Neutral Citation Number [2010] IEHC 244

THE HIGH COURT

2010 522 SS

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 18 OF THE FISHERIES (AMENDMENT) ACT 2003

BETWEEN

MICHAEL FAHERTY

APPLICANT

AND

THE REGISTRAR GENERAL OF FISHING BOATS

RESPONDENT

JUDGEMENT of Mr. Justice Charleton delivered the 29th day of June 2010

1. The MFV Sea Spray Junior was built in 1977. It is owned by Michael Faherty, the applicant who is from Inis Mór. It was registered in Ireland as a white fish trawler. It then had a capacity to hold 150m3 in dry stored fish boxes and in bulk. In 1984 the vessel was fitted with refrigerated sea water tanks and this reduced her capacity to 110m3. This reduction was accounted for, in part, by the necessity for a generator and freezing equipment. The difference between the two arrangements is that as she was configured from 1977 to 1984, fish caught by the vessel were loaded into boxes, covered in ice and then stored for a short time before returning to harbour. From 1984 the refrigerated sea water system allowed for longer periods at sea since the fish were immersed in extremely cold natural sea water and could, as I understand it, be unloaded more easily. In 2007 all of the refrigerated sea water tanks were removed, thus reverting the vessel to its original configuration. In this regard, the vessel is unique in Irish waters. It cannot be used by the applicant, to fish, however, because it does not have a licence. That process is on-going and, within that context, the licensing appeals officers, Mr. Michael Vallely, as asked a question to assist him with his determination.

The licensing regime

2. Under s. 3 of the Fisheries (Amendment) Act 2003, the Minister for Communications, Marine and Nature Resources is entitled to make policy directives for the management of the Irish fleet. These directives have a similar status to a statutory instrument. The case first made by the Minister and then laid before Houses of the Oireachtas. In issuing these directives, the minister is pursuing both European Union and National Policy as to the conservation and proper management of fish stocks within our national waters.

3. Two directives are relevant to this licence application. Under Policy Directive 2/2003, para. (A) provides:-

> *"The Irish fleet will comprise a polyvalent segment, a refrigerated sea water (RSW) pelagic segment, a beamer segment, a specific segment and an aquaculture segment. Other than as provided for hereunder the transfer of capacity as between segments of the fleet will be prohibited."*

4. Up to the end of 2009, the refrigerated sea water pelagic segment of the Irish fleet contained 22 vessels. These were mostly engaged in fishing for herrings, mackerel, and blue whiting; which are all species that live in mid sea water levels in large shoals. Since the volume of catch is the key, to this classification, the fish are stored in the refrigerated sea water tanks. The need for capacity requires these to be large vessels. I do not have to look at the beam trawler segment or the specific segment, beyond noting that these contain respectively 13 and 157 vessels. The polyvalent segment numbered 1,829 vessels in 2009. These fishing boats are multi-purpose, including small in-shore vessels and medium to large off-shore vessels. They tend to target white fish species that live near the seabed as well as pelagic species. Unlike the refrigerated sea water pelagic segment, these vessels are not laid up most of the year, because white fish can be targeted in the off season for pelagic species.

5. In September 2004 the minister issued Policy Directive 3/2004. This supplemented what I have quoted from Directive 2/2003 and para. F thereof, which I also take into account. Paragraph D of Policy Directive 3/2004 states:-

> *"In relation to para (f) of Policy Directive 2/2003, any vessels which have been equipped with pelagic wet storage capacity (tanks) but which do not have licence or a licence offer from the Licensing Authority at the date of this Directive, shall not be granted a licence to fish in the polyvalent segment of the fleet, other than as a replacement for vessels in the existing ring-fenced pelagic wet storage capacity sub-segment. Such vessels may not be licensed the polyvalent segment as dry hold vessels as a result of modification to their wet storage capacity (tanks). The renewal of existing licences will not be affected by this provision. This provision does not impact on the position, as set out in para. F of the Policy Directive 2/2003, with regard to licensed vessels which do not have a licence with approved pelagic wet storage capacity and which continued to have such capacity. Such vessels are still only allowed to continue to operate with wet storage capacity for the period of their current sea-fishing boat licence, as stipulated in para. F of Policy Directive 2/2003."*

6. Since one of the questions asked by the appeals officer, in this case stated, concerns the proper approach to interpreting these measures, I feel it appropriate for the sake of completeness, to also quote from Policy Directive 3/2004, whereby the minister sets out his objective in these paragraphs:-

> *"The final measures provide for a redefinition of existing policy in relation to the licensing of pelagic dry hold vessels in the polyvalent segment. It has become clear since the introduction of new licensing policy (Directive 2/2003) in November 2003, that the modification of wet storage capacity vessels as dried whole vessels is resulting in the licensing of dry hold vessels which retain many of the characteristics of vessels with wet storage capacity and which would not be considered as fully appropriate to the dry hold sub-segment of the polyvalent fleet".*
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> *Accordingly, as the intent of the policy as set out in 2/2003 is to exclude tank vessels from the polyvalent dry hold fleet, it is considered advisable to exclude vessels that were built or operated as tank vessels from this sub-segment of the*

fleet. The renewal of existing licences will not be affected by this provision."

7. These directives come within s. 2 of the Interpretation Act 2005. Section 5 thereof provides:-

"2.(1) In this Act-

"Act" means:-

(a) an Act of the Oireachtas, and

(b) a statute which was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution;

"enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument; "repeal" includes revoke, rescind, abrogate or cancel;

"statutory instrument" means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to "made" or to "made under" include references to made, issued, granted or otherwise created by or under such instrument.

….

8. Section 5 of the Act provides:-

"2.(1) In this Act-

"Act" means:-

(c) an Act of the Oireachtas, and

(d) a statute which was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution;

"enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument; "repeal" includes revoke, rescind, abrogate or cancel;

"statutory instrument" means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to "made" or to "made under" include references to made, issued, granted or otherwise created by or under such instrument.

(2) For the purposes of this Act, an enactment which has been replaced or has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.

3.(1) The following Acts are repealed:

(a) the Interpretation Act 1889;

(b) the Interpretation Act 1923 ;

(c) the Interpretation Act 1937 ;

(d) the Interpretation (Amendment) Act 1993 .

(2) (a) The repeal by this Act of an Act which assigns a meaning to a word or expression in another enactment does not affect the meaning so assigned if-

(i) in the absence of that meaning in this Act, or

(ii) by the application to the other enactment of the meaning assigned by this Act to the same or a similar word or expression, the other enactment would be changed in intent or become unclear or absurd.

(b) The repeal by this Act of an Act which provides for any matter (other than a matter to which paragraph (a) relates) in another enactment does not affect the matter so provided for if—

(i) in the absence of that matter being provided for in this Act, or

(ii) by the application to the other enactment of a matter provided for by this Act which corresponds to a matter provided for in the repealed Act concerned, the other enactment would be changed in intent or become unclear or absurd.

4(1) A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.

(2) The provisions of this Act which relate to other Acts also apply to this Act unless the contrary intention appears in this Act."

Licensing applications

9. Tony Faherty of Cill Ronáin of Inis Mór, who I understand is the brother of the applicant Michael Faherty, first applied for a licence in respect of the MFV Sea Spray Junior in December 2005. There was to be no increase in capacity in the national fishing fleet. Instead two vessels, named as the Annadale and the Iolair, were to be decommissioned. The licence application was responded to on 5th January 2006 by a conditional offer which stated that the vessel "shall not have or have had on board wet storage capacity (tanks), as determined by the Licensing Authority in accordance with para (f) of Policy Directive 2/2003 and para (d) of Policy Directive 3/2004". In the course of the application it emerged that the MFV Sea Spray Junior had been in the refrigerated sea water pelagic segment of the Irish fleet since 1984. The conditional offer was therefore withdrawn. On appeal, the appeals officer was of the view that any vessel which had ever been equipped pelagic wet storage capacity tanks should not be granted a licence. This ruling was notwithstanding that the vessel was being removed from the refrigerated sea water pelagic segment, thereby reducing that segment, and not increasing the polyvalent segment in terms of capacity but was, in fact, replacing two other vessels. Among other rulings, the appeals officer stated:-

> *"20. …I do not believe in proceeding to perhaps a purposive interpretation of the Policy Directive which could assist the appellants, and the reality is that on the 10th April 2006, their licence has been withdrawn on the basis of having RSW tanks on the vessel, which is precisely what the Policy Directives expressly and literally provide at the time of the withdrawal of the licence and I am bound by this."*
>
> *21. The appellant's case appears to be a unique one and the result of failing to have its licence returned will cause serious adverse economic consequences. Effectively, however, the appellants are attempting to modify their vessel to come outside the directives for legitimate business reasons, and they are also saying that if you give us a licence we will spend money on removing the tank.*
>
> *22. I believe I am constrained by the Policy Directive and must refuse the appeal.*
>
> *23. If the appellants were to present the vessel without RSW tanks and to seek a licence in the polyvalent sector, depending on the department's attitude there may be a fresh appeal process."*

10. It was clear that the appeals officer had some doubt in making this decision as between modification allowing for the grant of a licence, and the historical fact of ever having refrigerated sea water pelagic segments tank on board completely out-ruling the grant of any licence. It is also clear to me, from the course of this application, that this vessel is unique as regards the decision which I must make.

11. On 29th January 2007 a new application was made for a licence. The difference was as outlined above at para. 23 of the first decision on the appeal; from which I have quoted. The tanks were entirely removed. Only a surplus generator and some water cooling equipment remained. The vessel had, in effect, been returned to its original state.

12. On the second appeal it was found as fact that the MFV Sea Spray Junior had at once stage been equipped with pelagic wet storage capacity tanks and that it did not have a licence or a licence offer as of the date of Policy Directive 3/2004. The purpose in the application was not to replace a vessel within the specific refrigerated sea water pelagic segment but was to replace two vessels in the polyvalent segment with this single vessel. The result of the work done was that the Sea Spray had been returned to what it originally was, as a dry hold vessel. All refrigeration equipment had been decommissioned.

Questions

13. Arising out of this, four questions had been asked and I will give the answer to each of these in turn.

> *(1) Is the appellant's vessel Sea Spray Junior subject to Policy Directive 2/2003 para F and Policy Directive 3/2004 para. D issued under the Fisheries (Amendment) Act, 2003? The answer is that it is, yes.*
>
> *(2) If the answer to question 1 is yes, is a policy directive subject to the Interpretation Act, 2005? The answer to that is that it is clear from s. 2 of the Interpretation Act 2005, that the manner of interpreting these legal instruments is as provided for in s. 5 of the Interpretation Act 2005.*
>
> *(3) If the answer to question 2 is yes, can the appeals officer interpret the said paragraphs of the Policy Directive other than in a literal sense and proceed to the plain intention of the maker of the instrument in determining whether the Sea Spray Junior is subject to the restrictions of the said policy directive? The answer to this question is that in the unique circumstances of the history of this vessel that it is not necessary to do violence to the language of the policy directives in order to allow the appeal. There has been no modification. Policy Directive 3/2004 at para. D provides that: "any vessels which have been equipped with pelagic wet storage capacity tanks" but which are not then licensed as of 21st December 2004, "may not be licensed in the polyvalent segment as dry hold vessels as a result of modification to their wet storage capacity (tanks)". If the intention of the minister was to exclude any vessel which had ever carried a pelagic wet storage capacity tank, the wording used could have referred to "any vessels which have ever been equipped with pelagic wet storage capacity (tanks)". This wording was not used. Furthermore, the withdrawal of the conditional licence offer was made on the basis of the vessel being in the category of one that was prohibited on the basis that it "shall not have or have had on board pelagic wet storage capacity (tanks)". A potential ambiguity arises in relation to whether a vessel has been equipped, to use the wording in question, and whether this is past or present construction. Hence, the appeals officer should look to a construction which reflects the intention of the wording as ascertained from the instrument as a whole. It is urged that the minister has made it clear that modification has resulted in vessels retaining many of the characteristics of vessels with wet storage capacity. This vessel does not. Any lingering doubt may be removed by a licence condition. Thus, it is considered by the minister to be "advisable to exclude vessels that were built or operated as tank vessels from this sub-segment of the fleet". Is this such a vessel? I think not. The answer to this question in part depends on the answer to the fourth and last question.*
>
> *(4) If the answer to 3 is yes, do both the removal of most of the wet storage capacity (tanks) constitute a "modification" within the meaning of the policy directives. The answer to that is that, it does not. In this unique case there has not been a modification to the wet storage capacity of the MFV Sea Spray Junior. The wet storage capacity tanks have, in their entirety, been removed. This is the only evidence which is before the appeals officer. This does not amount to a modification of the vehicle. A modification would donate the making of a change which does not alter the essential nature or character of the vessel. In contrast, the tanks have been entirely removed. The vessel ceases to be what is was modified into, namely a refrigerated sea water vessel, and becomes what it was prior to that modification, a dry storage fishing vessel. If one moves to a purposive interpretation, one is not entitled to do violence to the plain wording of Policy Directive 3/2004 D. That is not required, since there has been no modification to the wet storage*

capacity of the MFV Sea Spray Junior. There has been a restoration, instead, to its original character.

Decision
14. Looking at the policy behind Policy Directive 3/2004, it is clear that the Minister does not want within the polyvalent segment any vessels which retain "many of the characteristics of vessels with wet storage capacity". Whereas it has been powerfully argued that the purpose of the Minister was to exclude any vessel that was either "built or operated" as a tank vessel, which purpose extends to vessels which are, in truth, modified as to their wet storage capacity. The danger outlined, as part of the purpose behind Policy Directive 3/2004, of vessels being modified but continuing with many characteristics of wet storage capacity does not arise in this unique instance. It does not do violence to Policy Directive 3/2004 para. D to rule that removal, in this unique case, of the wet storage tanks, so that the MFV Sea Spray Junior is returned to its original state as a dry storage vessel is not a modification of its wet storage capacity. Rather, it can be regarded as a vessel without any characteristic of wet storage. It is can be ruled appropriate, instead, to the dry hold sub-segment of the polyvalent fleet.

Addendum
15. In the light of the questions answered, the appeals officer can make his own decision. In my view, the refusal of the first licence appeal could not be criticised as it was in respect of a vehicle which could then described as having been equipped with refrigerated sea water tanks. This situation has changed. The appeal has been heard and advice has been properly sought from the High Court. If any issue is raised as to the objective behind Policy Directive 3/2004, it is to be noted that the boat owners have offered to put the vessel into dry dock and to remove the relevant machinery for freezing sea water, for which there are now no tanks. A relevant condition can be imposed in the licence, if this is thought appropriate. That, however, is not a matter for me.

16. As I understand it, the history of this vessel which I have outlined in the first paragraph makes this judgment individual to the particular circumstances that are outlined.