Federal Court Cour fédérale

Date: 20230509

Docket: T-1641-22

Citation: 2023 FC 659

Ottawa, Ontario, May 9, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DON PUBLICOVER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision, dated July 5, 2022 [the Decision], of the Honourable Joyce Murray, the Minister of Fisheries, Oceans and the Canadian Coast Guard [Minister], in which the Minister declined to grant the Applicant permission to transfer his Category B lobster fishing license.

[2] As explained in more detail below, this application is dismissed, because I find that the Decision is reasonable.

II. **Background**

[3] The Applicant, Donald Publicover, is a fisher who possesses a Category B lobster fishing license. This license, issued by the Government of Canada, allows Mr. Publicover to fish a limited amount of lobster in West Dover, Nova Scotia.

[4] Mr. Publicover first acquired his license in 1960 and has annually renewed it since. He routinely fished under the license until 2016. Since then, due to his deteriorating health, Mr. Publicover has been unable to fish under the license, and he has successfully applied each year for someone else to fish with his license, under what the Department of Fisheries and Oceans [DFO] terms its Medical Substitute Operator Policy [MSO Policy].

[5] Mr. Publicover and his wife, who are both in their late 60s, have two adult children who have a medical condition necessitating substantial care. Although most of Mr. Publicover's income comes from the operation of a food truck, he receives approximately $10,000 in income from his license every year. He explains that he and his wife do not have the financial means to sufficiently accommodate their children and their special needs. As such, he wishes to transfer his license to another fisher to generate additional funds.

[6] In 2019, counsel for Mr. Publicover wrote to DFO, seeking permission to market and sell or transfer his license. A senior advisor at DFO responded, advising that Category B licenses are non-transferable.

[7] In 2020, Mr. Publicover's counsel wrote to the former Minister, the Honourable Bernadette Jordan, asking her to exercise her discretion, pursuant to section 7 of the *Fisheries Act*, RSC 1985, c F-14 [Act], and allow Mr. Publicover to transfer his license to a qualified third party. In her response, Minister Jordan declined to make an exception to DFO's policy against transfer of Category B licenses and therefore declined Mr. Publicover's request [First Decision].

[8] Mr. Publicover applied for judicial review of the First Decision. On December 22, 2022, Justice Heneghan of this Court quashed the First Decision, and the matter was remitted back to the Minister for re-determination (see *Publicover v Canada (Attorney General)*, 2021 FC 1460 [*Publicover*]).

III. **Decision under Review**

[9] By letter dated July 5, 2022, the Minister conveyed her Decision in the re-determination of Mr. Publicover's request and again refused to allow him to transfer or sell his Category B lobster license.

[10] In her Decision, the Minster identified a number of considerations. First, she disagreed with the Applicant's counsel's assertion that the rationale related to Category B lobster fishing

licenses no longer exists. The Minister stated that the goal has always been to reduce the number of participants in the lobster fishery for conservation and socio-economic reasons, and that there was no reason to discontinue efforts to reduce the number of participants.

[11] Next, the Minister expressed her view that granting Mr. Publicover's request, and making exceptions on the basis of alleged financial difficulties, would undermine the objectives of departmental policy in this and other fisheries.

[12] The Minister then stated that there was a lack of evidence suggesting that Mr. Publicover had ever been dependent on the lobster fishery or that the fishery had ever been his primary source of income. She observed that Mr. Publicover had not appealed the categorization of his licence during the 1977 to 1982 time period when it was possible to do so based on a change in employment status. The Minister concluded that the fishery was never Mr. Publicover's primary source of income and that his stated financial difficulties were not related to his participation in the fishery.

[13] The Minister then stated that Mr. Publicover had been accommodated over time, through the benefits received from the fishery, and that his request to have his license issued to another fisher amounted to a request to revisit the accommodation that DFO policy granted to persons who were not dependant on the fishery. The Minister expressed her view that there was no reason to revisit DFO policy or the accommodation Mr. Publicover had received previously.

[14] Finally, the Minister noted that Mr. Publicover can continue to receive yearly income from the fishery through the use of a substitute operator, provided that he continues to meet eligibility requirements.

[15] The Minister concluded by stating that, after reviewing Mr. Publicover's request and in light of all relevant circumstances, there was no reason to revisit the accommodation Mr. Publicover had received. As such, the Minister denied his request.

IV. **Relief Sought**

[16] The Applicant requests that the Minister's Decision be quashed and that the Court substitute a decision allowing him to transfer his Category B license to a willing buyer. In the alternative, he seeks an order quashing the Decision and remitting the matter back to the Minister for another re-determination.

V. **Issues and Standard of Review**

[17] The Applicant's submissions raise two substantive issues for the Court's determination:

A. Is the Decision unreasonable?

B. Did the Minister fetter her discretion?

[18] The parties agree (and I concur) that the applicable standard of review for both issues is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*]; *Elson v Canada (Attorney General)*, 2019 FCA 27 [*Elson*] at para 30). Indeed, the second issue is perhaps best characterized as simply an additional argument challenging the reasonableness of the Decision (see *Elson* at para 30).

VI. **Analysis**

A. *Is the Decision unreasonable?*

(1) Legal Foundation for Issuance of Fishing Licenses

[19] Before moving to the Applicant's arguments challenging the reasonableness of the Decision, it is useful to note briefly the legal foundation for the Minister's issuance of fishing licenses.

[20] Pursuant to section 7 of the Act, the Minister has absolute discretion to issue a fishing license:

Fishery leases and licenses	**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.

[21] As confirmed by the Supreme Court of Canada in *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, 1997 CanLII 399 (SCC) at paragraph 36,

the Minister's discretion to issue licenses is restricted only by the requirements of natural justice and the obligation to make licensing decisions based on relevant considerations, avoid arbitrariness, and act in good faith. The Minister's discretion extends to decisions not to renew fishing licenses (see *Anglehart v Canada*, 2018 FCA 115 at para 31).

(2) DFO Policy

[22] It is also useful to provide some explanation surrounding the DFO policy underlying the Decision. While the Respondent's Memorandum of Fact and Law canvasses the history of the relevant policy in more detail than that of Mr. Publicover, I consider the more concise summary in his Memorandum to capture the main principles and events in the policy's evolution. His Memorandum provides the following summary at paragraphs 15 to 18:

> 15. In 1975, DFO introduced the Moonlighter Policy. The Moonlighter Policy placed stricter licence controls on fishermen that were not dependent on the lobster fishery (commonly referred to as "moonlighters"). Fishermen who held employment outside of the fishery were unable to fish as much lobster as fishermen who were dependent on the fishery (commonly referred to as "bona fide fishermen"). The stated intent of the Moonlighter Policy was to exclude moonlighters from the fishery. The Minister at the time, Romeo LeBlanc, expressed that there was no intent to disturb the part-time fishermen with a real dependence on the lobster fishery.
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> 16. In March 1976, the Moonlighter Policy was modified to include three categories of licences based on lobster fishery participation. Category "A" licences were limited to those persons who do not have full-time employment or whose part-time employment is not concurrent with the lobster fishing season in that person's locality. Category "B" licences were limited to individuals with a history in the fishery dating back to 1968 or earlier but do not meet the criteria for Category "A" licences. Category "B" licences were not transferrable. Category "C" licences were issued to persons who entered the fishery subsequent to 1968 and do not meet the criteria for Category "A" licences.

> 17. The Moonlighter Policy contemplated circumstances where exceptions could be made to permit the transfer of a Category "B" licence. It stated that "in order to transfer a registered lobster boat from one person to another…special circumstances may warrant consideration of a "B" Category licence transfer for a limited period of time following the premature or enforced retirement of a licencee." It purported to be "designed to fit different situations, to take account of historical attachment to the fishery, and to prevent cases of undue hardship through loss of licence." It stated that "normally, a B-licence remains restricted to the licencee alone and expires when he leaves the fishery." Letters sent to fishermen advising them of the change in lobster fishing licence policy stated that Category "B" licences were "normally not transferable."
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> 18. In 1996, the DFO established the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* (the "**1996 Policy**"), which has been revised over the years but remains in effect today. The 1996 Policy states that the Minister, in her "absolute discretion," may for administrative efficiency prescribe in policy those conditions or requirements under which she will issue a license to a new license holder as a "replacement" for an existing license being relinquished. The 1996 Policy lists Category "B" lobster licenses as a license that may not be issued as a replacement license to another fisher.

(3) First Decision and Judicial Review

[23] Finally, before turning to Mr. Publicover's arguments challenging the Decision, it is useful to explain the First Decision and the Court's decision in *Publicover*, as his current arguments include submissions that the errors in the First Decision, as identified in *Publicover*, were repeated in the Decision now under review.

[24] The First Decision was brief. Minister Jordan referred to the history of the categorization of lobster licenses, representing a means of achieving fishing effort reduction in the interests of the objectives of conservation and sustainability, and stated that she would not be making an exception in Mr. Publicover's case.

[25] Mr. Publicover highlights two findings by Justice Heneghan in *Publicover*, underlying her conclusion that the First Decision was unreasonable. First, she concluded that the First Decision was not responsive to Mr. Publicover's request to transfer his license, because Minister Jordan did not explain how allowing a transfer to an eligible fisher would undermine the goals of the applicable DFO policy (at para 66).

[26] Second, Justice Heneghan concluded that Minister Jordan failed to address Mr. Publicover's personal circumstances, as she dismissed the request in a single sentence, without explaining why his personal circumstances did not warrant a positive exercise of discretion (at para 67).

(4) Analysis of Applicant's Arguments

[27] Against that backdrop, Mr. Publicover submits that the Decision is unreasonable, in part because he asserts that it repeats the same two errors as were identified in *Publicover*.

[28] First, Mr. Publicover refers to the Minister's conclusion that granting his request to be able to transfer his license would undermine the longstanding objective of governmental policy. In so concluding, the Minister rejected Mr. Publicover's assertion that the underlying policy rationale that existed in the 1970s and 1980s no longer exists. The Minister explained that the goal has always been to reduce the number of participants in the lobster fishery for conservation and socio-economic reasons and that sustainability of fishing enterprises for fishers who have been dependant on the fishery remains a relevant objective.

[29] Mr. Publicover argues that the Minister's conclusion, that DFO's goal is as explained in the Decision and that this goal remains relevant, is not supported by any evidence in the record before the Minister. He refers the Court to a document in the Certified Tribunal Record [CTR], entitled History of the Categorization of Lobster Licenses in the Maritimes Region, which appears to have been prepared by DFO and attaches a series of relevant policy documents. Mr. Publicover notes that this material extends from 1960 to 2014, but not beyond, and he argues that the more recent material from 2013-2014 refers only to the need for strong conservation measures. It does not expressly refer to such measures as including a need to reduce fishing effort.

[30] Mr. Publicover does not dispute that fisheries conservation is a relevant consideration for the formulation of DFO policy. I also do not understand him to dispute that the record demonstrates a historical basis for the development of the policy against permitting transfer of Category B licences. Rather, his argument is that conservation does not necessarily require a reduction in fishing effort and that the record before the Minister does not demonstrate that the historical need for such reduction remains a current concern.

[31] I find little merit to this argument. As noted in the history of the relevant DFO policy as summarized by the Applicant and set out above in these Reasons, the identification of Category B licenses as non-transferable remains current policy. In my view, to possibly oblige the Minister to assemble scientific or other support for that policy, in order to justify as reasonable a decision to decline a request for an exception to the policy, would have required a substantially more

detailed and well-supported assertion (that considerations underlying the policy are ill-founded) than was made in the case at hand.

[32] As noted above, Mr. Publicover's request asserted that most of the rationale that existed in the 1970s and 1980s, for the non-transferability of Category B licenses, no longer exists. However, to the extent there is any basis provided for that assertion, it is in the immediately following couple of paragraphs of the request. These paragraphs submit that:

A. Allowing the transfer of the Category B license would not impact harvesting capacity or place additional strain on the lobster stock, as the license has been fished since it was originally downgraded from Category A to Category B; and

B. The MSO Policy has been amended to allow Category B license holder to maintain their licenses for longer than Category A license holder, when they are unable to fish their licenses themselves. Mr. Publicover argued that this demonstrates a change from the original policy intent, when the objective was to retire Category B licenses.

[33] The first of these submissions does not provide support for a conclusion that there is no longer a need for DFO to pursue a reduction in fishing effort in the lobster fishery. It merely asserts that allowing Mr. Publicover to transfer his license would not represent an increase in fishing effort. As the Minister states in the Decision, DFO's policy objective is not to avoid an increase in fishing effort but rather to achieve a reduction in effort. This explanation represents

an intelligible justification for this aspect of the Minister's reasoning and therefore withstands reasonableness review (see *Vavilov* at para 99).

[34] The second of the above submissions also does not provide support for a conclusion that there is no longer a need for DFO to pursue a reduction in fishing effort in the lobster fishery. It argues that the evolution of the MSO Policy is consistent with a conclusion that DFO policy no longer includes pursuit of a reduction in effort. However, the Minister explains that effort reduction remains DFO policy and subsequently addresses the significance of the MSO Policy for Mr. Publicover's circumstances, which is to afford him the potential for ongoing income from the lobster fishery. Again, this analysis is intelligible and withstands reasonableness review.

[35] Neither of the above submissions provides support for a conclusion, to the effect that the status of the lobster resource is such that effort reduction is no longer a valid policy consideration, such as could require the Minister to justify the policy itself.

[36] Before leaving this argument, I note that Mr. Publicover also asserts that DFO's real concern may be not the requirement for conservation of the resource but rather a concern that, if the present request was granted, it would open the floodgates to a multitude of other requests for transfer of Category B licenses. He submits that denying his request based on a floodgates concern is unreasonable, because such concern is both speculative and unrelated to his personal circumstances upon which the Minister's decision must be based.

[37] Mr. Publicover notes that, while the Decision does not express a floodgates concern, it is advanced in the briefing note that DFO prepared for the Minister in relation to the Decision. His argument relies on a document in the CTR, entitled Departmental Analysis. Mr. Publicover is correct that, in this document, DFO expresses concern that, if Mr. Publicover's request were granted, it could represent a precedent for requests from other Category B license holders.

[38] The Respondent argues that, as this concern is not found in the Minister's letter itself, it does not form part of the reasoning underlying the Decision. I am reluctant to accede to this argument, as there is abundant authority for the principle that a report or recommendation leading to an administrative decision can be regarded as informing the reasons for the decision when the decision-maker then adopts this recommendation and provides no reasons or only brief reasons of their own (see *Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119 at para 23). The Minister's letter conveying the Decision does set out reasons, but they are not particularly lengthy, and I am not convinced that the Departmental Analysis does not inform an understanding of the Minister's reasoning.

[39] However, I do not find this point to give rise to reviewable error. As explained in *Sofina Foods Inc v Canada (Attorney General)*, 2015 FC 47, an administrative decision-maker is permitted to consider the possibility that granting an exception to a policy may give rise to other similar requests, which may have to be granted for the sake of consistency, and the accumulated effect that granting such requests may have upon the underlying policy objectives (at paras 22-24).

[40] Turning to the second error identified in *Publicover* (the failure in the First Decision to explain why Mr. Publicover's personal circumstances did not warrant a positive exercise of discretion), he argues that the Minister has again made this error, by failing to engage with his submission that his need to provide for his family (including the special needs of his two adult children) warrants a policy exception on a compassionate basis. Mr. Publicover notes the Minister's focus was instead on whether he has ever been dependant on the lobster fishery, which was not the basis of his submission.

[41] In my view, it is not possible to infer from the Decision that the Minister overlooked the basis for Mr. Publicover's request for a policy exception. In the paragraph of the Decision on which the Applicant's argument relies, the Minister refers to Mr. Publicover's "stated financial difficulties". As I read this aspect of the Decision, the Minister was not prepared to make a discretionary exception to the policy, based on compassionate considerations, in the absence of evidence that those difficulties were related to Mr. Publicover's participation in the fishery. This reasoning is intelligible and demonstrates engagement with Mr. Publicover's request, albeit not in the manner or with the result for which he had advocated.

[42] The Applicant also submits that the Decision demonstrates new errors, distinct from those identified in *Publicover*. His principal argument is that the Minister's reference to him having been sufficiently "accommodated" over time represents an inaccurate and inappropriate characterization of the nature of a fishing license and application of the MSO Policy.

[43] Mr. Publicover submits that a fishing license is not an accommodation. Rather, it is a privilege, granted by the Minister under the Act, which privilege brings with it certain obligations borne by the license holder. Moreover, he argues that the effect of DFO policy, which has been to downgrade the status of Category B licenses, can hardly be characterized as an accommodation.

[44] Mr. Publicover is clearly correct that the effect of a fishing license is to confer a privilege upon the licence holder (see *Elson v Canada (Attorney General)*, 2017 FC 459 at para 3, aff'd 2019 FCA 27; *Green v Harnum*, 2007 NLTD 23 at para 16). However, I disagree that the Decision's references to accommodation give rise to reviewable error. While this portion of the Decision could have been written to capture with more legal precision the nature of a license, it is important to remember that judicial review is not a treasure hunt for error (see *Vavilov* at para 102). The Minister's reasoning was that Mr. Publicover has benefited from participation in the fishery for the last four decades and that a discretionary decision to confer additional benefits not supported by DFO policy was not warranted. Again, this reasoning is intelligible and therefore reasonable.

[45] In relation to the Minister's reference to the MSO Policy in particular, Mr. Publicover submits that it is inappropriate to refer to his use of a substitute operator as an accommodation, because jurisprudence of this Court has recognized that the MSO Policy engages protections afforded by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, c 11 [Charter] against discrimination on the basis of disability (see *Robinson v Canada (Attorney General)*, 2020 FC 942 [*Robinson*] at paras

56-57, affirmed *Canada (Attorney General) v Robinson*, 2022 FCA 59; *Boudreau v Canada (Attorney General)*, 2023 FC 428 [*Boudreau*] at para 41).

[46] While I recognize the jurisprudence upon which the Applicant relies, again I find no reviewable error in this aspect of the Decision. The time limited availability of the ability to use a substitute operator under the MSO Policy, which was the subject of the Charter arguments in *Robinson* and *Boudreau*, has not been raised as an issue in this application. Indeed, Mr. Publicover has been afforded the ability to use a substitute operator beyond the time limit provided by the MSO policy, and the Decision expressly recognizes the potential for such ability to continue in the future.

[47] I also struggle to understand why it would be inappropriate for the Minister to use the language of accommodation in the context of Charter-protected rights. However, the Applicant's argument fails principally because I read the Minister's language as a reference to the fact that Mr. Publicover has benefited from participation in the fishery and may continue to so benefit. Again, the Minister's reasoning, that a discretionary decision to confer additional benefits not supported by DFO policy was not warranted, is intelligible and therefore reasonable.

[48] The above analysis addresses Mr. Publicover's arguments as advanced by his counsel at the hearing of his application. In his Memorandum of Fact and Law, he frames his arguments somewhat differently. In the interests of being comprehensive, I will briefly address the additional arguments he advances in writing to the extent they have not already been considered in these Reasons.

[49] Mr. Publicover submits that the Minister erred by determining that his request was contrary to DFO policy, when it instead conformed to a relevant policy objective, because he sought to transfer his license to a qualified fisher who is dependent on the fishery. I find little merit to this argument. Despite the fact that a proposed transferee may be dependant on the fishery, such transfer would not be consistent with the policy objective of decreasing the fishing effort represented by Category B licenses.

[50] Mr. Publicover also argues that the Minister did not adequately consider that the original Moonlighter Policy (as described in the Applicant's summary of DFO policy set out earlier in these Reasons) itself contemplated a policy exception. His argument relies on policy language to the effect that Category B licenses are not "normally" transferable. Again, this argument does not undermine the reasonableness of the Decision. The Decision clearly demonstrates that the Minister understood that it was available to her to grant an exception. Her analysis explains why she decided not to grant one.

[51] Finally, Mr. Publicover submits that the Minister erred by deciding that there are no circumstances under which it would be acceptable to grant a policy exception. He argues that it was unlawful for the Minister to fail to recognize her broad discretionary powers and, as a result, to decline to exercise those powers. In my view, this submission amounts to an argument that the Minister fettered her discretion, which I will consider below.

B. *Did the Minister fetter her discretion?*

[52] As the Applicant submits, it is a reviewable error for an administrative decision-maker to fetter their decision-making discretion by binding themselves to administrative policy (see *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 22, 60; *Law Society of British Columbia v Trinity Western University*, 2015 BCSC 2326 at para 97, aff'd 2016 BCCA 423, rev's on other grounds 2018 SCC 32).

[53] Mr. Publicover submits that the Minister fettered her discretion by refusing to grant his request simply because it was contrary to DFO policy. That is, he argues that, in denying his request, the Minister relied exclusively on DFO policy and failed to recognize that she was obliged to consider whether to exercise her discretion to depart from the applicable policy.

[54] I accept that the Decision was influenced significantly by DFO policy and its objectives. However, it cannot be inferred from the Decision that the Minister afforded no consideration to the possibility of granting an exception. Rather, she concluded that the particular circumstances advanced by Mr. Publicover did not justify an exception. I find no merit to the argument that the Minister fettered her discretion.

VII. **Conclusion and Costs**

[55] Having considered the Applicant's arguments, I find that the Decision is reasonable and that this application for judicial review must therefore be dismissed.

[56] At the hearing of this application, the parties consulted on the disposition of costs and advised the Court as to their joint position including that, in the event the application was dismissed, no costs should be awarded to the Respondent. I adopt that disposition and my Order will so provide.

JUDGMENT in T-1641-22

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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