Federal Court  Cour fédérale

Date: 20211222

Docket: T-1032-20

Citation: 2021 FC 1460

St. John's, Newfoundland and Labrador, December 22, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DON PUBLICOVER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Mr. Donald Publicover (the "Applicant") seeks judicial review of the decision of the Honourable Bernadette Jordan, former Minister of Fisheries, Oceans and the Canadian Coast Guard (the "Minister"), dated August 5, 2020 (the "Decision"). In the Decision, the Minister rejected the Applicant's request to transfer his Category B Lobster Licence.

[2] Pursuant to Rule 303(3) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), the Attorney General of Canada is the Respondent (the "Respondent") in this application for judicial review.

II. BACKGROUND

[3] The following details are taken from the Certified Tribunal Record that was produced pursuant to Rule 318 of the Rules, as well as from the affidavits filed by the parties.

[4] The Applicant filed his affidavit, sworn on October 1, 2020. The Respondent filed the affidavit, sworn on November 16, 2020, of Ms. Julia McCleave, Senior Advisor, Fisheries Licensing Policy, Fisheries and Oceans, in Dartmouth, Nova Scotia.

[5] In his affidavit, the Applicant set out the history of his involvement in the lobster fishery. He deposed that he has held a lobster fishing licence since 1960. He also deposed about the history of his requests to the Minister to sell his licence and his reasons for wanting to do so.

[6] The Applicant holds a Category B Lobster Licence which permits him to fish in Nova Scotia. He acquired the licence in 1960 and has renewed it on an annual basis since that time, routinely fishing lobster until 2016.

[7] Beginning in 2017, the Applicant successfully applied every year for someone to fish with his licence, according to the Medical Substitute Operator policy.

[8] The Applicant and his wife are now in their late 60s. They are the parents of two adult children who both have cerebral palsy. They require care throughout the day.

[9] Most of the Applicant's income is derived from his operation of a food truck. He also receives approximately $10,000.00 from the operation of the licence.

[10] The Applicant says that his income is insufficient to look after his children and their special needs. He wants to transfer the licence in order to generate funds to look after the special needs of his children.

[11] By letter dated August 28, 2019, Counsel for the Applicant wrote to Fisheries and Oceans Canada. In that letter, Counsel advised that the Applicant wanted to sell or transfer his Category B licence, and asked if the Department of Fisheries and Oceans ("DFO") will "permit him to market and sell/transfer" the licence.

[12] Counsel for the Applicant sent another letter dated April 16, 2020 addressed directly to the Minister. In that letter, Counsel asked the Minister to exercise her discretion, pursuant to Section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14, allowing the Applicant to transfer his licence to a qualified third party.

[13] Counsel for the Applicant sent another letter to the Minister on May 20, 2020 setting out some further detail about his personal circumstances.

[14] By letter dated July 29, 2020, Counsel for the Applicant corrected a factual detail in his letter on May 20, 2020.

[15] Finally, Counsel for the Applicant wrote a letter dated July 23, 2020, asking when the Minister may be able to deliver a decision upon the Applicant's request.

[16] By letter dated August 5, 2020, the Minister made her decision. The penultimate paragraph of her letter reads as follows:

> Measures for the conservation of fishery resources and measures for the sustainability of the fishery are for the benefit of all Canadians and future generations. Although I appreciate the difficult situation Mr. Publicover is currently facing, in light of all the relevant circumstances, I will not be making an exception to the policy in this case.

[17] Ms. McCleave organized her affidavit under several headings, as follows:

- Lobster Fishery in the Maritime in the 1960's and early 1970s: enacting measure to limit participation in the fishery
- Creation of Category B Lobster Licences
- Lobster Conservation Measures
- Medical Substitute operator (MSO) and Category B Lobster licences
- Considerations underlying the recommendation to the Minister

[18] Ms. McCleave addressed aspects of the regulatory regime governing the lobster fishery in Nova Scotia, beginning with changes in 1969, with amendments to the *Lobster Fishery*

Regulations, C.R.C. 1978, c. 817, s. 10. These amendments were addressed to vessels which were described either as Category A or Category B vessels.

[19] According to Ms. McCleave, Category B vessels are "commonly referred" to as Class B vessels and the licences assigned to such vessels were restricted, in that they required renewal on an annual basis and could not be transferred. These licences were "to be invalid after May 31, 1975."

[20] Ms. McCleave also addressed the introduction of the "Moonlighter Policy" in 1975. She deposed that this policy was implemented to "prevent the issuance of licences to people not fully dependent" on the lobster fishery; this would allow fewer harvesters to catch more lobster per person and "support conservation by reducing the fishing effort."

[21] The Moonlighter Policy was designed to encourage conservation, with limitations on the availability of licences and a "freeze" on the reissuance of licences.

[22] More changes to the licencing process were introduced in 1976, including modification of the Moonlighter Policy in November 1976, to recognize three categories of licences : Category A, for those previously recognized as "*bona fide*" fishers, that is those fully engaged in the fishing industry; Category B, for those with regular employment but who had been licenced as main operators in the lobster fishery in 1968 and earlier; and Category C, for those people who were licenced in the lobster fishery since 1968 but who did not qualify for either a Category A or B licence.

[23] Ms. McCleave deposed that the earliest record that could be located showed that the Applicant had been issued a Category B licence in 1979. She further deposed that by February 1977, a Category B licence could be upgraded to Category C, if the licence holder's employment status had changed. She deposed that although the Applicant was eligible to apply for the upgrade of his Category B licence to Category A, there is no record that he had ever applied for such an upgrade.

[24] Ms. McCleave also deposed to a change in the licencing policy in 1982, so that upgrading of lobster licences was no longer allowed, leaving only two classes of licences: Category A and Category B. The Category B licences are non-transferrable, cannot be upgraded and "are eliminated upon the retirement or death of the licence holder."

[25] Ms. McCleave referred to various documents throughout her affidavit, including licencing policies, and the referenced documents were attached as exhibits to her affidavit.

[26] Ms. McCleave also deposed to an exception to the general policy of "Owner Operated", that is pursuant to subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53, which grants discretion to a fishery officer or an employee of DFO to authorize someone else to operate the licence if the licence holder cannot do so "due to circumstances which are beyond their control."

[27] At paragraph 27 of her affidavit, Ms. McCleave deposed as follows:

> Throughout the years, DFO developed policies to guide the application of subsection 23(2) of the FGR. These policies gave rise to the 1996 policy which states at subsection 11(11):
>
> > Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to support his request, he may be permitted to designate a substitute operator for the term of the licence. Such designation may not exceed a total period of five years.

[28] Ms. McCleave deposed that the Applicant was permitted to use an MSO at least from 1995 to 2005 and again, from 2015 to 2020. She expressed the opinion that that it "is also likely that an MSO was authorized for additional years". However, she does not refer to any record supporting that opinion.

[29] In the last section of her affidavit, Ms. McCleave refers to her role in the preparation of the recommendation to the Minister, upon which the negative decision was based.

[30] Ms. McCleave deposed that the retirement of Category B licences, that was introduced in 1976 and remains in place, is "integral to Lobster conservation and sustainability measures". She also deposed that the Applicant has benefitted from the MSO policy for at least 10 years, with the effect that his "fishing income" continued.

[31] Ms. McCleave deposed that to her knowledge, the policy about the non-reissuance of Category B licences has been consistently applied, that making an exception to the policy would

counter departmental objectives and efforts by DFO to "ensure the sustainability of the resource", and lead to claims from "all Category B licence holders", as well as from the estates of deceased holders of such licences.

[32] Ms. McCleave concludes her affidavit with an opinion that "any exception" to the policy about Category B licences would have a "destabilizing effect" on the management of the lobster fishery. She offered the opinion that the Applicant's financial situation "does not amount to an extenuating circumstance that would justify making an exception to policy."

[33] The Certified Tribunal Record was prepared by Ms. Jody Proctor, Chief of Staff to the Deputy Minister of DFO. It was signed on September 21, 2020.

[34] The Certified Tribunal Record consists of the following documents:

> – A Correspondence Routing slip, dated July 31, 2020, to Bernadette Jordan, apparently forwarding a letter, addressed to Mr. Richard W. Norman, Partner, Cox and Palmer Law, for signature
>
> – Ministerial Correspondence Form, docket number 2020-001-01028
>
> – Undated and unsigned letter to Mr. Norman referring to correspondence of April 16, 2020, May 20, 2020 and June 29, 2020
>
> – Letter dated April 16, 2020 from Mr. Norman to the Honourable Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard
>
> – Email dated April 16, 2020 from Bernadette Jordan to Neil Macisaac and Minister referring to attached correspondence from Richard Norman

– Letter dated May 20,2020 from Mr. Norman to the Honourable Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, following up on the letter of April 16, 2020

– Email dated May 20, 2020 from Bernadette Jordan- Assistant 1 to Minister referring to attached correspondence from Richard Norman

– Letter dated June 29, 2020 from Mr. Norman to the Honourable Bernadette Jordan , Minister of Fisheries and Oceans and the Canadian Coast Guard.

– E-mail dated June 29, 2020 from Bernadette Jordan –Assistant 1 to Minister referring to attached correspondence from Richard Norman

– Letter dated July 23, 2020 from Mr. Norman to the Honourable Bernadette Jordan, Minister of Fisheries and Oceans and the Canadian Coast Guard, following up on the letters of April 16, 2020, May 20 and June 29, 2020

– Email dated July 23, 2020 from Bernadette Jordan- Assistant 1 to Minister referring to attached correspondence from Richard Norman

III. SUBMISSIONS

i) *The Applicant's Submissions*

[35] The Applicant argues that the Minister fettered her discretion in dismissing his request for an exception to the 1976 Moonlighter Policy and alternatively, or otherwise, made an unreasonable decision.

ii) *The Respondent's Submissions*

[36] The Respondent submits that the Minister did not fetter her discretion and that her decision is reasonable.

IV. DISCUSSION AND DISPOSITION

[37] The Decision of the Minister is reviewable on the standard of reasonableness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.).

[38] The issue of fettering discretion is reviewable on the standard of reasonableness; see the decision in *Elson v. Canada (Attorney General)*, 2019 FCA 27, leave to appeal to Supreme Court of Canada refused, 38584 (25 July 2019).

[39] The merits of the Decision are also reviewable on the standard of reasonableness.

[40] According to the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.) at paragraph 99, the standard of reasonableness requires the Court to ask if the decision under review "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on that decision."

[41] The focus of the affidavit filed by the Respondent, on behalf of the Minister, is upon the development and implementation of policy measures designed to conserve the lobster as a resource and to manage the access to that fishery.

[42] The Minister's authority to manage the lobster fishery derives from subsection 2.1(a) of the *Fisheries Act*, R.S.C., 1985, c. F-14 (the "Act") as follows:

Purpose of Act	**Objet de la loi**
2.1 The purpose of this Act is to provide a framework for	**2.1** La présente loi vise à encadrer:
(a) the proper management and control of fisheries; and	**a)** la gestion et la surveillance judicieuses des pêches;
…	…

[43] Subsection 7(1) of the Act grants absolute discretion to the Minister to issue fishing licences and provides as follows:

Fishery leases and licences	**Baux, permis et licences de pêche**
7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	**7 (1)** En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d'exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[44] The discretion to issue a licence under the Act includes the authority to deny a licence; see the decision in *Anglehart et al. v. Canada (Attorney General)*, [2019] 1 F.C.R. 504, leave to appeal to Supreme Court of Canada refused, 38294 (21 March 2019).

[45] The broad discretion of the Minister in the matter of licencing was reviewed by the Supreme Court of Canada in the decision of *Comeau's Sea Food Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.

[46] In *Carpenter Fishing Corp.*, [1998] 155 D.L.R. (4th) 572 (F.C.A.), the Federal Court of Appeal observed that policy guidelines are not regulations and do not have the force of law.

[47] The Applicant is challenging the Decision of the Minister to refuse his application to transfer his Category B licence.

[48] The Applicant is not challenging the policies that underlie the operations of DFO nor the manner in which the Minister discharges her responsibilities under the Act. Rather, he is challenging the Minister's exercise of the discretion given pursuant to section 7 of the Act.

[49] The determinative question is whether the Minister exercised that discretion reasonably in denying the Applicant's request to transfer his licence.

[50] On this application for judicial review, the Respondent filed the affidavit of Ms. McCleave. She deposed, among other things, that she drafted the Minister's response to the Applicant's request for an exception.

[51] Ms. McCleave described the purpose of the policy, and described the "circumstances underlying the recommendation to the Minister."

[52] While Ms. McCleave's affidavit provides more details about the Decision, her affidavit does not form part of the Decision.

[53] The affidavit of Ms. McCleave appears designed to supplement the record that was before the Minister.

[54] In that regard, I refer to the decision in *Leahy v. Canada (Minister of Citizenship and Immigration)*, 438 N.R. 280, where the Federal Court of Appeal said the following at paragraph 145:

> In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision-maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. See generally, *Sellathurai v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576 (F.C.A.) at paragraphs 45 to 47; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 425 N.R. 341 (F.C.A.) at paragraphs 40 to 42; *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.$. 297 (F.C.A.).

[55] In his Memorandum of Fact and Law, the Respondent makes the following submissions at paragraph 53:

> Similarly, in the case at hand, in her letter, the Minister stated that "although I appreciate the difficult situation Mr. Publicover is currently facing, in light of all the relevant circumstances, I will not be making an exception to the policy in this case". "[A]ll the relevant circumstances" includes the record that was before the Minister.

[56] The "record" that was before the Minister is the Certified Tribunal Record. It is not the lengthy collection of documents that are attached as Exhibits to the affidavit of Ms. McCleave.

[57] At paragraph 33 of her affidavit, Ms. McCleave expresses an opinion about potential claims from others who had been denied transfers:

> …Additionally, allowing for these licences to be re-issued, unless there are extenuating circumstances, may lead to all Category B licence holders and the estates of deceased fishers who formerly were issued Category B licences to all request to do the same.

[58] However, Ms. McCleave does not say what she considers to be "extenuating circumstances", nor does she refer to anything in the policy documents about this element.

[59] Exhibit F to Ms. McCleave's affidavit is the current Lobster Licencing Policy, found in the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996*. Chapter 7 of that Policy is entitled "Appeal process and procedures". Subparagraph 35(7)(c)(ii) provides as follows:

> 35. Appeal System (Structure)
>
> (7) The *Atlantic Fisheries Licence Appeal Board* will only hear appeals requested by fishers who have had their appeals rejected following hearings by Regional Licensing Appeal Committees.
>
> …
>
> (c) The Board will make recommendations to the Minister on licensing appeals rejected through the Regional Licensing Appeal Structure by:
>
> …
>
> ii. determining if extenuating circumstances exist for deviation from established policies, practices, or procedures.

[60] The reference by Ms. McCleave is puzzling since “extenuating circumstances” appear to be a consideration upon an appeal relative to a licencing decision.

[61] There is no evidence that the Applicant pursued an appeal and the within proceeding relates only to judicial review of a discretionary decision of the Minister, refusing an application for the transfer of a licence.

[62] In my opinion, the Minister’s Decision was unreasonable as the reasons do not meet the standard in *Vavilov, supra,* that they be “transparent, intelligible and justified.”

[63] The Applicant sought an exception to the policy to allow him to transfer his Category B licence to an eligible fisher. He did not seek an exception to the eligibility requirements.

[64] In the Decision, the Minister describes the rationale behind categorization of lobster licences, which is the conservation and sustainability of the lobster fishery. She says that the rule against non-transferability of lobster licences “form[s] an integral party of these conservation and sustainability measures.”

[65] In *Vavilov*, *supra*, the Court explained the importance of responsive reasons, and said, at paragraph 128, that:

> … a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.

[66] In my opinion, the Decision is not responsive to the Applicant's request to transfer his licence. In particular, the Decision does not explain how allowing the Applicant to transfer his licence to an eligible fisher undermines the goals of the policy.

[67] Further, the Minister fails to address the Applicant's personal circumstances. She dismisses the request in a single sentence, without explaining why such personal circumstances do not warrant the positive exercise of discretion:

> … Although I appreciate the difficult situation Mr. Publicover is currently facing, in light of all the relevant circumstances, I will not be making an exception to the policy in this case.

[68] In my opinion, this conclusion is not reasonable.

[69] In *Vavilov*, *supra*, at paragraph 95, the Court said:

> … reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to the party.

[70] The Minister's Decision does not meet the standard of reasonableness as set out in *Vavilov*, *supra*.

[71] In light of my determination above, it is not necessary for me to address the submissions about fettering of the discretion afforded by section 7 of the Act.

[72] In the result, the application for judicial review is allowed with costs, the Decision of the Minister is set aside, and the matter is remitted for re-determination.

JUDGMENT in T-1032-20

THIS COURT'S JUDGMENT is that the application for judicial review is allowed with costs, the Decision of the Minister is set aside, and the matter is returned for re-determination.

The Applicant is awarded costs of the application, if the parties are unable to agree, brief submissions can be made by January 10, 2022. The parties can determine the dates, for serving and filing their submissions.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1032-20
STYLE OF CAUSE:	DON PUBLICOVER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE BETWEEN HALIFAX, NOVA SCOTIA AND ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
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REASONS AND JUDGMENT:	HENEGHAN J.
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