Date: 20091211

Docket: T-891-08

Citation: 2009 FC 1274

Vancouver, British Columbia, December 11, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SHAWN RALPH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Shawn Ralph (the "Applicant") seeks judicial review of the decision of the Minister of Fisheries and Oceans (the "Minister") made on May 16, 2008. In his decision, the Minister denied the Applicant's appeal concerning the reinstatement of his permit to fish for turbot in sub-area O of the NAFO fishing areas.

[2] The Applicant is a fisherman, residing in St. John's, Newfoundland and Labrador.

[3] The Minister is responsible for the administration of the fisheries resources of Canada pursuant to the *Fisheries Act*, R.S.C. 1985, c. F.14 (the "Act"). In this application for judicial review, the Minister is represented by the Attorney General of Canada, (the "Respondent") pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules").

Background

[4] The following facts are based upon the affidavits, together with the exhibits, that were filed on behalf of the parties. An affidavit was filed by the Applicant. The Respondent filed the affidavit of Ms. Beverley Green, a staff officer with the Department of Fisheries and Oceans ("DFO" or "the Department").

[5] The Applicant held a groundfish fixed gear ("GFFG") licence for 2GHJ 3KL since 1990. Subject to licence conditions, this licence authorized him to fish any of the groundfish species listed in Schedule 1 of the *Atlantic Fishery Regulations*, SOR/86-21. Turbot is included in Schedule 1.

[6] In 1996, the Department announced that persons holding groundfish licences for area 2GHJ 3KL could apply for limited access to fish turbot in sub-area O. Access was granted by means of a licence condition that was attached by amendment to a fisherman's current groundfish licence.

[7] By a document issued by DFO on July 5, 1996, the Applicant's fishing licence was amended, allowing him to fish for turbot for the period between July 5, 1996 and September 30,

1996, exclusively. The preamble and clause (a) of this document provide as follows:

> Pursuant to Section 22(1) of the Fishery (General) Regulations, licence document number 000166 is hereby amended as follows, when fishing for GREENLAND HALIBUT (TURBOT):
>
> a. this amendment is valid for the period beginning on the 5th day of July, 1996 and ending on the 30 day of September, 1996. At the end of this period new licence conditions are required.

[8] As well, the document includes the following statement:

> These conditions form part of the original licence document 000166 and must be attached to that licence. All other conditions issued with respect to the original licence remain in effect.

[9] The Applicant did not fish for turbot in sub-area O in 1996. He did not apply for access to the turbot fishery in 1997, 1998, or 1999. The amendment to his 1996 licence that allowed him to fish for turbot in 1996 expired on September 30, 1996.

[10] In May 2000, the Department decided to restrict access to the turbot fishery in sub-area O. A policy was introduced that required fishermen to provide proof of historic landings of turbot in order to gain access to the turbot fishery. The rationale for the limits on the turbot fishery was set out in a memorandum dated May 5, 2000. Access to this fishery would be restricted to those who could show “historic harvests”.

[11] By letter dated July 21, 2000, Counsel for the Applicant wrote to the Department, with an inquiry about the removal of his groundfish license for all species from sub-area O. The same inquiry was made in two subsequent letters, dated March 7, 2001 and February 4, 2002.

[12] The Department replied in an undated letter signed by Mr. Tom Perry, Chief - Licensing and Appeals, as follows:

> This is in response to your letter dated February 4, 2002 regarding access to Subarea O groundfish for your client Shawn Ralph.
>
> Fishers who had Subarea O Turbot landings in 1996 are eligible to participate in this fishery. Although Mr. Ralph was issued a permit for Greenland Halibut (Turbot) on July 5, 1996, a review of our catch and effort data confirms that we do not have any recorded landings for Subarea O Turbot for Mr. Ralph's enterprise during 1996.
>
> If Mr. Ralph has documentation showing that his enterprise did have Subarea O Turbot landings in 1996, please forward this information to the undersigned for further review.

[13] Ultimately, the Applicant was granted an appeal before the Atlantic Fisheries Licensing Appeal Board ("AFLAB" or the "Board"). His hearing before the Board took place on December 11, 2007.

[14] The Board prepared a summary of the evidence and submissions presented by the Applicant and the Department. According to that summary, the representative of the Department gave evidence about the licensing process. The permit for access to the turbot fishery was a condition attached to the Applicant's licence. In 2000, access to the turbot fishery was restricted, by licence conditions, to those who had historic landings for this fishery.

[15] The representative for the Applicant said that the Applicant had required upgrades to his fishing vessel in order to safely participate in the turbot fishery which takes place in far northern waters. The Applicant did not fish for turbot in 1996. His representative said that there was no requirement in the turbot licence to lead him to believe that landings were a condition of that licence.

[16] The Board recommended that the appeal be dismissed, saying the following:

> The Board reviewed all the information presented by the appellant, his representatives and the Department of Fisheries and Oceans. The Board recommends the appeal be denied based on the fact that Mr. Ralph did not provide proof of fishing Greenland Halibut in sub area OB prior to the announcement of May 2000, which restricted access to fishers that had landings prior to May 2000. Also, Mr. Ralph did not provide proof or documentation to the board of any request after 1996 up to May 2000 requesting access to the OB Greenland Halibut fishery. The Board could find no extenuating circumstances in this case and that the Department of Fisheries and Oceans policies and procedures were applied correctly.

[17] By letter dated May 16, 2008, the Applicant was advised that his appeal had been denied by the Minister. That letter provides as follows:

> Dear Mr. Ralph:
>
> The Honourable Loyola Hearn has asked me to respond to your letter regarding your request for access to Greenland Halibut in sub-area OB. As you know, your request was referred to the Atlantic Fisheries Licence Appeal Board and was heard on December 11, 2007 at the Battery Hotel & Suites, St. John’s, Newfoundland and Labrador.
>
> The Minister has made a decision based on a thorough review of all available information and I regret to inform you that he has denied your appeal. The Minister concluded that the licensing policy was

> correctly interpreted and applied by the Department of Fisheries & Oceans in your case.
>
> I regret, once again, that this decision could not be more favourable to you.

Submissions

i) Applicant's Submissions

[18] In this application for judicial review, the Applicant argues that the Board failed to discharge its mandate because it did not consider whether extenuating circumstances existed that would justify a recommendation to the Minister for the reinstatement of his turbot licence. He submits that he reasonably took steps to prepare his fishing vessel for voyages to ice-infested waters, that is by upgrading his vessel. This work was performed by Glovertown Marine Ltd. He argues that the expenditure of nearly $400,000.00 in that regard should have been taken into account by the Board as evidence of a demonstrated financial commitment to the turbot fishery that can constitute an "extenuating circumstance".

[19] The Applicant argues that the reliance by the Minister on an unreasonable recommendation by the Board means that the Minister's decision itself is unreasonable.

ii) Respondent's Submissions

[20] The Respondent takes the position that, having regard to the statutory scheme set out in the Act and the relevant regulations, the Minister's decision meets the applicable standard of review, that is reasonableness.

Discussion and Disposition

[21] The first issue to be addressed is the applicable standard of review. Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative decision-makers are reviewable on one of two standards, that is correctness and reasonableness. Questions of procedural fairness and natural justice are reviewable on the standard of correctness; see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, at para. 65. Correctness will also apply to questions of law. Generally, the standard of reasonableness will apply to questions of fact, mixed fact and law and the exercise of discretion.

[22] In my opinion, the present application does not raise any issues of procedural fairness or questions of law. The challenge to the Minister's decision relates to the recommendation of the Board. In turn, that recommendation is to be reviewed in relation to the evidence submitted and the applicable legislative framework. The appropriate standard of review in this case is that of reasonableness.

[23] The Minister is responsible for the management of fisheries. Pursuant to section 7 of the Act, the Minister holds absolute discretion over the issuance of licences, including the creation of terms and conditions.

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	7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi

leases and licences for fisheries or fishing, wherever situated or carried on.	que des licences d’exploitation de pêcheries — ou en permettre l’octroi —, indépendamment du lieu de l’exploitation ou de l’activité de pêche.

[24] Section 7 of the Act accords broad discretion to the Minister in the matter of issuing licences under the Act. The breadth of that discretion was discussed by the Supreme Court of Canada, in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at paras. 36-37 as follows:

> It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984.

[25] Section 10 of the *Fishery (General) Regulations*, SOR/93-53 (the “Regulations”) describes the period during which a licence is valid:

Expiration of Documents	Date d’expiration des documents
10. Unless otherwise specified in a document, a document expires (a) where it is issued for a calendar year, on December 31 of the year for which it is	10. Sauf indication contraire dans le document, celui-ci expire à l’une des dates suivantes : a) le 31 décembre de l’année

issued; or (b) where it is issued for a fiscal year, on March 31 of the year for which it is issued.	pour laquelle il a été délivré, s'il est délivré pour une année civile; b) le 31 mars de l'année pour laquelle il a été délivré, s'il est délivré pour un exercice.

[26] The Applicant characterizes his situation as a "revocation" of his "turbot licence". This characterization is incorrect and is not supported by the evidence.

[27] According to the evidence, the Applicant was authorized to participate in the turbot fishery only as a result of the issuance of an amendment to his GFFG licence. He never was granted an independent "stand alone" licence for the turbot fishery. The permission that was given to him in 1996 was defined in terms of time: the fishery was open to the Applicant only from July 5, 1996 until September 30, 1996.

[28] The Applicant did not seek permission to participate in the turbot fishery in 1997, 1998 or 1999. It is unclear from the record that is now before the Court whether he requested "permission" in 2000 or whether he only instructed his lawyers to write to the Department.

[29] In any event, it is clear from the evidence adduced on behalf of the Department that the turbot permit was attached to the Applicant's GFFG licence as a licence condition. This condition enjoyed validity for a specific time, as spelled out in section 10 of the Regulations.

[30] The Applicant did apply for and receive a GFFG licence for the years 1997, 1998 and 1999. The access to the turbot fishery in 1996 was only a condition of the GFFG licence and there is no evidence that that condition was an inherent part of the GFFG licence.

[31] It is incorrect for the Applicant to say that his turbot "licence" had been revoked. The condition that gave him access to the turbot fishery was a matter that lay within the authority of the Minister to grant or withhold, as a matter of the Minister's mandate to manage the fisheries.

[32] The Minister, through DFO, is authorized to develop and apply policies, including plans to manage specific fisheries. In this case, the restriction on access to the turbot fishery was addressed in a memorandum with a subject line of "Restricting Access to Competitive Quotas, in the Sub-area O Turbot Fishery/Limitation de l'Accèss aux Quotas Concurrentiels dans la Pêche du Flétan Noir de la Sous-Zone O".

[33] The policies relative to the management of the fisheries in the Newfoundland Region include the *Commercial Fisheries Licensing Policy for Eastern Canada* (Ottawa: Minister Supply and Services Canada, 1996) (the "Licensing Policy"). AFLAB is created pursuant to this policy. Chapter 7 of the Licensing Policy provides for an appeal process for those persons that are not satisfied with licensing decisions made by the employees of DFO. Section 35 of the Licensing Policy describes the mandate of the Board. Paragraph 35(7) is relevant to the present proceeding and provides as follows:

> 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.
>
> > (a) The Board will consider only those licensing appeals which deal with policies for vessels less than 19.7m (65') LOA.
> >
> > (b) The Board will only hear appeal requests made within three years from the date of a licensing decision or a change in policy.
> >
> > (c) The Board will make recommendations to the Minister on licensing appeals rejected through the Regional Licensing Appeal Structure by:
> >
> > (i) determining if the appellant was treated fairly in accordance with the Department's licensing policies, practices and procedures;
> >
> > (ii) determining if extenuating circumstances exist for deviation from established policies, practices, or procedures;

[34] Paragraph 35(7)(c) of the Licensing Policy describes the role of the Board, that is to hear appeals of licensing decisions and to make recommendations to the Minister, having regard to whether an appellant had been treated fairly and whether "extenuating circumstances" exist that would justify deviation from "established policies, practices or procedures" (underlining added).

[35] In *Jada Fishing Co. et al. v. Canada (Minister of Fisheries and Oceans) et al.* (2002), 288 N.R. 237 (F.C.A.), the Federal Court of Appeal commented on the relationship between the recommendations of the Board and the decision of the Minister at paras. 12 and 13 as follows:

> It is clear that the Minister is empowered under section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14, with absolute discretion to make decisions with regard to fishing licences. The Panel, on the other hand, was without statutory authority and merely made recommendations which the Minister was entitled to accept or reject. Accordingly, the Panel's recommendations are not in themselves prima facie reviewable. In this case, due to the breadth of the Notice of Application for Judicial Review before Pelletier, J. I am well satisfied that this Court can review a discretionary decision of the Minister based, in part, upon the Panel's recommendation.
>
> The present appeal seeks to set aside the Reviewing Judge's order, and refers only to the "decision" of the Panel and its conduct, without reference to the Minister. However, the Minister's decision of April 3, 1998, still stands, and, in any event, the decision or recommendation of the Panel is inexorably connected to his decision, being without legal effect unless "adopted" by the Minister as one of the basis for his decision. In my analysis, this appeal can only continue as a review of the Minister's decision, albeit under the guise of an attack on the Panel's recommendation, based on paragraph 18.1(4) of the Act as a review of the exercise of Ministerial discretion.

[36] This means that the recommendation of the Board is to be considered as a factor that was taken into account by the Minister when he made the decision that is under review.

[37] The Applicant’s submission is that the Board failed to discharge its responsibility to consider whether there were extenuating circumstances that would justify a recommendation to the Minister for a deviation from departmental policy, practice and procedure. The Applicant claims that such extenuating circumstances existed here because he had spent nearly $400,000.00 in upgrades to his fishing vessel. He relies on the decision in *Decker v. Canada (Attorney General)* (2004), 259 F.T.R. 216, where Mr. Justice O’Keefe found that the Board committed a reviewable error by failing to consider the existence of such circumstances. In that case, the Court found that

the Department recognized proof of demonstrated financial commitment to the fishing enterprise constituted “extenuating circumstances”.

[38] In this case, the Applicant argues that he has shown a financial commitment to the turbot fishery arising from his significant expenditures to make his vessel safe for fishing in far northern waters. He points to the work that was done by Glovertown Marine Ltd.

[39] However, in my opinion, this argument cannot succeed. The evidence adduced by the Applicant concerning the upgrades to his vessel is a one-page letter, dated May 30, 2002. The letter provides as follows:

> Since 1999 the Ship repair facility in Glovertown has done major renovations to the above fishing vessel in order that it may pursue fishing in northern ice infested waters.
>
> A List of the major items completed is as follows:
>
> 1. Enclosed the fishing deck to give the area a Watertight Integrity.
>
> 2. Replated & Reframed the vessel along the ice Belt with much heavier material for ice reinforcement.
>
> 3. Install extra fuel tank to increase capacity.
>
> 4. Install extra fresh water tank to increase capacity.
>
> 5. Install larger Generator & replace much of the 32 volt electric system to 110 volt AC system.
>
> 6. Reinsulated the Fish Hold.
>
> 7. Install Net Clearing Equipment.

> All the work listed above will enable the vessel to fish further from home ports for larger durations and on ice infested waters.
>
> In all he'd spent close to 400,000.00 at the facility.

[40] The repairs were carried out since 1999, according to Glovertown Marine Ltd. There is no detail as to exactly what was done for "close to 400,000.00 [sic]". There is no indication that any of the work was done in 1996, 1997 or 1998. This letter is insufficient to show a "demonstrated financial commitment" by the Applicant for the prosecution of the turbot fishery and the Board committed no error by failing to mention it in its recommendation to the Minister.

[41] I agree with the submissions of the Respondent that it was unreasonable for the Applicant to spend several hundred thousand dollars on his vessel for use in the turbot fishery when that fishery was open for only a few months.

[42] In the result, I find no basis for judicial intervention in the Minister's decision. That decision was fairly based upon the recommendation of the Board. There is a reasonable basis for the Board's recommendation, having regard to the evidence that was presented. Accordingly, this application for judicial review will be dismissed.

[43] The only issue remaining is the question of costs.

[44] The Respondent successfully defended this application for judicial review and is entitled to his taxed costs. I note that Counsel for the Respondent travelled from Halifax, Nova Scotia. He appeared before me in St. John's on two other matters, on June 2 and 3, 2009.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, with taxed costs to the Respondent, bearing in mind the fact that Counsel for the Respondent appeared before me on two other matters on June 2 and 3, 2009.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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