IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.28/83

(3)

720

IN THE MATTER of Section 138 of the Fisheries Act 1908

A N D

IN THE MATTER of an appeal against a decision of the Fisheries Licensing Authority

BETWEEN JOHN THOMAS RICHARDS

Appellant

A N D THE FISHERIES LICENSING AUTHORITY

Respondent

Hearing : 20th June 1984

Counsel : P.M. Maskell for Appellant
C.J. McGuire for Respondent

Judgment : 20th June 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal under Section 138 of the Fisheries Act 1908 ("the Act") against the refusal of the respondent, The Fisheries Licensing Authority, to grant the appellant's application for a licence to fish in the Hauraki Gulf Wet Fish Fishery. The decision was given on 5th January 1983.

On 25th March 1982, the Minister of Fisheries declared the Hauraki Gulf Wetfish Fishery to be a controlled fishery as from 1st December 1982 for the purposes of Part III

of the Act. The control date was subsequently amended to 1st March 1983. On 27th June 1982, the appellant made application for a controlled fisheries licence and the application was heard by the respondent at Auckland on 22nd September 1982. The appellant did not have the services of counsel; he prepared the documentation, which was placed before the respondent, himself. He was asked by the respondent at the hearing whether there was anything further he wished to bring to the attention of the respondent, but he did not do so. However, the respondent obtained clarification on certain aspects of his application.

At the hearing today, counsel for the appellant moved, under Section 142 of the Act, that I hear further evidence in determining the appeal. Counsel for the respondent had no objection; accordingly, a statement of evidence from the appellant was produced; he was cross-examined by counsel for the respondent. Had the respondent the benefit of this additional information which was obviously obtained after the services of solicitors had been retained, then it may well have come to a different decision on the one aspect on which I am about to differ from it.

Section 141 states that the procedure on appeal shall be in accordance with the Rules of Court; it is not, by any means, automatic that applications for further evidence will be entertained. However, in the circumstances of this case (a) when the respondent had no objection and (b) when the appellant was not represented at the original hearing, I thought that it was just to admit the further evidence.

The respondent was required by Sections 122 and 123 of the Act to take into account a number of matters there stated. In its report to the Court, made pursuant to Rule 37 of the High Court (Administrative Division) Rules 1969, the respondent set out its conclusions on the various criteria. It is not necessary to state the statutory criteria or the decision of the respondent on each of them, other than the criterion stated in Section 123(1)(b), namely that, in considering any application for a licence, the respondent shall generally have regard to "any policy approved by the Minister for the conservation of any species of fish or controlled fish, the proper management of any controlled fishery, or for any other matter relevant to fishing or the fishing industry within the controlled fishery."

By letter dated 25th May 1982, the Acting Minister of Fisheries advised the Chairman of the respondent that, in terms of Section 115 of the Act, the Authority was required to implement the policy of the Government as communicated from time to time in writing by the Minister. This policy in respect of the Hauraki Gulf Controlled Wetfishery is a fairly detailed document and establishes criteria for the respondent's consideration when considering the issue of licences within the Hauraki Gulf Controlled Wetfishery. The consideration of such policy is of course clearly required of the respondent by Section 123(1)(b) quoted above. The first statement is as to status of the applicant and reads as follows:

"1. Status of the Applicant

(a) Applicants who are ordinarily engaged in wetfishing as their principal means of livelihood are to be given preference for licences.

In particular, priority is to be given to applicants as follows:

(i) first preference is to be given to full-time fishermen (as defined in Section 100 of the Act) who have derived at least 80% of their earned income from wetfishing or activity related to wetfishing.

Note: For the purposes of this section earned income means income obtained as a reward of labour.

(ii) second preference is to be given to part-time fishermen whose economic wellbeing is vitally affected by their fishing activity and who have a genuine commitment to the wetfishery.

(b) Applications from part-time fishermen by choice, who are ordinarily engaged in an occupation other than wetfishing, are to be declined."

The second is in relation to the history of involvement in the Hauraki Gulf Wetfishery:

"2. History of involvement in the Hauraki Gulf Wetfishery

The status of the applicant and his history of involvement in the Hauraki Gulf wetfishery shall be primarily determined on the basis of the period between 1 January 1978 and 2 October 1980, when considering the eligibility of applicants for a licence. The moratorium on the issue of fishing permits in the Hauraki Gulf wetfishery was declared on 3 October 1980. Accordingly the Authority shall have regard to the following.

(i) first preference is to be given to applicants who can demonstrate their significant involvement in the fishery during the period 1 January 1978 to 2 October 1980, provided they have continued that involvement up to the present time.

(ii) second preference is to be given to applicants who have shown a significant involvement in the fishery only since the date of the moratorium, including applicants who have (since the moratorium) purchased a vessel from a fisherman who has retired or left the fishery.

(iii) applicants who for reason of the loss of a vessel, the sale or replacement of a vessel, or personal reasons (ill health or injury) were unable to fish for an extended time during the period 1 January 1978 to 2 October 1980 shall be expected from this policy."

The respondent determined that the appellant came within the second preference so far as status was concerned. In other words, he was not a full-time fisherman as defined by Section 100, who had derived at least 80% of his earned income from wetfishing or activity related to wetfishing.

In evidence given today, the appellant has satisfied me that, for his financial year ending 31st March 1983, 80% of his income, as defined by the criterion of the Minister, was derived from wetfishing. In his balance sheets, supplied today, he shows sales, mainly of fish, in that financial year of $15,525. He stated in evidence - and I accept him as a witness of truth - that at least 80% of this income came from fish and that there was some income from minor engineering jobs. He also received some income from rent but that is not to be considered because it is not "income obtained as a reward of labour".

It therefore seems that the respondent was in error in classifying the appellant in the second category so far as status was concerned. For that reason alone, the application will

have to be referred back to the respondent.

The second point taken by Mr Maskell for the appellant was that the respondent was in error in categorising the appellant in the second preference concerning history of involvement in the Hauraki Gulf Wetfishery. He submitted that he should be in the first preference category, namely, that he was an applicant who could demonstrate a significant involvement in the fishery during the period 1st January 1978 to 2nd October 1980 provided he had continued that involvement up until the present time.

The evidence today disclosed that the appellant approached the Ministry of Agriculture and Fisheries in May 1976 and took out a fishing permit. He took the vessel, which he had purchased, out of the water and transported it to his engineering workshop at Beachlands. He removed the whole top and interior of the vessel thinking it would only take him some months to have it back in the water. He misjudged the time it would take to complete the alterations. In the result, the boat was not launched until early 1981. The appellant showed photographs of this vessel in evidence. It has sails and is used for line fishing. During the period, he was living off capital, although he had occasional work as a part-time lecturer at the Manukau Technical Institute and he did occasional other jobs.

However, the evidence does not satisfy me that he had a significant involvement in the fishery. I think that that phrase in the Ministerial directive must refer to the Hauraki Gulf Wetfishery, and there is no evidence that he was

significantly involved in "the fishery" itself although he may well have been considered significantly involved in the fishing industry if he was spending most of his time in rebuilding his boat.

Alternatively, Mr Maskell submitted that the appellant came within the hardship exemption in item (iii) of the Ministerial directive regarding involvement in the Hauraki Gulf Wetfishery, in that, during the period of what has been called the moratorium between 1st January 1978 and 2nd October 1980, he was unable, for personal reasons, to fish for an extended time during that period. I am unable to accept this contention because it seems clear that "personal reasons" relate to some personal calamity to a person who has been a fisherman and who has, for some reason, been prevented from carrying out that activity. I do not think that the exception is wide enough to cover somebody who spends several years in adapting a boat for use as a fishing boat.

Mr McGuire pointed out that the guidelines were made by the Minister in an effort to regulate a diminishing resource of fisheries and that it was with this in mind that the Minister gave the directives to the respondent; of necessity there may be some hardship caused to persons such as the appellant, who was in effect preparing himself for his entry into the fishing industry.

Whilst I cannot say that the respondent was wrong to put the appellant in the second preference as to history of involvement in the Hauraki Gulf Wetfishery, it must be realised that this is merely a guideline and one of a number of factors

to be taken into account. I think that the respondent will be greatly assisted by having before it the detailed evidence now available to this Court which was not made available to the respondent when it considered the application.

The appropriate course is to refer the application back to the respondent Authority to consider generally the appellant's application in the light of the information made available to this Court, and in the light of this Court's determination that, on the facts, not available to it but available to the Court, the respondent was wrong to place the appellant in the second preference category so far as status is concerned.

It may well be that, with the information now available to it, the Authority may be able to look somewhat more favourably on the application. The appellant has demonstrated that he has gained a "few points" by being placed now in the first category so far as status is concerned. However, it would be quite wrong for this Court to take over the powers of the respondent which has, of course, a much greater knowledge of what applications there are for licences and what have been granted and is required by virtue of the Ministerial guidelines and the Act itself to consider a number of other matters. However, one would imagine that, at a new hearing of the application, which there will now have to be, the appellant will be greatly assisted by having the assistance of counsel to draw to the attention of the respondent a number of matters which should really have been drawn to its attention in the first place. Again, I make no criticism of the respondent because it was merely faced with an

application which did not convey all the information which is now before the Court.

Counsel are agreed that because this application was made and determined under the Fisheries Act 1908, this appeal and any order thereon and any fresh hearing ordered by this Court should be determined under the provisions of the 1908 Act and not the Fisheries Act 1983 which came into force on 1st October 1983. From a practical point of view, counsel could not see any real difficulty caused to the appellant by proceeding under the old Act. It seems clear from the finding that I have made that he must be considered a "fisherman" as defined in Section100(1) of that Act and referred to in Ministerial guideline 1(a) on the status of applicants.

The appeal is therefore allowed to the extent indicated; the application of the appellant for a fishing licence is referred back to the respondent for rehearing with the opinion of the Court.

R.D. Barker J

SOLICITORS:

Inder, Lynch, Conway & Co., Papakura, for Appellant.
Crown Law Office, Auckland, for Respondent.