Neutral Citation Number: [2009] IEHC 258

THE HIGH COURT

2008 905 JR

BETWEEN

Donal Healy

Applicant

And

Minister for Communications, Fisheries and Natural Resources,

Minister for Agriculture, Fisheries and Food,

Sea Fisheries Protection Authority,

Ireland

and

Attorney General

Respondents

JUDGMENT of O'Neill J. delivered the 28th day of May 2009.

1. Reliefs Sought
1.1 This Court (O'Higgins J.) granted leave to the applicant to seek, *inter alia*, the following reliefs by way of an application for judicial review on the 28th July, 2008:-

> 1. An order of *certiorari* quashing the decision of the second named respondent dated the 10th July, 2008, purporting to withdraw the authorisation to fish for tuna granted to the applicant and dated the 30th June, 2008.
>
> 2. A declaration that the respondents and each of them, their respective servants or agents acted in breach of and failed to uphold and insofar as practicable vindicate the applicant's constitutional rights and in particular dealt with the applicant in breach of natural and/or constitutional justice and in breach of the principle of *audi alterem partem.*

2. The facts
2.1 The applicant is a fisherman. He claims to have invented a new method of fishing for tuna in the form of a special net. Commencing in 2003 the applicant has applied six times for an authorisation to fish for tuna using this net, which has been modified somewhat over that time.

The application of 2003
2.2 On the 12th May, 2003, the applicant made an application to the first named respondent for an authorisation in respect of the MFV Marden to fish for tuna and to participate in the 2003 Albacore Tuna Fishery. On the application form he indicated that he proposed to use fishing gear "*other*" than "*pair pelagic*", "*mechanised trolling"* or "*surface long-lining",* though he did not specify what gear he would use.

2.3 The first named respondent requested further information about the applicant's proposed method of tuna fishing by letter dated the 23rd July, 2003, in particular, details of the material from which the net was made and how the fish were retained in the net. An inspection of the net the applicant had invented was conducted by Mr. Dominic Rihan of Bord Iascaigh Mhara ("BIM") on the 13th August, 2003. Mr. Rihan prepared a report dated the 15th August, 2003, on foot of this inspection and forwarded it to the first named respondent. Mr. Rihan concluded that the applicant's proposed fishing gear was very similar to drift netting, which is prohibited under E.U. and national law:-

> *"In conclusion while I would consider that potentially the proposed method is not illegal according to the existing regulations prohibiting drift-netting for tuna, the fact that the gear being used is very similar means that control and enforcement and the need for supervised trials essential to prove it's (sic) legality as there are certain similarities in the gears being used. Whether the method will work is conjecture at this stage and ultimately the decision whether to grant a permit on a purely experimental basis is solely at the discretion of the DCMNR."*

For the above reason the application for an authorisation was refused by the first named respondent by letter to the applicant dated the 4th September, 2003. The following day Mr. Michael Keating, Fisheries Development Manager of BIM set forth the opinion of BIM on the matter to the first named respondent in the following terms:-

> *"Having considered this matter further and following detailed consultation with the Board's expert in gear technology [Mr. Rihan], BIM is of the opinion that the characteristics of this gear and the manner in which it was deployed display the characteristics of a gill or entangling net."*

The application of 2004
2.4 A further application was made for an authorisation to fish for tuna on the 30th April, 2004, by the applicant in respect of the MFV Marden for the 2004 Albacore Tuna Fishery. On this application it was indicated that the type of fishing gear he would use would be *"sea netting"* and *"rope slide".* There was an undated application to fish for tuna in respect of the MFV Lauralena wherein it was indicated that fishing gear "*other*" than the types stated on the form would be used. Further information was sought by the first named respondent by letters sent by fax dated the 6th May, 2004, and the 11th May, 2004, in respect of the proposed method of fishing to be applied. A further letter was sent to the applicant by fax on the 3rd June, 2004, requesting him to make contact with Mr. Jim Condon of the office of the first named respondent. There are no other details on the file of the first named respondent in respect of this application.

The application of 2005
2.5 The applicant applied for a patent in respect of his net on the 8th December, 2004. He made an application to the first named for an authorisation to fish for tuna in respect of the MFV Marden to participate in the 2005 Albacore Tuna Fishery. He indicated on the application form that he intended to use *"sea netting".* The first named respondent sought clarification as to what this meant by letter dated the 12th July, 2005. A further assessment of the applicant's gear was carried out by Mr. Rihan in August 2005 whereby he considered, *inter alia*, the patent application documentation supplied by the applicant. In his report of the 10th August, 2005, he noted that the gear proposed differed slightly from that put forward by the applicant in 2003, in that, the gear in the 2003 application had multiple "*pockets*" along its length whereas the gear as described in the patent only had a single "*pocket*". Mr. Rihan concluded, however, in his report of 2005, that the fishing gear had similarities with standard drift net gear which *"would make control and enforcement almost impossible without constant independent observation".* In particular, he found that the method of hauling the gear would be similar to a gill or a drift net and he expressed the view that the patent would not stand up to legal scrutiny. The first named respondent decided not to grant the authorisation to fish for tuna in respect of the application using the fishing gear proposed by the applicant and communicated this to him by letter dated the 12th August, 2005.

2.6 In 2006, Mr. Rihan sought advice from Mr. Ken Arkley, a Senior Gear Technologist with the Seafish Industry Authority in Hull, United Kingdom, on the method of fishing proposed in the applications of the applicant. He forwarded him his report from 2005 and a copy of the patent application. Mr. Arkley wrote back to Mr. Rihan by letter dated the 28th March, 2006, enclosing a note of his comments which stated that he agreed with the findings of the BIM report *"in that it would be extremely difficult to classify the gear as anything other than a drift net."*

The application of 2006
2.7 On the 14th June, 2006, the applicant re-applied to the first named respondent for an authorisation to fish for tuna to participate in the 2006 Albacore Tuna Fishery in respect of the MFV Lauralena and the MFV Marden. In this application form he indicated that he would use gear "*other*" than the options outlined on the form, specifying "*seining*". The next day the first named respondent wrote to the applicant seeking clarification as to what "*seining*" was. By letter dated the 4th July, 2006, the applicant replied and described the gear. The first named respondent by letter dated the 22nd August, 2007 (from the terms of the letter the year in the date should read 2006). The application was refused on the basis that the *"gear as described and its proposed method of deployment has been reviewed as 'not differing greatly from that as previously reviewed' and cannot therefore be considered as a legal method of fishing under SI 343/2006."*

The application of 2007
2.8 Another application was made by the applicant on the 12th June, 2007, for an authorisation to fish for tuna in respect of the MFV Lauralena to participate in the 2007 Albacore Tuna Fishery. The applicant indicated in this form that the fishing gear he proposed to use was *"mechanised trolling",* and "*other*", specifying "*lines*" and *"sea netting."* The first named respondent sought clarification of the intended gear by letter dated the 2nd July, 2007, to which the applicant responded by letter dated the 20th July, 2007. A report was not prepared by Mr. Rihan in respect of this application. By letter dated the 9th August, 2007, to the applicant his application was declined in respect of *"lines and sea netting"* for the following reason:-

> *"2. From your letter of the 20th of July you indicate that we are already in receipt of all information in relation to this method of fishing. I take this as meaning that your submissions to this department made in previous years have not altered in any way.*
>
> *3. Given this type of gear was adjudicated previously and you have not furnished any additional material to alter our previous review, this gear cannot therefore be considered as a legal method of fishing under SI343/2006."*

The letter went on, however, to state that since it was indicated on the application form that *"mechanised trolling"* would be used by the applicant, that his application would be recommended to the licensing section in respect of that method only. The applicant did not pursue this option.

The application of 2008
2.9 The applicant applied to the second named respondent, who had taken over responsibility for fisheries, on the 22nd May, 2008, for an authorisation to participate in the 2008 Albacore Tuna Fishery. In this application he described the type of fishing gear to be used by him as "*other*" than the options given and specified that he intended to use "sea netting". This was the same method as had been referred to in the application of 2007, although this application did not make reference to *"mechanised trolling"* or "*lines*". No new information was provided about this type of fishing gear by the applicant. The second named respondent issued an authorisation to the applicant dated the 30th June, 2008 pursuant to s.13(1) of the Sea-Fisheries and Maritime Jurisdiction Act 2006 ("the Act of 2006"). The authorisation was valid from the 1st July, 2008, until the 31st October, 2008. The second named respondent submits that the authorisation was issued on foot of an administrative error. The applicant was informed by an undated letter, marked received by the applicant's solicitors on the 10th July, 2008, that the said authorisation had been withdrawn by reason that the proposed method of gear, (i.e."sea netting"), was not accepted as a legitimate fishing method. The applicant was also invited, in that letter, should he wish to receive a new authorisation, to indicate which of a number of alternative approved methods of fishing (i.e. *"pair pelagic, surface long-lining, mechanised trolling"*) he wished to use. This letter which contained the decision challenged in these proceedings was in the following terms:-

"Dear Mr. Healy,

I refer to the Tuna Authorisation you would have received last week. I wish to advise you that this authorisation has been withdrawn. It has come to our attention that the method of gear you are using (Sea Netting) is not accepted as a legitimate fishing method.

In order to receive a new Authorisation, please advise us in writing the type of gear you wish to use instead, eg, Pair Pelagic, Surface Long-Lining, Mechanised Trolling and return to the Original Authorisation to the address below.

Thanks and regards

…."

3. The applicant's submissions

3.1 Mr. Creed S.C., for the applicant, contended that the second named respondent did not act in accordance with s. 13(13) of the Act of 2006 in purporting to withdraw the applicant's authorisation. He submitted that the manner in which the authorisation was revoked was *ultra vires* the Act of 2006 and that the applicant's right to natural justice was infringed as a result. In particular, he noted that s. 13(13) (b) of the Act of 2006 grants a right to the holder of an authorisation to make representations to the first named respondent, which must be considered by him or her and that the failure to follow the revocation procedure in the Act of 2006 breached the principle of *audi alterem partem*. He argued that the applicant had a legitimate expectation that the statutory scheme would be adhered to.

3.2 Even if the authorisation was issued in error, in his submission, it was still a lawful authorisation. He argued that there must be a presumption that it is lawful and that should the Minister wish to withdraw it, he was obliged to follow the statutory procedure, as to do otherwise, in his submission, would be to set the legislation at naught.

3.3 Mr. Creed disputed the argument of the respondents that this Court should exercise its discretion not to grant *certiorari* because the time of the operation of the authorisation had expired. He relied on the case of *Carr v. Minister for Education and Science* (Unreported, Supreme Court, Geoghegan J. 23rd November, 2000) in this regard. Not to grant the relief, he argued, would be to condone the Minister disregarding the provisions of the Act of 2006 and he submitted that it was appropriate for this Court to grant the relief sought.

3.4 Mr. O'Connell S.C., for the respondents, submitted that the authorisation that was granted in 2008 was issued in error, as the Minister had no power to issue an authorisation to fish for tuna using the type of netting proposed. He argued that it was void *ab initio* which had the consequence, in his submission, of rendering it futile to follow the statutory procedure under s.13 of the Act of 2006 as that section presupposed that the authorisation was validly issued. In essence, he made the case that the authorisation was a nullity and, as such, there was no need to follow the procedure in the Act for its withdrawal.

3.5 He submitted that *certiorari* was a discretionary remedy and in this regard he argued that even if this Court took the view that the Minister should have followed the statutory procedure that, as the authorisation expired in October 2008, an order of *certiorari* would serve no purpose and would not be of legal benefit to the applicant. In such circumstances, he submitted that this Court should exercise its discretion not to grant it. He relied on the Supreme Court decisions in *The State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] 1 I.R. 381 and *Stefan v. Minister for Justice* [2001] 4 I.R. 203

4. Section 13 of the Sea-Fisheries and Maritime Jurisdiction Act 2006

4.1 Section 13(12) of the Act of 2006 gave the then Minister for Communications, Marine and Natural Resources and now the Minister for Agriculture, Fisheries and Food by virtue of Sea Fisheries, Foreshore and Dumping at Sea (Transfer of Departmental Administration and Ministerial Functions) Order 2007 (S.I. 707 of 2007), the power to revoke or withdraw an authorisation that has been granted. It states:-

"(12) If the Minister is satisfied that there has been a failure to comply with a Community Regulation or this Act or with a condition specified in an authorisation, the Minister may revoke or withdraw for a period the authorisation."

4.2 Section 13(13) of the Act of 2006 goes on to state:-

"(13) (a) Where the Minister proposes to revoke, or withdraw for a period, an authorisation he or she shall notify in writing (including writing in electronic form) the holder of the authorisation of the proposal and the reasons for it.

(b) The holder may within 14 days of being sent the notification make representations to the Minister about the proposal.

(c) The Minister shall consider such representations before making a decision to revoke or withdraw the authorisation.

(d) The decision takes effect 24 hours after notification of it in writing is sent to the holder.

(e) It is the duty of the holder to inform immediately the master of the sea-fishing boat to which the authorisation relates of the revocation or withdrawal."

5. Issues

5.1 The first issue to determine is whether an administrative error in issuing an authorisation renders it a nullity with the

result that s.13 of the Act of 2006 cannot or need not be invoked. If the determination on this issue is that the statutory procedure in s.13[13] should have been followed, the next question that arises is whether this Court should exercise its discretion to grant the relief of *certiorari*.

6. Whether the administrative error gave rise to a nullity
6.1 It is quite clear that there was an administrative error in issuing the authorisation to fish for tuna to the applicant. This is apparent from the fact that the issuance of the authorisation was picked up quickly by the second named respondent and that steps were swiftly taken to withdraw the authorisation. In addition, the second paragraph of the letter informing the applicant of the withdrawal invited him to make an application in respect of approved methods of fishing. From the evidence it appears that the second named respondent held the view that this application was the same or almost the same as the applications that had been made since 2003 and that there was nothing new in the most recent application which warranted a different outcome. I am satisfied that this view was amply supported by the evidence adduced in this case.

6.2 In making the argument that the authorisation was a nullity and did not require the statutory procedure to be followed it is noteworthy that the respondents do not rely on any authority in support of this submission. I am not satisfied that simply because an administrative mistake is made that the provisions of an apparently valid legal instrument (the authorisation) can, without more, be set at naught by the unilateral action of the second named respondent, particularly when there is a specific statutory procedure for the revocation of these authorisations. Whilst I am satisfied that the authorisation was issued as a result of an administrative error, it cannot be said that there was no possible basis for the authorisation. As can be seen from the history of the applications since 2003, the applicant proposed a method of fishing which was to some extent novel or inventive and clearly part of the consideration of the respondents of these applications was whether to grant an authorisation on an experimental basis. In the events they consistently refused to do this. However, when the applicant received the authorisation in June 2008 he was entitled to think that the second named respondent had finally been persuaded to permit him to try out his new netting system.

6.3 As there was a possible basis for the authorisation, in my view it could not be treated as a nullity, as might be the case if an authorisation were sent to the wrong person or where an authorisation was sought for one method of fishing and was granted in error for an entirely different method or in respect of the wrong fishing vessel. It is noteworthy that in the letter purporting to withdraw the authorisation, it is not said that the authorisation was issued as a result of an error. The reason given was that the method of gear to be used was not acceptable as a legitimate fishing method. Whilst it is clear from the evidence that the issuance of the authorisation was the result of an administrative error, the failure to state that, and the reliance on a reason which was inextricably connected to the merits of the application, in my view, fatally wounds the respondent's reliance in these proceedings on the notion of nullity due to administrative error as a legitimate basis for avoiding the revocation procedure set out in s. 13(13) of the Act of 2006.

6.4 In these circumstances the second named respondent was not entitled to treat the authorisation as a nullity and thus avoid the revocation procedure in s. 13(13) of the Act of 2006. In proceeding in this way, the second named respondent deprived the applicant of the opportunity afforded by the procedure to put a case as to why the authorisation should not be revoked. It might be said that having regard to the history of these applications going back to 2003, there was little or nothing left to be said by the applicant that had any prospect of swaying a decision in his favour. The mere fact that the applicant's case might be extremely weak cannot be a ground upon which he could be denied access to the s. 13(13) procedure. This procedure is there to provide an opportunity to persons affected by proposed revocations to be heard regardless of the strength or weakness of their case. The fundamental purpose of this procedure would be defeated if a determination could be made in advance to deny access to the procedure merely because the second named respondent believed that he was unlikely to be persuaded by whatever might be urged by an applicant.

6.5 The mistake in this case cannot be treated as a nullity, and what the Minister did in avoiding the relevant statutory scheme was an illegality, capable of being quashed.

7. Whether it is appropriate to grant *certiorari*
7.1 The Supreme Court in *The State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] 1 I.R. 381 decided that it may not always be appropriate for a Court to exercise its discretion to grant an order of *certiorari*. O'Higgins C.J. stated the principle as follows at p.393:-

> *"In the vast majority of cases … a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy."*

7.2 In *Carr v. The Minister for Education and Science* (Unreported, Supreme Court, 23rd November, 2000), upon which the applicant relies, the Supreme Court affirmed the order of the High Court which, *inter alia*, granted an order of *certiorari* to the applicant quashing a decision of the Minister to suspend payment of her salary as a disciplinary measure. It was found that there was no legal basis for this decision as s.7 of the Vocational Education (Amendment) Act 1944 gave the Minister no power to suspend payment on the grounds of unreasonable behaviour as claimed. Geoghegan J. at p.18 expressed the view, that the case was not a suitable one for the Court to review or restate the principles applicable to the exercise of its discretion against making orders of *certiorari* because of its particular facts and highlighted the lack of statutory foundation for the action taken:-

> *"I do not think that this is a suitable case for this Court to review or restate the principles applicable to the exercise of this discretion. I say this, because I am satisfied that whatever may be the correct formulation of the principles this is a clear case where the court ought not to exercise its discretion against making the orders of certiorari and declarations sought … This is a case where the Minister purported to suspend salary on the basis of the section of an Act which could not be conceivably be construed as giving him that authority. It was a decision which by its nature was to have fundamental effects for the applicant in depriving her of her salary. It might be an entirely different matter if there was such a power conferred by the section but the Minister did not adopt completely fair procedures in the exercise of the power or in some other way rendered his exercise defective and capable of being judicially reviewed."*

This case is to be distinguished on a number of clear grounds. What was in issue in the Carr case was a positive action taken by the Minister without any statutory basis which had *"fundamental effects"* for the applicant. In the present case there was a power to revoke conferred upon the Minister under s.13 (12) of the Act of 2006, although in the exercise of this power the Minister omitted to follow the appropriate statutory procedure.

7.3 The height of the benefit that can accrue to the applicant by an order of *certiorari* is that the decision is quashed, but this will have no practical consequence because the period for which the authorisation was given namely, from the 1st July, 2008, to the 31st October, 2008, has long since expired. In such circumstances, I am satisfied that no practical benefit will accrue to the applicant from the quashing of the impugned decision and thus an order of *certiorari* will not achieve or enhance the protection of the rights of the applicant infringed as a result of the impugned decision. In this respect, this case differs markedly from the Carr case where the quashing order was necessary to trigger the ancillary relief, which was an order directing the repayment of salary illegally withheld.

7.4 Another point of difference between the *Carr* case and this case is that in the *Carr* case the ground upon which the Court was urged to exercise its discretion to refuse relief was that it was submitted by the respondent in that case, that there was unreasonable behavior on the part of the applicant, rather than that the relief sought would be futile. In this case there is no question of any unreasonableness on the part of the applicant.

7.5 The rights that the applicant would have had under s.13 of the Act of 2006 will not be protected or advanced by an order of *certiorari*. A reason to grant *certiorari* would be for this Court to mark its disapproval of the conduct of the Minster in apparently setting the scheme of the Act of 2006 at naught in the manner in which the withdrawal of the authorisation was accomplished. Each of the applicant's six applications for authorisations to fish for tuna using a specially created net was considered by the relevant Minister. Numerous opportunities were given to the applicant to provide more information in respect of the net and detailed analysis of the information he provided and examinations of the net took place. Over the span of these applications including the 2008 application there was very little development in the nature of the applications or in the information supplied with them. All applications prior to 2008 were refused. Against this background the respondents may have been lulled into thinking that the revocation of the 2008 authorisation would be readily accepted by the applicant as an administrative mistake and that he would be willing to treat the withdrawal of it as a *pro forma* exercise. The helpful or conciliatory tone of the letter withdrawing the authorisation, would suggest such a state of mind on the part of the second named respondent. Although the action of the Minister was regrettable, it cannot, in light of all the circumstances of the case as discussed above, be said that it was so egregious as to warrant an expression of disapproval from this Court in the form of an order of *certiorari* which would have no other purpose.

7.6 An important aspect of this case which, in the context of the exercise of the Court's discretion to grant or refuse the relief sought, is the fact that the time scale available to bring a case such as this, is such as to ensure in all cases similar to this, that by the time the case comes on for hearing, the granting of relief will not be capable of conferring a practical benefit on an applicant or of protecting his rights. In this case, once the period of the authorisation had expired on the 31st October, 2008, it was no longer possible to redress the infringement of the applicant's right in respect of that authorisation by way of an order of *certiorari*, in the sense of securing to the applicant the benefit of the authorisation. Thus the granting of the relief in these circumstances, unless some other consideration warranted it, would be pointless.

7.7 Because of the near impossible timescale for bringing illegalities of the kind involved in this case to the attention of this Court for quashing by way of judicial review, the public authorities concerned, in respect of the exercise of their statutory powers and functions, would effectively be beyond the reach of the judicial review jurisdiction of this Court. Needless to say, such a situation cannot be permitted. For this reason alone, I feel compelled to exercise my discretion in favour of the granting of the relief sought.

8. Conclusion

8.1 In these circumstances I am satisfied that the relief sought must be granted.