Neutral Citation Number: [2012] IEHC 260

THE HIGH COURT

JUDICIAL REVIEW

RECORD NO: 2011/664JR

BETWEEN:

CARBERY FISHING LIMITED AND FINTRA TRAWLING COMPANY LIMITED

APPLICANTS

v.

MICHAEL VALLELY THE REGISTRAR GENERAL OF FISHING BOATS, THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, EMILE DALY, IRELAND AND THE ATTORNEY GENERAL.

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered the 28th day of June 2012

1. The first named applicant is a limited liability company which carries on business in the fishing industry and is the registered owner of the M.F.V Atlantic Quest "S0985". The second named applicant is a limited liability company which carries on business in the fishing industry and is the registered owner of the M.P.V. Eternal Dawn "S0958". The first named respondent was appointed an Appeals Officer by the third named respondent in accordance with section 6(1) of the Fisheries (Amendment) Act 2003. The second named respondent is the licensing authority responsible for sea fishing boats.

The third named respondent is the Minister with responsibility for Agriculture, Fisheries and Food. The fourth named respondent is an Appeals Officer appointed by the third named respondent in accordance with section 6(1) of the Fisheries (Amendment) Act 2003. The fifth named respondent is the Irish State. The sixth named respondent is sued as legal representative of the fourth and fifth named respondents.

2. The applicants seek the following reliefs.

> (i) a declaration that on 31st March 2011, the first named respondent was validly appointed as Appeals Officer for the purposes of Part Ill of the Fisheries Amendment Act 2003;
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> (ii) a declaration that the applicants had a legitimate expectation that the first named respondent was a validily appointed Appeals Officer for the purposes of Part Ill of the Fisheries (Amendment) Act 2003;
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> (iii) a declaration that on 31 March 2011, the first named respondent was entitled to hear the applicant's appeal against the Mackerel Authorisation vessel, the MFV Eternal Dawn and Atlantic Quest;
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> (iv) a declaration that on 31 March 2011, the first named respondent had the power, pursuant to section 18 of the Fisheries (Amendment) Act 2003, to refer questions of law, which arose during the course of the Applicants' appeal, to the High Court for decision;
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> (v) a declaration that the third named respondent was not entitled to request that the first named respondent return the appeal papers in the in the applicants' appeal to the Second Respondent on the grounds that the first named respondent was not, on 31 March 2011, a validly appointed Appeals Officer for the purposes of Part III of the Fisheries (Amendment) Act 2003;
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> (vi) an order of certiorari quashing the decision of the third named respondent to direct the first named respondent to return the appeal papers in the applicants' appeal to the second named respondent;
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> (vii)an order of certiorari quashing the decision of the second named respondent to forward the papers in the applicant's appeal to the fourth named respondent for the purposes of the fourth named respondent conducting a full rehearing of the applicants' appeal;
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> (viii) an order of mandamus compelling the first named respondent to refer questions of law, which arose during the course of the applicants' appeal, to the High Court for decision;
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> (ix) an order of prohibition prohibiting the fourth named respondent from conducting a full rehearing of the applicants' appeal;

Background Facts

3.1 These proceedings arise out of a Sea Fishing Boat Licence Appeal. The law governing the independent appeals system for sea fishing boats is contained in Part III of the Fisheries (Amendment) Act 2003 ("the 2003 Act"). The right to appeal is contained in section 7(1) of the 2003 Act which provides:-

> "(a) Subject to paragraph (b), a person aggrieved by a decision of a licensing authority on an application for a licence or by the revocation or amendment of a licence may, before the expiration of a period of one month beginning on the date of that decision, revocation or amendment, appeal to an Appeals Officer against that decision, revocation or amendment by serving on the Appeals Officer a notice of appeal which may be withdrawn by serving a notice to that effect.

(b) A person other than the applicant for or holder of the licence concerned may only appeal under paragraph (a) if he or she made representations in writing to the licensing authority before the decision in question was made."

Section 6(2) provides that appeals shall be considered and determined by Appeals Officers. Section 6(1) provides that:

"The Minister may appoint one or more persons with not less than 5 years' experience as a practising barrister or practising solicitor before his or her appointment as an Appeals Officer ("Appeals Officer") for the purposes of this Part. The Minister may, for stated reasons, remove such person from office."

Section 6(7) provides that the provisions of Schedule 1 of the 2003 Act shall apply to Appeals Officers. Article 1 of Schedule 1 states:

"The term of office of an Appeals Officer shall be 3 years and, subject to paragraph 3, a person may be reappointed to that office for a second or subsequent term."

3.2 On 31st of March 2011 the applicants appealed the granting of authorisations for their respective vessels for the fishing of mackerel. The second named respondent raised a preliminary objection that the first named respondent had no jurisdiction to determine the appeal under the Fisheries (Amendment) Act, 2003 as the matter appealed did not relate to a licence issued by the second named respondent, but rather an authorisation granted by the third named respondent. The first named respondent determined that a case stated should be referred to the High Court pursuant to section 18 of the Fisheries (Amendment) Act 2003. The oral hearing before the first named respondent was adjourned pending the determination by the High Court of the case stated.

3.3 On 12th April 2011 and the 18th April 2011 the third named respondent requested that the first named respondent furnish the third named respondent with a copy of his warrant of appointment. In a response to correspondence on the 18th of May 2011 from the applicant's solicitor, the first named respondent on the 22nd of May 2011 refused to state a case pursuant to section 18 of the Fisheries (Amendment) Act 2003 to the High Court on the grounds that his warrant of appointment had expired.

3.4 On 25th July 2011 an application was made *ex parte* by the plaintiffs to Mr Justice Peart grounded on the affidavit of Mr. D.P Barry, Solicitor for the plaintiffs sworn on the 22nd of July 2011. Peart J granted leave to apply by way of application for judicial review for the reliefs set out in the Statement of Grounds and to serve an originating Notice of Motion returnable for 13th of October 2011. The respondents issued a motion seeking an Order setting aside the applicants' application for leave for failure to comply with the provisions of section 19 of the Fisheries (Amendment) Act 2003, and the procedures for applying for Judicial Review contained therein. In a written judgment of Mr. Justice Cross delivered on the 19th of December 2011, the respondents' motion was dismissed. The respondents Statement of Opposition was delivered on the 25th of January 2012 and is grounded on the Affidavit of Paschal Hayes.

Applicant's Submissions

4.1 The applicants submit that the second, third, fourth and fifth named respondents (the Respondents) are estopped from arguing that the first named respondent was not a validly appointed Appeals Officer when he conducted the Oral Hearing into the applicant's appeal, by reason of their conduct during the course of their application to set aside the Orders of Peart J. granting the applicants leave to apply for judicial review.

The respondent's application was rejected by Cross J. who outlined the basis for this decision in a 13 page written judgement dated 19 December 2011. Cross 1. set out the respondents' arguments at pages 7 to 10 of the written judgment. The respondents sought to argue that the applicants should have utilised the judicial review procedure set out in section 19 of the 2003 Act. Section 19 states *inter alia*:-

"(1) A person shall not question a decision of an Appeals Officer on an appeal otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (in this section referred to as "the Order").

(2) An application for leave to apply for judicial review under the Order in respect of a decision of an Appeals Officer:-

(a) shall be made within the period of 3 months commencing on the date on which the decision was made, and

(b) shall be made by notice of motion (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) which shall be served on an Appeals Officer and each party or each other party, as the case may be, to the appeal, or any other person specified for that purpose by order of the High Court, and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed..."

At page 10 of the judgment, Cross J. stated:-

"In response to questioning by the court, Mr McGarry on behalf of the respondent submitted that the reliefs sought at [paragraphs] (iv) and (viii) were in effect a challenge to the first named respondent's decision as Appeals Officer [to] decline to state the case once his authority had been impugned by the rest of the respondents."

At page 12 of the judgment Cross J. stated that the Respondents were estopped from advancing this line of argument since they were also contending that the first named respondent was not a validly appointed Appeals Officer. The applicants submit that notwithstanding the fact that they were unsuccessful in the application before Cross J, the fact that the respondents argued that the first named respondent was a validly appointed Appeals Officer for the purposes of seeking to set aside pursuant to section 19, means that they are now estopped from arguing the complete opposite in this case, namely that the first named respondent was not a validly appointed Appeals Officer.

4.2 The 2003 Act does not specify the manner in which Appeals Officers are to be appointed other than to provide that they shall be appointed by the third named respondent. The 2003 Act does not require Appeals Officers to be furnished with Warrants of Appointment to be validly appointed. It simply requires that they be appointed. The Shorter Oxford English Dictionary defines the verb "appoint" *inter alia* as follows:-

"6. Verb trans. Nominate, ordain (a person) to an office, to act in some capacity; give an official position; nominate, set

up someone as (an officer, trustee, etc)."

The applicant submits that the absence of any specific mechanism for appointment such as for example, requiring a warrant of appointment, combined with the definition of the verb 'appoint,' namely to set someone up in the position, means that it was perfectly open to the third named respondent to reappoint the first named respondent as an Appeals Officer by placing the first named respondent's name on the website of the second and third named Respondent as an Appeals Officer and by participating in appeals conducted by the first named respondent.

4.3 In *McGlinchey v Governor of Portlaoise Prison* [1988] IR 671 the Supreme Court held that a judge, who had been validly appointed to the Special Criminal Court, a creature of statute, at the date of his appointment, was entitled to continue to sit as a member of the Special Criminal Court notwithstanding the fact that he had retired as a judge. The applicant submits that the *McGlinchey* case is relevant because it shows that as long as an individual was qualified at the date of his appointment he can continue to act notwithstanding that his circumstances might have changed. In the present proceedings, the first named respondent had the necessary qualifications i.e. not less than 5 years experience as a practising barrister, and continued to act after the expiration of his three year term at the behest of the second named respondent. Consequently, he was in the same position as the retired judges in the *McGlinchey* case who continued to act past their retirement date, because (a) they had the necessary qualifications when they were initially appointed and (b) were also still qualified as barristers or solicitors of at least 7 years standing.

4.4 The applicants submit that they had a legitimate expectation that the first named respondent was a validly appointed appeals officer when he conducted the oral hearing into the applicant's appeals on Thursday, 31 March 2011 in circumstances where the public authority, in this case the second and third named respondents, made a statement on their website to the effect that the first named respondent was a validly appointed appeals officer and adopted a position amounting to a promise or representation that he was an appeals officer by directing that appeals be sent to him at the address given and by participating in appeals that he conducted; that representation was addressed and conveyed directly to the applicants, who were affected actually or potentially as an appellant, in such a way that it formed part of a transaction definitively entered into or a relationship between the applicants and the second and third named respondent and that the applicants acted on the faith of the representation by lodging and participating in the appeal before the first named respondent; the expectation reasonably entertained by the applicants was that the second and third named respondents would abide by the representation such that it would be unjust to permit the public authority to resile from it.

Respondents Submissions
5.1 The respondents submit that the applicants have failed to exhaust all remedies. The Chief State Solicitor's Office, for the second and third named respondents, in correspondence to the applicants dated the 23rd of May 2011, assured the applicants that they would be afforded their full appeal before a validly appointed Independent Appeals Officer. The applicants' appeal was forwarded to the fourth named respondent, a validly appointed Independent Fisheries Appeals Officer with statutory power to hear and determine applicants' appeal. The respondents submit that the second and third named respondents' statutory duty and fulfilment of their functions under the Fisheries (Amendment) Act 2003, required the applicants' appeal to be forwarded to the fourth named respondent, as the first named respondent had no jurisdiction to hear the applicants' appeal. The respondents submit that, the third respondent, in limited circumstances, has the power the reassign an appeal in circumstances of illness or legal capacity of a member; however it is accepted that any power must be exercised fairly and in accordance with the principles of natural and constitutional justice.

5.2 While the remedies available in judicial review proceedings are discretionary in nature, relief may be refused when there is an adequate alternative remedy available. The respondents submit that this was a case where there was an adequate alternative remedy available. In *State (Abenglen Properties Limited) v Dublin Corporation* [1984] I.R. 381 the Supreme Court was of the view that the applicant should 'exhaust all remedies'. In those proceedings, the applicant sought to challenge the imposition of restrictive conditions attached to a grant of planning permission in judicial review proceedings. However, the applicant had the option of appealing the decision to An Bord Pleanala. Henchy J., in his judgment was of the view that the courts should not intervene by way of judicial review where the statutory appellate procedure was adequate to meet the complaint on which the application was grounded.

The respondent submits that the applicants would suffer no prejudice as a result of the matter being transferred to the fourth named respondent. The applicants are seeking the reliefs of *certiorari, mandamus, prohibition* and declaratory relief by way of Judicial Review. These reliefs are not necessary as the fourth named respondent holds the position of an Appeals Officer with full statutory powers capable of ensuring an appeal conforming with all the requirements of natural justice and fair procedures.

5.3 The respondent submits that the reliefs sought by the applicants should not be ordered in circumstances where they would confer no practical benefit or where no legitimate purpose would be served. The respondents argue that a public authority or Appeals Officer cannot expressly, or by mistake, give itself jurisdiction it does not posesess, nor can an applicant or a private individual consent to or waive jurisdiction. The applicants in these proceedings would suffer no prejudice as a result of the matter being transferred to the fourth named respondent.

5.4 There can be no lawful expectation to do something that is not legitimate. In *Wiley v Revenue Commissioners* [1994] 2IR 160, the applicant had previously been afforded an entitlement to the repayment of excise duty based on medical and other criteria. On the occasion in question, based on a more detailed consideration of the applicant's case, he was subsequently refused such repayment. The applicant sought to quash the respondents' refusal to grant a refund. He argued that having been granted a refund on two previous occasions on the basis of evidence of the licensing authority exempting him from road tax and not having been given any notice of change of practice, he had a legitimate expectation of a refund in the present instance. On the facts, it was found that the refusal was a proper application of the relevant criteria and the Supreme Court held the applicant's expectation had not been a legitimate one. The respondent, the Revenue Commissioners, being a statutory body which could only act pursuant to statutory powers vested in them, and would have been acting ultra vires and in breach of their statutory duty to collect the value added tax and excise duties had they granted an exemption. The respondents submit that based on *Wiley* the applicants could not have had a legitimate expectation as that there can be no lawful expectation to do something that is not legitimate.

Decision of the Court

Estoppel
6.1 The argument of the applicant is misconceived. The applicant has misunderstood the decision of Cross J. which was that the respondent's claim the applicant should have utilized the special judicial review provisions in s. 19 of the Act was not open to them because they were also arguing that the Appeals Officer was not validly appointed. They still say he was not validly appointed and the only thing they are estopped from is arguing that leave should not be granted save under s. 19. That issue is now decided. The applicant has been granted leave thus that issue no longer has relevance. The respondents are not estopped from denying the

Appeals Officer was not a validly appointed Appeals Officer. They have always done so and the decision of Cross J. in this regard confirmed this was their case and decided they could not move on another contradictory case.

Appointment
6.2 The applicant relies on *McGlinchey v Governor of Portlaoise Prison* [1988] IR 671. In that case judges fully qualified on their appointment were held still qualified even though they had retired. Finlay C.J. held as follows at 703:-

> "The statutory provision with which we are concerned is s. 39, sub-s. 3 of the Offences Against the State Act, 1939, and it reads as follows:-
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> > "No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant."

The first matter that is of some importance is that considering the terms of that subsection of the Act of 1939, it is of significance that the requirements for appointment to the Special Criminal Court in regard to barristers and solicitors, as distinct from the requirements of the statutes which deal with the appointment of barristers to the High Court and Circuit Court and solicitors to the District Court, are that they should be a barrister in one case of not less than seven years standing or a solicitor of not less than seven years standing. With regard to persons appointed to the Supreme Court, High Court, Circuit Court and District Court the requirement is that they should be a practising barrister of not less than a certain number of years standing. The same applies to solicitors in the District Court. The evidence before the High Court, which is quite clearly correct, is that at the time of the appointment of two of the members of the Special Criminal Court concerned, they were, respectively, judges of the High Court and of the Circuit Court. At the time of the appointment of the third member to the Special Criminal Court, he was a solicitor of not less than seven years standing. At the time of the trial, each of the persons concerned was qualified within s. 39, sub-s. 3, that is to say that two members who had formerly been judges of the High Court and Circuit Court remained, as they had been, barristers of not less than seven years standing, and the solicitor was still a solicitor of not less than seven years standing. I, therefore, am quite satisfied that there is no substance in this point and that the decision of the High Court was perfectly correct concerning it."

6.3 I do not consider the Mc Glinchey case assists the applicant because the basic facts are different. Under the Fisheries Act, the Appeals Officer is appointed for a specific term of three years. In the instant case the Appeals Officer was appointed first in 2003 and again in 2006. It is common case he was not appointed again. He confirmed on 22nd May 2011, that his warrant of appointment had lapsed and that he was no longer a statutory appointed appeals officer. The most that is argued for by the applicant is that he was continued on in some informal manner. Evidence of this was to be found on the official website and by implication from his continuing to hear appeals after 2009. But unlike the judges of the Supreme Court in *Mc Glinchey*, whose terms were not ended by any expired term limit as at the date of the impugned hearing, the Appeals Officers term was ended. Article 1 of Schedule 1 to the Fisheries Act 2003 provides the Appeals Officer may be appointed to a term of three years. He may be reappointed. These appointments pursuant to s. 6 (1) of the Act must be made by the Minister. The Minister did so twice, in 2003 and again in 2006 but not again. I do not believe it is possible to read the Act in such a way as to allow continuance in office without such appointment. Such an interpretation could not in my view survive a challenge by a disappointed appellant to this Court on judicial review. Such an argument is equally not sustainable here in what might be considered the opposite circumstance.

Alternative Remedies
6.4 In reading those sanctions dealing with resignation, dismissal or other vacation of office it is surely the case that those appeals before such a departing Appeals Officer would be assigned to another officer. I am referred to and I accept as a support for the pragmatic operation of a statutory scheme, the decision in *McCarron v Kearney* [2010] IEHC 28 in which Fennelly J. quoted from the judgment of Lord Selborne in *Attorney General v Great Eastern Railway Co* (1880) 5 App. Cas 473 as follows at paragraph 30:-

> "Whatever may fairly be regarded as incidental or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*."

The circumstances of this case seem especially apt to this approach. The respondents offered to the applicant a *modus operandi* that seemed manifestly reasonable once the true situation became clear. The appeal would be assigned to another Appeals Officer. It has been stated by Counsel for the respondent's that they would not object to the reference to the High Court, so who would object to this course of action? Only the applicant could have any interest in doing so and why should he object to the validity of his own appeal. Moreover there is a certain futility to the applicant's case. If he obtains the relief he seeks, then the matter would go back to Mr Vallely who would then sign the case stated for the High Court. If he loses then Mr Daly will deal with the case. I am informed as noted above that the other respondent's will agree to his sending forward the same case stated. The two questions will come before the High Court on either result.

6.5 In *State (Abenglen Properties Limited) v Dublin Corporation* [1984] I.R. 381 Henchy J. held as follows at 405:-

> "... where Parliament has provided a self-contained administrative and quasi judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for *certiorari* is grounded."

Although the method of resolving the instant problem is not specified in the statutory scheme, it seems possible within it. Certainly nothing precludes such a solution. I am informed that in those cases where Mr Vallely determined appeals after the expiry of his term, appellants were offered a fresh hearing and this with their agreement resolved the problem. In much the same way a perfectly acceptable solution has been proposed to the applicants to resolve the present impasse. The applicant's case therefore appears pointless and futile.

Legitimate Expectation
6.6 The applicant claims that because of the first respondent's acceptance of the appeal together with the statement on the official website to the effect that the first respondent was a validly appointed appeals officer, he first had a legitimate expectation that the Appeals Officer was validly appointed. It might however be more accurate to say that he had a belief which was, albeit unbeknownst to him, incorrect. I consider the authority most helpful to be *Re Greendale Building Company* [1977] I.R. 256. In that case the Court addressed the question arising under the Housing Act 1966 which provided that, a notice to treat in relation to land purchases may only be served after the compulsory purchase order has become operative and such order does not become operative pending the determination of proceedings which challenge its validity. The facts of this case were that a notice to treat was served by a local

authority in 1972 but this notice was invalid as proceedings had already been commenced by a third party challenging the validity of the compulsory purchase order on which the notice depended. That order did, however, take effect in 1975, after the third party proceedings had been dismissed. Following the dismissal of the proceedings the local authority immediately served a second notice to treat. The value of Greendale's land was less in 1975 than it had been in 1972 and the company, who wished to rely on the first notice to treat in 1972, contended that the local authority should be estopped from relying on the invalidity of the first notice as the authority had implicitly represented that it had been validly served and the company had relied on the validity of that representation and had acted to their detriment. The Supreme Court, affirmed the High Court decision that the date of the service of the second notice to treat was the relevant date for the purpose of the 1966 Act as the housing authority had no power to serve a notice to treat before the compulsory purchase order became operative and that the absence of such power could not be counteracted by the application of the doctrine of waiver and estoppel.

In the Supreme Court, Henchy J. was of the view that it would destroy the doctrine of *ultra vires* if the donee of a statutory power could extend his power by creating an estoppel. Henchy J. at page 264 of the judgment said;

> "The general rule is that a plea of estoppel of any kind cannot prevail as an answer to a well-founded claim that something done by a public body in breach of a statutory duty or limitation of function is ultra vires. That was held by Cassels J. in *Minister of Agriculture and Fisheries v Matthews* [1950 1 K.B.l48, by Harman J. in *Rhyl UD.C. v Rhyl Amusements Limited* [1959] 1 W.L.R. 465, and in the reported case of *Minister of Agriculture and Fisheries v Hulkin* (cited with approval by Cassels J. and Harman J. in those cases) in which Lord Greene M.R. said:-
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> "The power given to an authority under a statute is limited to the four comers of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it was possible for the donee of a statutory power to extend his power by creating an estoppel."

The same situation applies here. The Appeals Officer cannot give himself jurisdiction by creating an estoppel. He is appointed by the Minister pursuant to power granted in the Fisheries Act to a term limited to three years. Only the Minister can reappoint. On the applicant's case, the Appeals Officer would in effect be appointing himself. This cannot be.

6.7 To summarize, firstly, I am satisfied that the respondents are not estopped from denying the Appeals Officer was not a validly appointed Appeals Officer. They have always done so and the decision of Cross J. in this regard confirmed this was their case and decided they could not move on another contradictory case. Secondly, I am not satisfied that the McGlinchey case assists the applicants because unlike the judges in McGlinchey whose terms were not ended by any expired term limit, Appeals Officers terms are ended by the expiry of specific term limits. Thirdly, it seems to me that the applicant has failed to exhaust all remedies. There was a perfectly acceptable solution proposed to the applicants to resolve the problem. The applicants appeal could have been heard by the fourth named respondent who was a validly appointed Appeals Officer with statutory power to hear and determine the applicants appeal. Finally it is clear that the applicants cannot rely on the doctrine of legitimate expectation. A public authority cannot give itself a jurisdiction it does not possess. For all the above mentioned reasons I must refuse the relief sought.