Federal Court of Appeal | Cour d'appel fédérale

Date: 20220407

Docket: A-264-20

Citation: 2022 FCA 59

CORAM: **RENNIE J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DANA ROBINSON

Respondent

Heard at Halifax, Nova Scotia, on March 22, 2022.

Judgment delivered at Ottawa, Ontario, on April 7, 2022.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Since 1986 the Minister of Fisheries and Oceans has sought to ensure an economically viable and environmentally sustainable inshore fishery by keeping the control of fishing licences in the hands of independent owner-operators in small coastal communities.

[2] This policy objective was rooted in regulations. The *Atlantic Fishery Regulations, 1985*, S.O.R./86-21/Inshore and Coastal Licences, subsections 18(a), 19(2), require that the holder of an inshore fishing licence personally carry out the activities authorized by the licence. If the licence holder cannot engage in the fishing activity due to circumstances beyond their control, the licence holder may apply for permission to have someone else carry out the fishing activity (subsection 23(2) of the *Fishery (General) Regulations*, S.O.R./93-53 [the Regulations]).

[3] The discretion as to when and to what extent the Department of Fisheries and Oceans [DFO] will authorize another person to fish the licence is governed by the Commercial Fisheries Licensing Policy for Eastern Canada, 1996 [the 1996 Policy]. The 1996 Policy provides that if a licence holder is unable to fish due to illness, a medical substitute operator [MSO] may exercise the rights given under the licence for the remaining balance of the term of the licence. Importantly for the purposes of this appeal, an MSO exception is limited to five years. Subsections 11(10) and (11) of the 1996 Policy read:

> (10) As provided under the *Fishery (General) Regulations*, where, because of circumstances beyond his control, the holder of a licence or the operator named in a licence is unable to engage in the activity authorized by the licence or is unable to use the vessel specified in the licence, a fishery officer or other authorized employee of the Department may, on the request of the licence holder or his agent, authorize in writing another person to carry out the activity under the licence or authorize the use of another vessel under the licence.
>
> (10) Tel qu'énoncé dans le *Règlement de pêche (dispositions générales)*, si, en raison de circonstances indépendantes de sa volonté, le titulaire d'un permis ou l'exploitant désigné dans le permis sont dans l'impossibilité de se livrer à l'activité autorisée par le permis ou d'utiliser le bateau indiqué sur le permis, un agent des pêches ou tout autre employé autorisé du Ministère peut, à la demande du titulaire ou de son mandataire, autoriser par écrit une autre personne à pratiquer cette activité en vertu du permis ou autoriser l'emploi d'un autre bateau.

(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.	(11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

[4] In 2008, following the global economic downturn and its consequences for the fishery, the DFO adopted a more flexible approach to the application of MSO exemptions. In 2015, however, and in response to concerns raised by the Canadian Independent Fish Harvesters Federation that this practice was undermining the regulatory and policy objectives, DFO restored the application of the five-year limit. Licence holders who had reached or exceeded the five-year limit were notified that further extensions would only be approved on a case-by-case basis.

[5] Mr. Robinson had a licence which authorized him to harvest lobster on the southwest coast of Nova Scotia in an area known as Lobster Fishing Area 35. He obtained the licence in 2007 and fished it personally until 2009 when a medical condition prevented him from doing so.

[6] Mr. Robinson requested authorization to use an MSO for his lobster fishing licence in 2009. His request was approved, and it was approved every year following until 2015. In October 2015, the DFO informed Mr. Robinson that his latest request for an MSO was approved to July 31, 2016 (the end of the lobster fishing season), even though such approval exceeded the five-year maximum set out in the 1996 Policy. The letter informed Mr. Robinson that pursuant to the Policy, further requests for an MSO would not be approved.

[7] Mr. Robinson appealed the refusal to continue to extend the exemption beyond five years to the Maritimes Region Licensing Appeal Committee [MRLAC]. The MRLAC denied his request for an extension beyond the term of his existing licence. However, pending the decision of the MRLAC, Mr. Robinson's licence was further extended by the DFO until July 2017.

[8] Mr. Robinson appealed the MRLAC's decision to the Atlantic Fisheries Licence Appeal Board [AFLAB], seeking the continued use of an MSO authorization with no end date.

[9] In his submissions to the AFLAB, Mr. Robinson contended that the five-year limit in the 1996 Policy was arbitrary, discriminatory, and violated his rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. He submitted that an administrative decision-maker must ensure that any decision which engages an individual's Charter rights is proportionate. He also challenged the constitutionality of the 1996 Policy and submitted that the MRLAC's decision made no attempt to accommodate his disability.

[10] The Deputy Minister received recommendations concerning the appeal from both the AFLAB and the DFO. In its recommendations, the AFLAB concluded that an extension of the MSO authorization was not consistent with the 1996 Policy objectives. It also concluded that it was outside of its mandate to make a recommendation on the contention that the Policy violated Mr. Robinson's subsection 15(1) rights.

[11] The recommendation by the DFO to the Deputy Minister was contained in a memorandum to the Deputy Minister. The memorandum summarized the background to the decision the Deputy Minister was required to make including the AFLAB's recommendations.

[12] Under the heading "Strategic Considerations", the memorandum noted the 1996 Policy and on-going efforts to strengthen and standardize the application of the substitute operator provisions across regions. In the DFO's view, softening the application of the five-year maximum on MSOs, was not, in light of the 1996 Policy, recommended. The memorandum reviewed the circumstances giving rise to Mr. Robinson's request for an extension and concluded that they did not warrant a further exception to the 1996 Policy, that the AFLAB's recommendations should be followed, and that Mr. Robinson's request for a further MSO should be denied.

[13] After receiving the recommendations from the AFLAB and the DFO, the Deputy Minister dismissed the appeal.

[14] The Deputy Minister's decision briefly discussed the Regulations and 1996 Policy before giving the following substantive reasons:

> After careful review and consideration of all the relevant information pertaining to your licensing case, including the regional decision, the materials submitted to AFLAB, and AFLAB's recommendation, I am of the view that the circumstances raised before the AFLAB to support your request for a further exception to the policy, namely your claim of financial hardship and your succession plan in respect of the licence, do not constitute extenuating circumstances that would warrant making an exception to policy.

[15] Mr. Robinson brought an application for judicial review in the Federal Court to set aside this decision.

The Federal Court's decision

[16] The Federal Court (2020 FC 942 *per* Southcott J. [Reasons]) began with an explanation of the *Doré*/*Loyola*/*TWU* framework (*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*]; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 [*TWU*]). This trilogy of cases addresses both when and how Charter rights and "Charter values" are to be considered in administrative decision-making.

[17] The Supreme Court has developed a two-step approach, asking, first, whether the decision affected or engaged a Charter protection, and then, if so, whether that decision reflected a proportionate balance between the Charter protection and the statutory objectives (*TWU* at para. 28). I note, parenthetically, that the majority decision of the Supreme Court of Canada in *TWU* refers to Charter protections, and, in paragraph 41 of *TWU* the majority writes, that "any exercise of statutory discretion must comply with the Charter and its values", citing *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 at paragraph 41.

[18] The judge then turned to the standard of review. Following *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, 441 D.L.R. (4th) 632 [*Ferrier*], the judge determined that the appropriate standard of review for the first question of the *Doré*/*Loyola*/*TWU* test (determining whether a Charter protection was engaged) was correctness, and that the standard

of review for the second question (the balancing of the Charter protection against the policy objectives) was reasonableness. However, he also held that regardless of which standard he applied to the question of whether a Charter protection was engaged, the Deputy Minister's decision would be unreasonable as it was silent on the question. Given the failure to address the central question, the Deputy Minister's decision was neither correct nor reasonable.

[19] The judge then applied the *Doré*/*Loyola*/*TWU* framework to the question whether the decision not to extend the MSO beyond five years engaged subsection 15(1) of the Charter. Relying on *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, the judge asked whether the decision, on its face or in its impact, created a distinction based on an enumerated or analogous ground, and if so, whether the decision imposed burdens or denied a benefit in a manner that constitutes substantive discrimination (Reasons at para. 46).

[20] The judge concluded that the decision not to grant an exception to allow the continued use of an MSO was differential treatment, creating a distinction on the ground of physical disability. He noted that while Mr. Robinson has no more right to have his licence renewed each year than any other licence holder, if the Minister does re-issue his licence, then the decision to not grant an MSO denies Mr. Robinson a benefit. Mr. Robinson's ability to avail himself of the benefits afforded by the licence differs from the ability of other licence holders who are not disabled.

[21] The judge concluded that "neither the recommendation documents nor the Decision demonstrates any consideration of the impact of those policy considerations upon Mr. Robinson's equality rights" (Reasons at para. 70). Citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], the judge observed that while the inadequacy of reasons is not a standalone ground for judicial review, the reasons were silent on the critical questions that required answering and were not reasonable:

> The conclusion that five years was a reasonable time to make alternate arrangements … misses the thrust of Mr. Robinson's *Charter* argument, i.e. that, as a person with a disability, he should not be required to give up his chosen livelihood. There is no balancing of the severity of that result against the policy objectives or consideration of whether those objectives could reasonably be achieved in a manner that reduced the impact on Mr. Robinson's equality rights. I therefore disagree with the Respondent's contention that the Decision represents an implicit effort to conduct a balancing of *Charter* rights against statutory objectives. The Decision does not demonstrate that the DM was alive to the requirement to strike such a balance.
>
> (Reasons at para. 70)

[22] The Federal Court allowed the application on the basis that the Deputy Minister's decision engaged Mr. Robinson's Charter rights and remitted the decision to the Deputy Minister to conduct the balancing exercise. After reviewing the jurisprudence, the judge also concluded that as the five-year limit in subsection 11(11) of the 1996 Policy was not legislative in nature, it was not subject to challenge under section 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11. Section 52 states that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[23] Mr. Robinson cross-appeals the refusal of the Federal Court to grant a declaration under section 52 of the Constitution on the basis that the 1996 Policy was not a law.

[24] The Attorney General submits that the judge erred in relying on *Ferrier* and assessing whether the decision engaged subsection 15(1) protections against a correctness standard. He submits the presumptive standard of reasonableness should be applied to both the first and the second question under the *Doré*/*Loyola*/*TWU* framework.

[25] Turning to the substantive question, the Attorney General argues that the judge erred in finding that the decision engaged subsection 15(1) of the Charter for the purposes of a *Doré*/*Loyola*/*TWU* analysis. He contends that that the Deputy Minister's decision not to extend the MSO exemption beyond five years did not create a distinction on a prohibited or analogous ground, nor did it have the effect of reinforcing, perpetuating and exacerbating disadvantage. He also contends, in the alternative, that if Mr. Robinson's subsection 15(1) rights were engaged, there was no need to expressly balance the degree of interference with a Charter right or value with the policy objective. This was because the use of an MSO for up to five-years was, in and of itself, a responsive accommodation to any Charter right or value that Mr. Robinson might have.

Analysis

[26] The first question before us is whether the judge adopted the correct standard of review; the second is whether he applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 at para. 10).

[27] It is sufficient for the purposes of this appeal to say that I agree with the judge that the Deputy Minister's decision ought to be set aside for failing to address the key question before him. During the appeal process, Mr. Robinson contended that the decision not to grant an exception under the policy violated his subsection 15(1) rights under the Charter.

[28] An administrative decision-maker does not have to address the Charter in every decision he or she makes (*Loyola* at para. 4). However, where, as in this case, a Charter protection is squarely raised by a party, the unexplained failure to address whether the Charter was engaged cannot survive reasonableness review. The reasons were not responsive to the question as framed in circumstances where it was called on to be answered (*Vavilov* at paras. 81 and 86) and the decision fails on both the transparency and justification metrics. As the Supreme Court said in *Vavilov*, reasons are the primary mechanism by which administrative decision-makers show that their decisions are reasonable (para. 81). For a decision to be justifiable where, as here, reasons are required, the decision must be justified by the reasons (paras. 86-87).

[29] In light of this conclusion, it is unnecessary to comment on the reasons of the Federal Court with regard to the application of the *Doré*/*Loyola*/*TWU* test. Similarly, whether this Court ought to adopt the approach of the Ontario Court of Appeal in *Ferrier*, holding that the first question under the *Doré*/*Loyola*/*TWU* analysis is to be determined on a correctness basis, and the second question on the basis of reasonableness, should be decided when it must and with the benefit of a full argument.

[30] I would therefore dismiss the appeal with costs.

[31] As no error has been identified in the Federal Court judge's reasons with respect to the refusal to grant a declaration under section 52 of the *Constitution Act, 1982*, I would dismiss the cross-appeal with no order as to costs.

"Donald J. Rennie"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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