that the ICC and its affiliated clubs would comply in all respects with public health guidelines".*
43. In these circumstances, the Department indicated that it did not believe the applicant had an exemption to continue coursing and placed a temporary hold on its licence with effect from Wednesday 21 October. On 22 October, the applicant indicated its intention to suspend coursing meetings.
44. It is also uncontested that Mr Fitzgerald himself has attended various coursing meetings and was the witness chosen by the respondents to give evidence, quite appropriately, as to how coursing meetings are run.
45. The above truncated description of the relationship between the applicant and that Department does not of course determine the question as to whether that Department ought to have been consulted (assuming an obligation of consultation exists). Rather it is set out to demonstrate that there is undoubtedly a deep familiarity on the part of that Department with the activities of the applicant, and that there is a factual basis upon

which the applicant can assert that the Minister for Housing, Local Government and Heritage ought to have been consulted.

46. In relation to the Minister for Agriculture, Food and the Marine, the position is more straightforward. The applicant submits that pursuant to Greyhound Industry Act, 1958, the Minister for Agriculture, Food and the Marine is the "parent department" of the applicant. This has not been controverted by the respondents. In the circumstances the applicant contends that the Minister for Agriculture, Food and the Marine ought to have been consulted.
47. Again, without deciding this argument, it appears to me that the applicant has at least identified *prima facie* why, in respect of both Ministers, they enjoyed a special position and interest in the applicant and therefore why, on the applicant's case, they ought to have been consulted in the making of regulations that removed the benefit of the exemption from the applicant. The respondents will undoubtedly argue that the regulations affected a wide range of persons and consultation by reference to individual interests was not required. That is an issue the trial judge will have to decide.
48. The third question is whether there was in fact adequate consultation for the purposes of the regulations. The respondents submit that the Cabinet meeting of 22 December 2020 made the decision to adopt the restrictions subsequently reflected in S.I. 695/2020, which included the withdrawal of the benefit of the exemption from the applicant. In the circumstances, the respondents submit that there was effective, albeit informal, consultation with all Government Ministers, including the Minister for Agriculture, Food and the Marine and the Minister for Housing, Local Government and Heritage.
49. It is true that Eilis O'Connell of the DAFM has sworn in her affidavit of 15 January 2021 that it was not necessary for it to have been consulted in the manner provided for by s.31A(3), thus appearing to acknowledge that it did not participate in a formal consultation process. Nonetheless, she goes on to say that through the standard processes that have been adopted and co-ordinated by the Department of the Taoiseach in respect of COVID-19 public health measures, all Government Departments including the DAFM had the opportunity to make such contributions, observations and input as it considers appropriate.
50. It is explained by Mr Hempenstall of the Department of Health that this was indeed the case since, in the context of current public emergency, there is a process whereby memoranda for government setting out proposed restrictions are circulated by the Department of an Taoiseach to all Departments and Ministers prior to deliberation at Cabinet, observations may be made prior to the Cabinet discussions and at Cabinet there is a further opportunity for members of government to participate in and contribute to the discussion.
51. The consideration of the trial judge in this regard will necessitate a view as to what consultation is envisaged by s. 31A of the Health Act and whether it must involve a consideration of draft regulations and commentary on same, or whether it is enough that

the relevant Minister was aware of the proposed measures in outline, and had an opportunity to make comments on same, whether in Cabinet or in previous communications.

52. Having regard to the detailed legal and factual issues involved in a determination of the grounds raised in respect of consultation, and the arguments identified in this respect by the applicant, in my view the applicant has shown that it has a sufficiently strong argument on this ground.

**Argument on obligation to provide reasons**

53. A second ground raised by the applicant is that no reasons were provided to it, despite request, explaining the decision to remove the exemption it had previously enjoyed. It quotes *Balz and Heubach v. An Bord Pleanála* [2019] IESC 90, where the Supreme Court noted that it is a basic element of any decision-making affecting the public that relevant submissions ought to be addressed and an explanation given as to why they are not accepted, and that same is fundamental to the law and to the trust which members of the public are required to have in decision making institutions (para 57). The applicant also refers to the decision of the Supreme Court in *Mallak v. Minister for Justice* [2012] 3 IR 297 and the well-known passage at paragraph 43 where Fennelly J. says that decision-makers must act fairly and rationally, meaning that they must not make decisions without reasons. Later Fennelly J. says that in the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or decision-making process.
54. In this respect, counsel for the applicant submits it is irrelevant whether the exemption from the ban on sporting events is a right or a privilege; in either case there is a duty to give reasons.
55. Counsel for the respondents fairly accepts that, even where the matter is addressed by way of delegated legislation, there may be circumstances following the decision in the *Garda Representative Association v. Minister for Public Expenditure and Reform* [2018] IESC 4 that a person is entitled to reasons for the decision, since it is the substance and not the form of the decision that determines the obligation to give reasons. However, he submits that in this case there is no entitlement to individualised reasons. He says there was nothing to prevent the applicant bringing these proceedings and that it had sufficient information to do so in the absence of tailored reasons being provided. He further submits that it knows why the decision was taken, given the publicly available evidence in respect of the COVID-19 situation, the huge amount of engagement between the applicant and various Ministers, the previous regulations and the background to the impugned regulations.
56. It is undisputed that the applicant wrote to the respondents seeking reasons for exclusion from the list of permitted sports on two occasions prior to the issuance of the within proceedings, the first time on 24 December 2020 and the second by way of letter of 28 December 2020 from its solicitor, and that no response was provided to those letters.

57. The duty to give reasons in administrative law has been considerably expanded in recent years. It is difficult to find a case where the courts have accepted that there is no duty whatsoever to give reasons for a decision substantially affecting the rights of an applicant. There are undoubtedly strong arguments that the respondents can make to the effect that, given the unusual circumstances in which the regulations impugned were made, including the move to Level 5, and given the breadth of the application of the regulations, no obligation to give reasons to any given individual affected by the regulations exists in this case.
58. But on the other hand, this is not a case where the position of the applicant is precisely the same as every other person in the country affected by the regulations. The applicant had been excluded from the benefit of the exemption at Level 5, had then lobbied to persuade the respondents that it ought to benefit from the exemption when Level 5 restrictions were lifted, had been granted an exemption when Level 3 came into effect on 1 December 2020 and then had lost the benefit of that exemption when regulations reflecting the Level 5 designation came into effect on 25 December 2020. It is of course true that the country moved from Level 3 to Level 5 on that date and a court may ultimately decide that explained the removal of the exemption, and that no individual reasons were required.
59. Nonetheless, in circumstances where (a) the applicant had engaged substantively on the question of exemption with the DHLGH and the DAFM and (b) given the emphasis on the obligation to provide reasons in administrative law, it seems to me that the applicant has met the requisite standard in respect of its reasons argument.

**Other grounds raised by the applicant**

60. The applicant has also made arguments to the effect that it was discriminated against by the loss of the exemption as compared with similarly situated sports, that the Minister's decision to exclude coursing was unreasonable and/or irrational, that the Minister took into account irrelevant matters, and that the Minister was biased in making the decision and/or took the decision for improper purposes.
61. In the latter respect, it is argued that the Minister was negatively disposed towards coursing, having voted to abolish it in a Private Members Bill on animal protection in relation to hares in Dail Éireann in 2016, and that the Minister had chosen to consult with other Ministers that he knew were also against coursing. (In fact, the Minister consulted the following Ministers on the draft regulations on 23 December 2020 – Ms Helen McEntee, Minister for Justice, Mr Paschal Donoghue, Minister for Finance, Mr Eamon Ryan, Minister for Transport, Ms Catherine Martin, Minister for Tourism, Culture, Arts, Gaeltacht, Sports and Media, and Mr Leo Varadkar, Tánaiste and Minister for Enterprise, Trade and Employment. Of those, two had voted against the Private Members Bill and three had voted for it. Mr. Hempenstall explains in his affidavit why the Minister for Health had chosen to consult with those particular Ministers).
62. The rationale for granting an injunction pending a full trial is explained by Clarke J. in *Okunade*. "There is an inevitable risk that, with the benefit of hindsight, and after a full

*trial has been conducted, an injustice may seem to have been done. A party may be subject to a challenged reviewable measure only to find that the measure is held to be invalid after a full trial” (paragraph 9.3).*

63. The grant of an injunction looks to a possible future where an applicant’s legal challenge is upheld and the decision quashed. In most cases, there will be more than one ground for challenging an impugned decision. An applicant only needs to succeed on one of those grounds to have the challenge upheld, the decision quashed and the rationale for imposing an injunction justified. Therefore, it seems to me that it is unnecessary to consider the strength of all the grounds asserted once two of them are sufficiently strong, particularly where I conclude (as discussed below) that (a) I have no jurisdiction to grant the form of injunction sought, and (b) even assuming jurisdiction, the balance of convenience and the interests of justice lean heavily against the grant of the injunction sought.

### **Jurisdiction to grant injunction sought**

#### **Nature of relief sought**

64. The relief sought in this motion is identified at paragraph (n) of notice of motion. There are several features of this relief that require comment.
65. It seeks an injunction “*requiring the First Respondent to permit the Applicant and its sporting activities to continue in operation in the like manner of greyhound racing, horse racing and horse sport (i.e. behind closed doors”) as so provided for at Article 10 of SI 701/2020” pending the determination of the proceedings.*
66. The applicant is not looking to stay or to suspend the operation of the decision to de-list it under S.I 701/2020 pending the hearing of this case. That is presumably because any such suspension would not avail the applicant since the Regulations under which it was granted an exemption on 1 December 2020, S.I. 560/2020, were revoked by S.I. 701/2020. The *status quo* prior to the impugned Regulations (if the 24 days in December during which the applicant enjoyed an exemption may be described as such) is gone. Therefore, a quashing of the decision to de-list it under S.I. 701/20 would not result in the applicant having the benefit of an exemption.
67. Nor can I treat this application, as I urged to do by counsel for the applicant, as being in substance an Order restraining the prohibition applying to the applicant. The prohibition on organising sporting events applies to everyone: exceptions are given to specified persons. There is no specific prohibition on the applicant organising sporting events to be lifted and the wording of the relief recognises this.
68. I must also reject the alternative argument made to the effect that it is academic whether this application is characterised as mandatory or prohibitory. There is an important difference between those reliefs, as recognised in the traditional case law on injunctions whereby mandatory relief is considerably more difficult to obtain than prohibitory relief (see *Campus Oil Ltd v. Minister for Industry and Energy (no 2)* [1983] I.R. 88, where O’Higgins C.J. made it clear that mandatory relief does not usually issue prior to the trial

of the action but there are exceptions to this, and *Riordan v Minister for the Environment* (no. 6) [2002] 4 I.R. 404, where Murphy J. stated that the granting of a mandatory injunction on an interlocutory basis was exceptional though not unknown).

69. For those reasons, the applicant is forced to seek an Order asking me to direct the Minister for Health to "permit" – presumably by the making of regulations under the Health Act 1947 although this is not stated – the applicant to continue in operation in the like manner as identified sports i.e. behind closed doors, in the manner currently provided for under Regulation 10 of S.I. 701/2020. This is undoubtedly a mandatory relief.
70. The application is not one for secondary legislation giving the applicant parity of treatment with greyhound racing, horse racing and horse sport but rather that the Minister should permit the current model of exemption given to those sports be applied to the applicant. In other words, even if the Minister decided that greyhound and horse racing and horse sport should no longer benefit from an exemption from the prohibition on sporting events for public health reasons, any regulations made pursuant to the court Order sought would remain in place. Further, any such Order would require those regulations to be in being until the hearing of the action, irrespective of any external events that might take place from a public health perspective.
71. As identified above, I am not being asked to restrain the application of either primary or secondary legislation. Nonetheless, because the jurisprudence on such applications is (indirectly) relevant here, it is worth making some brief observations upon it. This is a jurisdiction that it is well accepted should be exercised most sparingly (see *MD (An Infant) v. Ireland* [2009] IEHC 206, *Okunade, Friends of the Irish Environment v. Minister for Communications* [2019] IEHC 555, *R v. Secretary of State for Transport, ex parte Factortame* [1991] A.C. 603, *Dowling v. Minister for Finance* [2014] IEHC 595, *Garda Representative Association v. Minister for Public Expenditure* [2014] IEHC 237. It is certainly the case that there should be even greater hesitation on the part of a court in exercising this jurisdiction where the legislation in question is primary rather than secondary, but the case law makes it clear that a reticence to suspend must exist whether primary or secondary legislation is at issue. The necessity for significant countervailing factors to exist before such relief could be granted was identified by Clarke J. in *M.D. (An infant) v. Ireland*:

*"While, in general terms, the principles applicable to the grant or refusal of an interlocutory injunction in a case such as this are no different from those which apply in the case of any other interlocutory injunction, it has to be emphasised that a very significant weight indeed needs to be attached, in considering the balance of convenience, to the desirability that legislation once coming into force should be applied unless and until such legislation is found to be invalid having regard to the Constitution. It should only be where significant countervailing factors can be identified or where it is possible to put in place measures which would minimise the extent to which there would be any interference with the proper and orderly implementation of the legislation concerned, that a court should be prepared to*

*grant an injunction which would have the effect of preventing legislation which is prima facie valid from being enforced in the ordinary way.”*

72. The application before me, if successful, would have the effect of disapplying the existing legal framework restraining the applicant from holding sporting events, and the line of case law identified above is thus applicable.
73. But the relief sought goes considerably further, in that the applicant is asking that I direct the Minister to afford to it an exemption from the prohibition, in the same way as he has done for other sports under S.I. 710/2020. This would necessitate the court directing the Minister to legislate in a particular way for a specified period of time, presumably pursuant to his powers under s. 31A of the Health Act. So unusual is this application that neither party could point to any case, even one where the relief had been refused, where such an application was made. I am therefore in uncharted waters insofar as there is a complete absence of precedent on the point and I must turn to first principles, including the constitutional principle that the Oireachtas enjoy exclusive power to legislate and the terms of s.31A.
74. Before considering the Constitution, it is necessary to consider how the Minister is directed by s.31A to exercise his powers to make regulations and the extent to which he would be able to lawfully exercise those powers if I made the Order sought.

**The Minister’s powers and obligations under Section 31A**

75. As set out above, s. 31A(1) identifies the matters regulations may address, including the prohibition of events, and the imposition of safeguards to be put in place by event organisers to minimise risk associated with COVID-19. The purpose of the regulations is stated to be for the purposes of preventing, limiting, minimising or slowing the spread of COVID-19.
76. Immediately, two problems present themselves. First, if an Order was made in the terms sought, could the Minister in adopting the regulation provide for safeguards, or would the Order have to be in identical terms to Regulation 10 of S.I. 701/20, i.e. where the only safeguard specified is that at Regulation 10(2)(a) i.e. that the event is attended or proposed to be attended only by the necessary persons? Certainly, the form of Order sought does not envisage any deviation from the terms of Regulation 10.
77. Second, more substantively, if the Minister did not hold the view, when making the regulation directed by the court giving the applicant an exemption from the prohibition on sporting events, that it would prevent, limit, minimise or slow the spread of COVID-19, would I be directing him to act *ultra vires*, and if so, what power would I have to do so? Because I know that he, along with rest of the Cabinet, decided to de-exempt coursing for public health reasons on 22 December 2020 when it was decided to put the country into Level 5, and because any Order made would require him to make regulations within a very short period of time, it is highly likely that, when making such regulations, the country would still be at Level 5 and that therefore he would be unlikely to hold the view that the said regulation would prevent, limit, minimise or slow the spread of COVID-19.

78. A different problem arises in respect of s.31A(2) which requires the Minister to have regard to identified matters relating, *inter alia*, to the risks of COVID-19, to the advice of the Chief Medical Officer, and to guidance provided by the WHO and other similar bodies. Given that I would have directed him to make regulations in specified terms, there would be no benefit to him having regard to any of the identified matters and he would presumably either have to ignore his obligations under subsection (2) altogether or carry out an empty exercise where he takes account of the matters while knowing they cannot influence his decision.
79. A further problem arises in respect of s.31A(3) which provides for either optional or mandatory consultation, depending on whether one accepts the argument of the applicant or the respondents in this regard. Accepting the applicant's argument, the Minister would be required either to ignore the consultation obligation or to consult but in circumstances where he knew his decision was already set in stone by the court Order.
80. In other words, an Order directing the Minister to adopt a regulation under s.31A(4) exempting the applicant from the current prohibition on sporting activities is very likely to have the effect of obliging the Minister to ignore his statutory obligations under s. 31A. I do not believe that I have the power to impose an obligation on the Minister to act unlawfully in this way or that it is in any way desirable that I should do so. That would amount to the court effectively arrogating to itself the Minister's power to adopt secondary legislation under s. 31A (but without taking the steps required by s.31A), exercised through the hand of the Minister. In so doing the court would indeed be making policy decisions, a step that the applicant accepted through its counsel was not appropriate.
81. The applicant seeks to evade the consequences of its application by arguing that it is not asking the court to make policy; rather it is simply asking the court to reinstate the position between 1 December and 24 December when the applicant had an exemption from the prohibition. But that ignores the fact that during those days, the country was at Level 3 whereas from 25 December onwards it was at Level 5. Between 7 October and 30 November 2020, when the country was at Level 5, the applicant did not benefit from an exemption. In other words, the applicant has only once benefited from an exemption and that was while the country was at Level 3. Indeed, this was recognised by the applicant in its detailed submission of 11 November to the Minister for Agriculture which was headed up "*Level 5 COVID 19 impact on Coursing activities including greyhound welfare and the importance of resumption upon exiting current Level 5 restrictions*". To permit the applicant to benefit from an exemption during Level 5 when it has not previously done so is a policy decision.
82. The regulations, once made by the Minister, would remain in being until the hearing of the case, irrespective of events relevant to the spread of COVID 19, and in circumstances where the situation is so fluid at present that new regulations are being made every couple of weeks to respond to the COVID situation. Again, that would amount to policy making by the courts.

83. Further, I would be making policy decisions in circumstances where the only expert evidence before me is that provided by Dr O’Flanagan, special adviser to the National Public Health Emergency Team, who avers at paragraph 23 of her affidavit that, having regard to what is involved in the activity of coursing, she considers that certain elements of it give rise to an increased risk of transmission of COVID 19 that justify the ban on coursing at Level 5.

### **Separation of powers**

84. Turning now to the Constitution and the doctrine of separation of powers, under Article 15.2.1 of the Constitution, the sole and exclusive power of making laws for the State is vested in the Oireachtas and no other legislative authority has power to make laws for the State. If granted, the Order sought would come dangerously close to the court making a law, *albeit* through the device of directing the Minister to make regulations in specified terms.

85. There is a long-standing line of jurisprudence that makes it clear that, because of the constitutional doctrine of separation of powers, the courts will not encroach upon either the executive or legislative powers of the State. As identified at paragraph 3.2.140 of Kelly, “The Irish Constitution”, 5th Edition, “...*the courts have held that their function of reviewing legislation under the Constitution is limited to declaring an act to be invalid*”, quoting *Somjee v Minister for Justice* [1981] I.L.R.M. 324, where Keane J. observed:

*“The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question invalid, if that be the case. The Court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment”.*

86. Here I am being asked to grant an injunction on an interim basis rather than to review the constitutionality of legislation: but the principle that courts should not become involved in legislation is equally applicable. Directing a Minister to make a regulation in specified terms, as I am asked to do, is in my view an indirect way of substituting a more desirable form of legislation.
87. As noted in the decision of Hardiman J. in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 (where the Supreme Court were reviewing a decision of the High Court to grant a mandatory injunction formulating and directing the application of future State policy in relation to educational needs), to exercise such a jurisdiction would, *inter alia*, offend the constitutional separation of powers, would lead to the courts to take decisions in areas which they have no special qualification or experience and would permit the courts to take such decisions though they are not democratically responsible for them as the legislature and the executive are. The observations were made in the context of an injunction involving expenditure by the State and therefore distributive justice but apply equally in the context of this application.

88. I have no public health qualifications or public health advice available to me, save that of Dr. O'Flanagan, who explains why coursing at the current time is contrary to public health considerations. Nor have I been elected by the people to take decisions as to what sporting bodies should avail of an exemption.
89. Having regard to the above, I consider that if I made the Order sought I would be directing the Minister to ignore the requirements of s.31A and act *ultra vires*, and I would be usurping the exclusive legislative function of the Oireachtas, in circumstances where I have no expertise in the matter and am not democratically elected. Accordingly, I conclude I have no jurisdiction to make the Order sought and refuse the relief on that basis. However, for the sake of completeness, I will go on to consider the question of the balance of convenience/justice.

**Balance of Convenience/Risk of Injustice**

90. The path that I must follow in deciding upon an application for an injunction in a public law context has been carefully laid out in *Okunade* by Clarke J. I start from the premise that I must identify which course is likely to involve the least risk of injustice if it turns out to be wrong.
91. I have already determined that this is a case where the applicant has at least some grounds that are sufficiently strong.
92. I also agree with both parties that this is a case where damages would not be an adequate remedy for either party, in circumstances where it is highly unlikely that the applicant would be able to obtain damages from the State if it turned out at the trial of the action that the applicant ought to have benefited from an exemption at the relevant time.
93. I turn therefore to the balance of convenience. The factors that weight on the side of maintaining the present regime are as follows.
94. First, even assuming I have jurisdiction to grant a mandatory injunction in these circumstances, it seems to me that considerable importance must be attached to, as per Clarke J. in *Okunade*, "*the operation of the particular scheme concerned or the facts of the individual case in question which may place added weight on the need for the relevant measure to be enforced unless and until it is found to be unlawful*". Given the severity of the current COVID-19 situation, I place significant weight on the need for the current regime to be left undisturbed, in circumstances where not just the Minister for Health but the entire Cabinet took decisions prior to S.I. 695/2020 and S.I. 701/2020 that only the sports identified in the relevant regulations should be permitted to avail of an exemption.
95. Second, I am conscious of the weight that the court should give to the orderly implementation of the regulations, which do not enjoy the benefit of the presumption of constitutionality but must be treated as if they are *prima facie* valid. The relief sought would, in substance, require me to set aside the implementation of S.I. 701/2020 insofar as the applicant is concerned.

96. Third, as per *Okunade*, I am conscious of the weight that must be given to concerns about heightening the risk to the public interest should the application be granted. In this respect, I am very conscious of evidence of Dr O'Flanagan referred to above, that identifies the risks posed by the applicant being permitted to organise coursing meetings. She avers that at paragraph 24 that because of the restrictions, 36 coursing meetings will not take place involving 3, 600 entries, and that in circumstances where two handlers attend with each dog, as well as stewards and security people, that would mean involvement of a significant number of people. That is the only expert evidence before me.
97. I should say at this point that I fully accept the evidence of the applicant in relation to the strenuous efforts it has made to ensure that its meetings are COVID compliant. However, that does not detract from the evidence of Dr O'Flanagan. Given that, as identified at s.31A (2)(iii), COVID-19 poses significant risks to human life and public health by virtue of its potential for incidence of mortality, the grant of the mandatory injunction sought by the applicant could entail risk to human life.
98. Fourth, I am conscious that the coursing is only one of very many sporting activities affected throughout Ireland by Regulation 10. The applicant complains of the inclusion of events held under the authority of Horse Sport Ireland (although accepts that point to points are now excluded) and Rásaíocht Con Éireann. But it fails to acknowledge that a number of sports who were included at Level 3 in December (some under the Regulations adopted on 17 December) have now lost the benefit of the exemption just as coursing did, including golf, tennis, GAA inter county teams at senior, under 20 or minor level, Ladies Gaelic Football Association at senior, under 18 or under 16 level, underage national leagues organised by the FAI, and competitions organised by the IRFU provincial academies. In the balance of convenience, I think it relevant to take into account the fact that restrictions are being imposed on sporting bodies across the country because of COVID-19.
99. On the other hand, the factors that weight on the side of granting the relief are as follows. First, there are the financial consequences of refusing the application. The coursing season will end on 28 February 2021 with the National Meeting in Clonmel so there are only 5 weeks left in which the persons who participate in coursing can have the opportunity of winning prize money and obtaining the other, less quantifiable but no less real, financial benefits of participating in meetings. The livelihood of breeders, trainers and dog owners are affected. This sport is not state funded and therefore the applicant cannot offer care payments to greyhound owners. The season has already been shortened by the delay in the grant of the licence which was only issued on 16 September 2020.
100. Second, there are animal welfare issues at stake since competitions are limited by age and therefore many greyhounds will miss out on participating if competition is not opened up. This will have medium term negative implications for greyhound breeding and investments.

101. Third, because the coursing season is so short, it cannot recommence in March or April as other sports can do as the season will be over at that stage.
102. Balancing those considerations, insofar as injustice and balance of convenience are concerned, if I grant the injunction, and the application is ultimately dismissed, I will have caused 36 race meetings to go ahead during Level 5 with potentially 3,600 people attending, in the face of expert evidence that the current ban is an appropriate and necessary public health measure in the circumstances and that there are elements of coursing that give rise to an increased risk of transmission of COVID-19 and justify the ban. This is in circumstances where I am aware of the potentially fatal consequences of COVID.
103. I will have had done so by directing the Minister to adopt regulations in specified terms, thus preventing the implementation of *prima facie* valid measures and the orderly operation of the scheme of COVID restrictions adopted following detailed advice given by NPHET, and in circumstances where unfortunately many other sports events have been prevented from taking place during Level 5.
104. It seems to me that significant injustice, including risk to human life, will potentially be caused in those circumstances.
105. If on the other hand, I refuse the injunction, and the applicant is ultimately successful, I will have prevented 36 race meetings from going ahead, with the consequence that owners and trainers will have incurred financial loss, including from the potential loss of prize money and I will also have prevented greyhounds racing, with a potential longer term impact upon the coursing industry and on the welfare of the greyhounds, some of whom may not get an opportunity to race again due to their age. I will be doing so in a context where it is highly unlikely coursing will start again before September 2021.
106. Balancing those risks, I have no hesitation in concluding that the balance of convenience favours the refusal of the injunction, in circumstances where far greater injustice would be caused to the respondents and to the population it seeks to protect if I grant the injunction and it succeeds in the trial of the action, than if I refuse the injunction and the applicant succeeds. I accordingly refuse the relief on the grounds of balance of convenience also.