[2023] JMSC Civ. 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV02746

BETWEEN	**ORAL CLARKE**	**APPLICANT**
AND	**THE FIREARM LICENSING AUTHORITY**	**FIRST RESPONDENT**
	THE REVIEW BOARD	**SECOND RESPONDENT**
	MINISTER OF NATIONAL SECURITY	**THIRD RESPONDENT**

IN CHAMBERS VIA ZOOM

Mr. Hugh Wildman and Miss Jodian Small instructed by Hugh Wildman and Co for the Applicant.

Miss Alana Wanliss for the First Respondent.

Miss Faith Hall instructed by the Director of State Proceedings for the Second and Third Respondents.

Heard January 25, 2023 and February 17, 2023.

Leave to apply for judicial review –Extension of time to apply for judicial review – Whether use of the word 'shall' in section 37 of the Firearms Act to be accorded mandatory or directory effect- Whether the Minister or applicant should initiate proceedings before the Minister.

PETTIGREW COLINS J.

THE APPLICATION

[1] This application was brought by the applicant on September 5, 2022, seeking leave to apply for judicial review in order to challenge the decision of the first respondent to revoke the applicant's firearm licence. The applicant also seeks leave to challenge the second respondent's failure to hear the applicant's appeal against the decision of the first respondent within the stipulated 90 days period and the third respondent's failure to intervene to ensure that the second respondent act within the 90 days period or himself determine the appeal.

[2] The precise orders that the applicant intends to pursue if granted leave are as follows:

> *(i) "A declaration that the purported revocation of the applicant's firearm licence on 25th day of ay 2021 by the 1st respondent, on the basis that the applicant is "no longer considered fit and proper to retain a firearm licence", is irrational, rendering the said revocation null and void and of no effect.*
>
> *(ii) A declaration that the decision of the 1st respondent to revoke the applicant's firearm licence on the basis that the applicant is no longer considered fit and proper to retain a firearm licence is procedurally improper, rendering the said revocation illegal, null and void and of no effect.*
>
> *(iii) An order of certiorari quashing the decision of the 1st respondent in revoking the applicant's firearm licence on the 25th day of May 2021, on the basis that the applicant is no longer considered a fit and proper to retain a firearm licence.*
>
> *(iv) A declaration that the decision of the 2nd respondent not to determine the applicant's appeal against the decision of the 1st respondent to revoke the applicant's firearm licence, within a period of 90 days stipulated under section 37 of the Firearms Act is illegal, null and void and of no effect.*
>
> *(v) An order of certiorari quashing the 2nd respondent's decision in refusing to determine the applicant's appeal within the period of 90 days as mandated by section 37 of the Firearms Act.*
>
> *(vi) A declaration that the 3rd respondent acted unlawfully in failing to intervene to ensure that the 2nd respondent complied with the law and have the applicant's appeal determined within a period of 90 days, failing which the minister shall determine the appeal is in breach of 37A (4) of the Firearms Act, rendering the said decision illegal, null and void and of no effect.*
>
> *(vii) An order of certiorarii quashing the decision of the 3rd respondent in failing to ensure the applicant's appeal was determined in a period of 90 days, by the 2nd respondent, failing which the 3rd respondent shall intervene*

and determine the appeal as required by section 37A (4) of the Firearms Act."

[3] On September 6, 2022, the applicant filed another Notice of Application for Court Orders in which he sought an extension of time for leave to apply for judicial review.

BACKGROUND

[4] The first respondent, the Firearm Licensing Authority (hereinafter referred to as the FLA), is a statutory body established under ***section 26 of the Firearms Act*** (hereinafter referred to as the Act). That body is responsible for issuing and revoking where it sees fit, firearms licences. The second respondent was established under ***section 37A (1) of the Act*** and is responsible for reviewing decisions of the first respondent, refusing to grant firearm permits or licences. The third respondent The Minister of National Security, is mandated to receive the second respondent's report and recommendation so that he can give directives to the first respondent regarding the appeal.

[5] The applicant was granted a firearm users licence which he held for some nine years. In 2017, he was twice charged for breaches of the Firearms Act, but he was discharged on those offences in circumstances where there had been no trial. In 2021, he applied for renewal of his firearms licence but he was then issued with a notice of revocation indication that his licence had been revoked in July of 2020. The evidence is that the decision was taken in January of 2020, to revoke the licence. He was granted permission to file an appeal with the Review Board and he did, but after 13 months, he did not hear from the Review Board hence he brought his applications for leave and for extension of time to apply for leave.

THE ISSUES

[6] The issues arising in this application are:

1. Whether an extension of time to bring the application should be granted?

2. Did he applicant have an alternative remedy available to him?

3. Is there an arguable case that there was procedural impropriety in arriving at the decision to revoke the applicant's licence?

4. Is there an arguable case that the decision to revoke the applicant's firearm was irrational?

5. What is the construction to be placed on the use of the word "shall" in stipulating the period of 90 days for the review to be completed?

6. In circumstances where the review was not conducted within the 90 days period, how was the process to have the minister consider the appeal to be initiated?

7. Should any of the orders being sought be granted?

APPLICANT'S SUBMISSIONS

[7] The applicant submitted that based on the wording of ***section 36 of the Act***, the first respondent must show cause for revoking a firearm licence. He says that it is only when cause is shown that the applicant can make an assessment as to whether he should launch an appeal. Counsel described the conduct as oppressive and arbitrary, stating that no basis for the revocation was given. Counsel severely criticized the affidavit evidence indicating that the applicant is of intemperate behaviour, when the aspect of the statute quoted was that he was not a fit and proper person to hold a licence. The applicant says that the FLA has contradicted itself. He asks the court to have regard to the document evidencing the fact of the revocation.

[8] Mr. Wildman says it is not sufficient for the FLA to simply repeat the words of the statute. He urged that it is only where reasons are given that the minimum standard of fairness required may be met. Counsel asked the court to find that the applicant has been denied procedural fairness. Counsel relied on dicta in the case of ***Naraysingh v Commissioner of Police (Trinidad and Tobago) 2004 UKPC 20***. The applicant further relied on the case of ***Fenton Denny v Firearm Licensing Authority [2020] JMSC 97*** and ***Mauritius of Societe des Chasseurs de L'lle***

Maurice and other (Appellants) v The State of Mauritius and Other (Respondents [2016] UKPC 13 for the proposition that, where a firearm licence is revoked without good cause or reason being shown, leave will be granted to an applicant to apply for judicial review.

[9] It is the further submission of the applicant that ***section 37A of the Act*** stipulates that the Review Board must hear, receive and examine evidence in the matter under review and submit a written report to the Minister within 90 days. He says that since there has been a manifest breach of this provision, the Review Board is thereby rendered unable to thereafter properly give a decision in the matter. Thus, certiorari will go to quash any decision it makes or fails to make once the period of 90 days has expired.

[10] Mr. Wildman prayed in aid the decision of ***Joachim v Attorney General of St Vincent and the Grenadines*** *[2006] UKPC 6*, which he says interprets language such as that used in ***section 37A of the Act***. He insisted that, the effect of the use of the word "shall" is that compliance with the timeline is mandatory and where there is noncompliance, the action taken is void. Counsel says ***R v Soneji*** *[2005] UKHL 49* is clearly distinguishable, as the word "shall" was not the word to be interpreted in that case. He urges the court to find that the second respondent is contending for an absurd interpretation of the section.

[11] The submission continued that since the first respondent has not shown cause for the revocation, and the applicant is entitled to know why his licence has been revoked, the Review Board is the applicant's next recourse. Further, since the Review Board has not afforded the applicant a hearing within the stipulated time; the applicant has been permanently deprived of a hearing and the decision of the FLA to revoke his licence should be quashed.

[12] It was the further submission that, the onus was on the Minister to hear and determine the applicant's matter under review in circumstances where the Review Board failed to comply with the requirement to submit its findings and recommendation to the

Minister within the stipulated 90 days. He says that, the obligation to initiate the process whereby the Minister is to hear and determine the applicant's case, where the review Board did not act in a timely manner, ought to be a matter of communication between the Review Board and the Minister. Counsel concedes that the statute does not speak to how the process under ***section 37*** is to be initiated, but contends that the statute does not impose an obligation on the applicant and it could not be for the applicant to approach the Minister in order to invoke the process.

[13] Mr. Wildman further contends that, the fact that the Minister has now written a letter to say that he accepts the findings and the recommendation of the Review Board, the position adopted by the Minister is also a nullity. This is especially so he says, in circumstances where the applicant was never invited to participate in a hearing before the Review Board. He relies on the case of ***Mauritius of Societe des Chasseurs de L'Ile Maurice and other (Appellants) v The State of Mauritius and Other*****.** He says in circumstances where the entire revocation process was flawed, the applicant has an arguable case for judicial review with a realistic prospect of success.

FIRST RESPONDENT'S SUBMISSIONS

[14] The first respondent's Attorney at Law Miss Wanliss submitted that, the applicant has failed to act promptly in keeping with the provisions of ***rule 56.6(1) of the CPR***, since the decision of the FLA was made in July of 2020, which is more than two years before the applicant filed his application for leave. She also observed that the 90 days' period during which the Review Board should have heard his appeal expired in October of 2021, almost a year before the applicant filed his application. She stated further that the applicant did not approach the Minister as he could have done, based on the provisions of ***section 37A (4) of the Act*** when the Review Board failed to act, but has instead brought this application. She contends that it was in the interest of the applicant to bring the matter to the attention of the Minister. Thus, she says, the applicant has not exhausted all his available remedies.

[15] On the substantive points, Counsel submitted that the applicant must show that the FLA in arriving at its decision to revoke the applicant's licence, committed a breach of law, practice or procedure and/or acted irrationally. She observed that the basis of the revocation was in accordance with ***section 36(1) of the Act***. She relied on paragraph 33 of the case of ***Robert Ivey v Firearm Licensing Authority [****2021] JMCA App 26* and the reference to the dictum of Denning MR in ***Kavanagh v Chief Constable of Devon and Cornwall [1974] 2 All ER 697***. She further submitted that in accordance with ***section 36(2) of the Act***, the FLA is only required to give notice to the holder of a firearm licence where the Board has revoked the licence. She concluded that there was no breach of law or procedure and the application should be refused.

[16] She asked the court to have regard to the case of ***Steadman Broderick v The Firearm Licensing Authority [2020] Civ 197*** and in particular paragraph 34 where the language of section 36 was examined and it was determined that the section appears wide-ranging to encompass circumstances where the conduct, activities or circumstances of the licence holder make it incongruous for him/her to continue to hold the licence. Further, that the matters explained in paragraph 5 of Miss Allen's further affidavit (filed December 8, 2022), could properly have formed the basis for saying that the applicant "*is otherwise unfitted to be entrusted with such a firearm or ammunition"* in accordance with ***section 36 (1) (a) of the Act***.

[17] Miss Wanliss asked the court to have regard to the cases of ***Kevin Bertram v The Firearm Licensing Authority***, **Review Board and the Minister of National Security** *[2021] JMSC Civ 154,* ***Fenton Denny v Firearm Licensing Authority*** *[2020] JMSC Civ 97* and ***Raymond Clough v Superintendent Greyson and Another***, in order to determine what conduct may be considered when analysing the concept of fit and proper, and in accepting the position that the FLA is not required to give detailed reasons for its decision, but that it is the hearing before the Minister that can be attacked on the basis of irrationality and illegality.

SECOND AND THIRD RESPODENT'S SUBMISSIONS

[18] Miss Hall strongly disagreed with the applicant's position that the Minister should have intervened when the Review Board did no act in a timely manner. According to her, the logical interpretation of ***section 37A*** is that it is the applicant who should approach the Minister, and since the applicant did nothing to trigger the Minister, he cannot properly seek an order to quash the non - action of the Minister. She emphasized that what the applicant is seeking are orders to quash the decision not to review within 90 days and also to quash the non - action of the Minister and he is therefore not challenging the decision of the Review Board and so he should have been prompt. She posits that, the applicant should not be able to blow hot and cold by saying on the one hand, that he was awaiting the decision of the Review Board for over a year and so he did not file his application for judicial review, if on the other hand, he is saying that the Review Board cannot properly give a decision after the 90 days.

[19] Miss Hall in her submissions adverted to the well-known test enunciated in ***Sharma v Brown Antoine and Others*** *[2007] 1 WLR 780*. She also submitted that, the applicant has failed to comply with ***rule 56.3 (3)(d) of the CPR***. It is also the submission that the applicant has failed to exhaust his alternative remedies. She adverted to the provisions of ***section 37A (4) of the Act*** which permits the Minister to act if the Review Board does not act within the stipulated 90 days' period. She says the applicant should have sought the Minister's intervention.

[20] On the question of delay, Miss Hall referenced the relevant provisions in the CPR and cited the case of ***City of Kingston Cooperative Credit Union Limited v Registrar of Co-operatives Societies and Friendly Societies and Yvette Reid*** *Claim No 2010 HCV 0204*, for the proposition that the date of the decision and not the date the applicant acquires subjective or actual knowledge of the decision, is the date from which time begins to run against the applicant. She incorrectly alludes to May 25, 2021, as the date of the revocation. She said that the application for the review was filed July 15, 2021. Miss Hall points out that logically, if one follows the

applicant's reasoning, and since it is the applicant who is making heavy weather of the need for strict compliance with the time period, time to file his application for judicial review would have begun to run at the expiration of 90 days from the time he sought the review and therefore the grounds for the application of leave in relation to the second and third respondents arose October 15, 2021.

[21] Miss Hall notes that, the applicant ought to have made the application promptly or within the three months' period. She contends that the applicant has failed to seek an application for extension of time. It emerged that counsel was not aware of the application for the extension of time which was filed a day after the application for leave.

[22] It was the submission that the use of the word "shall" in section 37A, defining the time period within which the Review Board is to "*hear, receive and examine the evidence in the matter under review"* is directory and not mandatory. She submitted that the approach that the court is to employ when determining the issue of noncompliance with a statutory provision, is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. She urged that in determining the question of purpose, regard must be had to the language of the relevant provision and the scope and purpose of the whole statute. She commended the case of ***R v Soneji*** *(Supra)*.

[23] Miss Hall contends that the critical consideration is the consequence of noncompliance. In this case she says, it could hardly be that Parliament intended that the process of review would be invalidated if not done within the 90 days period. She alerted the court to the existence of an alternative procedure for review as provided for in ***section 37A (4) of the Act***. She urged that this is proof that Parliament contemplated a scenario whereby the Review Board does not conduct the review within the stipulated 90 days and so the Minister is given the discretion to hear the matter.

[24] Miss Hall, as did Miss Wanliss, observes that there is no indication that that process was engaged. She further urged the court to consider that the role of the Review Board is ultimately to make recommendation and not render a decision on the appeal; it is the Minister who makes a decision. She stated that the Minister has not yet made a decision.

[25] Miss Hall asked the court to have regard to the contents of paragraph 7 of Miss Duhaney's affidavit and accept that administrative bodies should not be confined to rigid requirements and the court should take into consideration the prevailing circumstances that such bodies are operating within.

[26] As his final salvo, Mr. Wildman in response to Miss Hall's submission that time began to run as at the expiration of 90 days from the filing of the application for the review on July 2021, contends that there was a continuing act of breaching ***section 37A*** of the statute and that time did not begin to run as long as the Review Board remained in breach.

THE LAW

[27] In the case of ***Sharma v Brown-Antoine and Others (2006) 69 WIR 379***, the Judicial Committee of the Privy Council propounded the test to be satisfied in order to be granted leave to apply for judicial review. Lords Bingham and Walker explained as follows at page 387 J of the judgment:

> ***"****The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy… Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, at para 62 in a passage applicable mutatis mutandis to arguability:*

…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen; Matalulu v The Director of Public Prosecutions [2003] 4 LRC 712 at 733.

[28] The applicant must also be able to establish at least one of the recognized grounds for being successful in an application for leave. The traditional grounds were explained in ***Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service [1985] AC 374***, HL by Lord Diplock as illegality, irrationality and procedural impropriety. He said:

i. "By "illegality" as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

ii. "By irrationality" I mean what can by now be succinctly referred to as — Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. …

iii. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice." *(emphasis added)*

[29] It has also been made clear in case law that the purpose of seeking leave is to ensure that cases which have no merit whatsoever are eliminated from the process, and that only persons with the requisite locus standi are able to pursue an application for judicial review. An applicant must frame his case within the parameters of the relevant provisions in the Civil Procedure Rules. The relevant rules will be examined at the appropriate juncture when examining the issues raised by this application, suffice it to say at this point that an applicant must satisfy the court that he has sufficient interest in the subject matter of the application. See ***Rule 56.2 (1)***. An applicant may very easily demonstrate sufficient interest by establishing that he is a person who has been adversely affected by the decision which forms the subject matter of the application. (***See Rule 56.2 (2) (a)***). The applicant has no difficulty whatsoever overcoming that hurdle since he has been deprived of his firearm licence and seeks redress. I now examine the issues that have arisen for my determination.

Whether an extension of time to bring the application should be granted?

[30] ***Rule 56.6*** of the ***Civil Procedure Rules*** provides that:

> *"(1) An application for leave to apply for judicial review must be made promptly and in any event, within three months from the date when grounds for the application first arose.*
>
> *(2) However the court may extend the time if good reason for doing so is shown.*
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding."*

[31] By virtue of ***rule 56.6 (5)***, in considering whether to grant or refuse leave on account of delay, the judge is required to consider whether granting leave or relief, would be likely to cause substantial hardship to or substantially prejudice the rights of any person, or is likely to be detrimental to good administration.

[32] In ***Constable Pedro Burton v The Commissioner of Police [2014] JMSC Civ. 187***, the court accepted that the pursuit of an alternative remedy was a good reason for

the delay in making an application for leave to apply for judicial review, and one that should be given favourable consideration.

[33] At paragraph 24 of her judgment Dunbar Green J Ag as she then was, explained that:

> *"The import of Rule 56 is that it is not so much a question of whether there are good reasons for the delay as good reasons to extend time (see R* ***(Young) v Oxford City Council*** *(EWCA) Civ 240) albeit the existence of unexplained delay could be decisive in an exercise of discretion whether to grant leave for extension of time (see* ***R v Secretary of State exp. Furneau*** *[1994] 2 All ER 652, 658."*

[34] In his affidavit in support of the application for extension of time to apply for leave to claim judicial review filed September 6, 2022, the applicant stated that thirteen months had elapsed since he filed his application with the Review Board and that he had not heard from the Review Board or the Minister and he had been awaiting a response, so he is constrained to apply for an extension of time.

[35] It is important to note that the FLA has not refuted the applicant's evidence that the licence was revoked on July 27, 2020. Indeed, it has confirmed that assertion. Neither does the FLA dispute that it was in May of 2021, that the applicant was advised of the revocation. Thus, it is disingenuous to advance as a reason why the extension of time should not be granted, a delay of over two years. While the court recognizes that the relevant date is the date of the decision being challenged and not the date when the applicant acquired knowledge that the decision was made, the date on which that knowledge was acquired is of particular relevance to the question of whether an extension of time should be granted. An applicant is incapable of challenging a decision that he is not aware of. Furthermore, the applicant's lack of knowledge was not due to any fault of his.

[36] In the case of ***City of Kingston Cooperative Credit Union Limited v Registrar of Co-operatives Societies and Friendly Societies and Yvette Reid Claim No 2010 HCV 0204***, Sykes J as he then was, relied on the case of Securities Commission of the ***Bahamas ex parte Petroleum Products Limited BS 2000 SC 24 delivered***

July 4, 2000 delivered July 4, 2000 (*Suit No. 1440 of 1999)*. With reference to the question of when grounds for an application for judicial review arose, the court said:

> ***"In my view, "when grounds for the application first arose" was on 1 June 1999, when the prospectus was registered, being the complained of conduct of the Commission, not on 1 July 1999, when FOHCL inevitably took advantage of such registration to market itself to the public. Thus, the application is even beyond the six month limit, quite apart from the fact that, as the English Court of Appeal stated in R v Stratford – on –Avon DC ex p Jackson*** *[1985] 1 WLR 1391 at 1322**."***
>
> ***"The essential requirement is that the application must be made promptly"*** (emphasis added)

[37] The excerpt continued as follows:

> "**If such essential requirement is not satisfied in any event within the objective six month period, the question arises whether or not "the Court considers that there is good reason for extending the period" It is here, in my view, that the court should take account of the time the impugned matter came to the knowledge of the applicant. It should consider whether the applicant,** after acquiring such knowledge**, made the application promptly, there being a greater need to act promptly the greater the period since the objective date of the grounds for the application. If the applicant did then apply promptly the period should be extended to that necessary to make the application timely.**
>
> **The essential requirement then becomes that the applicants must here show that they acted promptly after 5 July 1999."** *(emphasis added)*

[38] Miss Hall is correct in saying that if one follows the applicant's reasoning, time to file his application for leave to apply for judicial review would have begun to run at the expiration of 90 days from the time he sought the review and therefore the grounds for the application for leave in relation to the second and third respondents arose on October 15, 2021. This court has not lost sight of the fact that the essential requirement is for promptness. Leaving aside for now the applicant's assertion that the Review Board is incompetent to act after the expiration of 90 days, it would not have been unreasonable for the applicant to await the outcome of the appeal to the Review Board and thereafter make his application for leave after 13 months when no communication had been made with him and no resolution to his appeal was forthcoming. This court is of the view that the applicant has offered a good reason

for the delay in making his application for leave to apply for judicial review, hence there is a good reason why the court should extend time.

[39] The court notes with concern the assertion by both Attorneys at Law for the respondents that the application for extension of time which was filed a day after the application for leave was not served on the respondents. There was no acceptable explanation to this observation. The court is mindful that applications such as these before the court may be made ex parte. The court's directive in this matter made reference to the application (inferentially only that for leave to apply for judicial review) to be served on the respondents. I say inferentially, since it was an on paper ruling and the only application listed on the minute sheet was that for leave. Good practice would of course dictate that since the application was to be heard inter partes and the question of extension of time to file the application also had to be considered by the judge hearing the application for leave, then the applicant would serve the respondents, who, almost invariably might wish to address the matter.

Is there an arguable case that there was procedural impropriety in arriving at the decision to revoke the applicant's licence?

Is there an arguable case that the decision to revoke the applicant's firearm was irrational?

[40] It is convenient to discuss these two issues together. In order to assess the question as to whether the FLA acted fairly and whether there was a proper basis on which the applicant's licence was revoked, it is appropriate to commence by examining the statutory regime governing the revocation of a firearm licence and the procedure set out for redress, in the event the person whose licence has been revoked is dissatisfied with the conduct of the FLA. I will thereafter look at relevant case law, addressing the criteria by which the procedure adopted by the relevant authorities in the revocation and review process is to be judged.

[41] ***Sections 36, 37(1) and 37A (1) of the Firearms Act*** provide as follows:

> "*36.--(I) Subject to section 37 the Authority may revoke any licence, certificate or permit if -*
>
> *(a) the Authority is satisfied that the holder thereof is of intemperate habits or of unsound mind, or is otherwise unfitted to be entrusted with such a firearm or ammunition as may be mentioned in the licence, certificate or permit; or*
>
> *(b) the holder thereof has been convicted in Jamaica or in any other country for an offence involving-*
>
> *(i) the illegal importation or exportation of fire-arms or ammunition;*
>
> *(ii) the illegal possession or use of a firearm or ammunition;*
>
> *(iii) the use of violence for which a sentence of imprisonment of three months or more was imposed;*
>
> *(c) the holder thereof has been convicted of an offence against the Dangerous Drugs Act or any other offence for which a sentence of two years or more was imposed;*
>
> *(d) the holder thereof has been convicted of an offence involving-*
>
> *(i) the unlawful discharge of a firearm in a public place;*
>
> *(ii) failure to adequately secure a firearm or ammunition at his place of abode or work or on his person;*
>
> *(iii) the unlawful use of a firearm to threaten violence against another person; or*
>
> *(iv) negligence, resulting in the loss of a firearm or ammunition;*
>
> *(e) the holder thereof fails to comply with a notice under section 35.*
>
> *(2) Where the Authority revokes any licence, certificate or permit under this section or under section 18 or 46, the Authority shall give notice in writing to the holder thereof-*
>
> *(a) specifying that the Authority has revoked such licence, certificate or permit;*
>
> *(b) requiring such person to deliver up such licence, certificate or permit to the Authority on or before the day (not being less than three days after delivery of such notice) specified in such notice."*

37.-(1) Subject to this section and section 37A, any aggrieved party may within the prescribed time and in the prescribed manner apply to the Review Board for the review of a decision of the Authority

a) refusing to grant any application for a licence, certificate or permit; or

(b)amending or refusing to amend any licence, certificate or permit; or

(c) revoking or refusing to revoke any licence, certificate or permit; or

(d) refusing to grant any exemption pursuant to subsection (3) of section 35A or any certificate pursuant to subsection (4) of section 35A.

"37A.-(1) For the purpose of a review under section 37, there is hereby established a Review Board consisting of persons appointed by the Minister in accordance with the Fourth Schedule.

(2) The Review Board appointed under subsection (1) shall within ninety days of receiving an application for review-

(a) hear, receive and examine the evidence in the matter under review; and

(b) submit to the Minister, for his determination, a written report of its findings and recommendations.

(3) The Minister upon receipt and consideration of the reports of the Review Board shall give to the Authority such directions as the Minister may think fit.

(4) Where the Review Board fails to comply with subsection (2), the Minister may hear and determine the matter under review."

[42] In ***Narysingh v Commissioner of Police [2004] UKPC 20***, the Judicial Committee of the Privy Council considered the question of whether the Commissioner of Police of Trinidad and Tobago acted fairly in deciding to revoke the appellant's firearm licence. In delivering the judgment of the Board, Lord Brown made the following observations:

"*As for the demands of fairness in any particular case, their Lordships not for the first time are assisted by the following passage from Lord Mustill's speech in* ***R (on the application of Doody) v Secretary of State for the Home Secretary*** *[1994] 1 AC 531, 560, [1993] 3 All ER 92:*

What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an

> *intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4)* ***An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*** *(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."* **[Emphasis mine]**

[43] His Lordship made the observation that there was no system of appeals from the decision of the Commissioner of Police in Trinidad and Tobago. That is unlike the case in our present regime. The Board rejected the submission that, the Commissioner was required to hold an oral hearing and it accepted the previously decided position in Trinidad and Tobago, that the Commissioner could have adopted an exclusively written procedure. But the Board also decided that the Commissioner ought not to have rejected without greater scrutiny, the appellant's allegation that the firearm had been planted. It was said that more in the way of investigation was required than had been done. The Board was also clear in saying that it would not always be necessary for the Commissioner to ascertain more about the circumstances of whatever it is which inclined him to revoke a licence, than was ascertained in that instance. This is so simply because, further information may not be available or the facts may be plain, but that in circumstances where more information was obviously available and there were a number of puzzling features to the case, fairness required that further enquiries be made, especially in the light of the abandonment of the criminal procedure. The Commissioner's decision to revoke the appellant's licence was quashed.

[44] In the case of **Aston Reddie v the Firearm Licensing Authority and *Others* *(unreported), Supreme Court, Jamaica,*** *Claim No HCV 1681 of 2010**,** judgment delivered 24 November 2011*, McDonald-Bishop, J at paragraphs 39-40 of the judgment, gave clarity to the requirement for a hearing in the context of our statutory regime. She said:

> *I form the view, having looked at the whole scheme of the Act pertaining to revocation of a firearm licence, that the insertion of this provision does not, by its terms, expressly impose any obligation or duty on the Authority to conduct a hearing or to act in a quasi-judicial manner. What it has done, in my view, is to leave it to the Authority, in its absolute discretion, to determine the steps it would take and the procedure it would adopt in seeking to carry out on its functions under the Act. It would appear that if the Authority forms the view that it would be necessary and expedient for a hearing to be conducted then it could do so by virtue of 26B(2)(c). In my opinion, it is by no means obliged to do so on the express terms of the statue. So I conclude that section 26B (2), while enlarging the power of the Authority under the Act, has still not expressly cast upon it the burden to conduct a hearing before it revokes a Firearm User's Licence.*
>
> *When all the terms of the statutory regime for the revocation of the firearm licence are broadly considered, it remains quite clear, as it was in Clough's case, that the Act itself provides for a procedure to be followed upon the revocation of a licence and part of that procedural regime is for the hearing and reception of evidence. This, however, is not at the stage of the Authority but at the stage of a review where there is an application for that to be done. It is at the review stage that the right to a hearing would operate. Parliament by expressly providing for a hearing at that level, and without expressly doing so at the level of the Authority, is taken to have intended not to cast a legal duty or obligation on the Authority to conduct a hearing before revocation of a licence."*

[45] The applicant also relies on the case of ***Fenton Denny v The Firearm Licensing Authority*** *[2020] JMSC Civ 97*. The applicant in that case alleged that he had not been given the opportunity to be heard by the FLA before his licence was revoked. He did not avail himself of the procedure of review, and by the time of the hearing of the application for leave to apply for judicial review, the opportunity was no longer available to him to file an appeal with the Review Board. The court found that there was sufficient basis for saying that he had an arguable case in relation to fairness. At paragraphs 76, 77, 78 and 79 of the judgment, the learned judge opined as follows:

"[76] Further, my appreciation of the authorities is that up until 1989 there was the view that once the decision was administrative, the decision maker was not required to give reasons for its decision (see ***Raymond Clough v Superintendent Grayson & AG,*** *supra). However, since that time the courts have gradually moved away from that position on the principle of fairness (see* ***R v Secretary of State for the Home Secretary, ex parte Doody****, supra);* ***Barl Naraysingh v Commissioner of Police****, supra).*

[77] In fact, even where there is an express provision in a statute that a decision-maker is not required to give reasons, the court has nevertheless held that reasons should be given. In the case of ***R v. Secretary of State for the Home Department, Exp. Fayed and Another*** *[1997] 1 All E.R. 228, the court was called upon to review a decision of the Home Secretary under the British Nationality Act 1981. Section 44(2) of the Act provided that the Home Secretary is not "required to assign any reason for the grant or refusal of any application" under the Act. However, the court held that even where a provision of an Act expressly states that there is no requirement to give reasons, in order to be fair, where the decision involved the exercise of discretion, there is a requirement for the decision-maker to furnish sufficient information as to the subject matter of concern to enable the aggrieved party to make representations. This is also clearly with a view to prevent aberrant and irrational decisions.*

[78] This modern position was recognized by McDonald-Bishop J. in Reddie. Therefore, despite the fact that there is an avenue for appeal within the scheme of The Act, and whereas the Applicant may not have been entitled to a hearing prior to proceeding before the Review Board, at which stage he would be entitled to the full details of the complaint, it is arguable that this does not preclude the FLA, on the principle of fairness, from providing the Applicant with the gist of the complaint and investigation on which their decision was based. It is arguable that providing these reasons would have facilitated the appeal process. In fact, my understanding of Lord Mustill's reasoning in relation to making worthwhile representation, is that the information should be provided to him to allow him to exercise the option whether or not to appeal the decision.

[79] I am not ignoring the Judge's reason in the Aston Reddie case that there is no provision within the Act for the Applicant to be given full details of the reason. However, despite it not being specifically stated in the Act, the cases have indicated that all statutory powers are granted with the implicit assumption that decisions will be made fairly, and that persons that are affected will be permitted to hear the reason to decide whether they have the need to make representations at all."

[46] In the case of ***Steadman Broderick v The Firearm Licensing Authority (Supra)*** the learned Judge made the following observation at paragraph 34 of the judgment:

"Nonetheless, it seems that the drafters of the Act might have contemplated a situation such as those in this case, where, after a firearm licence has been

> *granted, the holder becomes unfit to hold the licence. The words "otherwise unfitted to be entrusted with such a firearm" in section 36(1)(a) seem wide enough to encompass circumstances where the conduct, activities or circumstances of the licence holder make him/her unsuitable to continue to hold the licence. In my opinion, reliable intelligence relating to the applicant's activities might form the basis of a decision that an applicant's firearm licence should be revoked. However, it is noted that although Ms. Allen states that the intelligence received in respect of the applicant was forwarded to the board, this was not the stated reason for the revocation."*

[47] Mr. Letine Allen deponed in an affidavit which was filed on October 24, 2022, that the applicant's firearm users' licence was revoked on the basis that he was no longer fit and proper to retain a firearm licence.

[48] Mr. Allen gave a third affidavit in the matter on December 8, 2022. In that affidavit, he stated that the FLA received intelligence regarding the charges laid against the applicant in January 2017. He deponed that no evidence was offered against the applicant on those charges and he was discharged by the court in May 2017. He also explained that the basis for the applicant being discharged was that in one instance the witness had died and in the other, the witness did not attend court. He also deponed that the applicant attended upon the office of the FLA on May 8, 2017, and provided a statement in which he explained the circumstances of those charges and indicated that he was innocent of the allegations made against him.

[49] In that same affidavit, Mr. Allen stated further that an investigation was conducted by the FLA and certain findings were made. According to him, the investigations revealed that the applicant exhibited violent tendencies on multiple occasions and did not appear to handle conflicts in a proper manner. Further, that the applicant's file, including the investigator's findings was submitted to the Board of the FLA and that it was on or about January 28, 2020, that the Board took the decision to revoke the applicant's licence. The source of that information was not stated. He stated that it was after a consideration of those findings that the Board of the FLA made the determination to revoke the applicant's firearm licence. It is his contention that there were no procedural breaches as the applicant was given an opportunity to be heard and he provided a written statement.

[50] The applicant in his affidavit said that in May 2021, he went to renew his firearm licence which he held for some nine years. He said that on that occasion, the FLA held on to his firearm and he was advised that his licence had been revoked since 2020. He said that he was informed of his right of appeal and he filed his appeal within five days. He nevertheless, exhibited a receipt which he says showed that he lodged his appeal on July 15, 2021.

[51] The applicant detailed in his affidavit, a series of events which this court does not find it necessary to rehearse, but which the applicant says demonstrate that the decision to revoke his firearm licence was engineered and orchestrated by an Inspector of police whom he named and who is stationed at a police station in the community in which he carries on business. The gist of the allegations against the Inspector is that his conduct was actuated by malice towards the applicant, on account of the applicant's involvement while he was a serving member of the Jamaica Constabulary Force, in exposing certain corrupt conduct involving a particular police who was arrested charged and subsequently convicted.

[52] The applicant also deponed that he had been charged with the offences of illegal possession of firearm and ammunition on two separate occasions. He said that one occasion was said to relate to an incident where he allegedly hit someone in the face with a firearm but that in fact no such incident had ever occurred. It is not clear from the applicant's affidavit when he was charged but he related that he was acquitted (presumably of both charges) on May 3, 2017. He exhibited a letter from the Gun Court which shows that he was acquitted of the charges of Illegal Possession of Firearm Assault Occasioning Bodily Harm and Assault on May 2, 2017.

[53] He said that his firearm (which apparently had been seized) was eventually returned to him. He said he did not receive the rounds which were also taken from him and in his effort to retrieve his rounds, he had to speak to the said inspector whom he claims, bears malice towards him. The applicant also alleged that the Inspector was involved in instituting at least one of the charges against him. He alleges that the inspector then threatened to write to the FLA if he continued to make enquiries about the

rounds. It was upon the anniversary for renewal following that event that he was advised that his licence had been revoked.

[54] The applicant stated in his affidavit that he was able to give a statement to the FLA. He states that some 13 months have elapsed since his appeal was filed and that he has (presumably up to the time of filing his application before this court) had no response from the Review Board. Neither has he heard from the Minister.

[55] In filing his appeal before the Review Board, the applicant stated that it was difficult for him to give a reason for an appeal when the reason for the revocation was that he is no longer considered to be fit and proper. He also stated that natural justice required that he be afforded a reason. He nevertheless listed grounds. Those grounds are detailed at paragraph 89 below. He exhibited documents such as, his certificate of discharge from the JCF; a duplicate certificate of title to property registered in his name; a licence to operate his restaurant, bar and pastry business; valuation report in respect off his dwelling house; and proof of payment of taxes for his property.

[56] In this case, based on a perusal of the revocation order, the Chairman of the Board of the FLA signed the order of revocation on July 27, 2020. It is stated as having been served on the applicant on May 25, 2021. There are questions in my mind surrounding the timing of the notification to the applicant, of the fact of the revocation. What appears plain enough, is that the applicant's firearm licence had been revoked without his knowledge. At least it seems certain that he had been carrying around a firearm up until May 2021, the licence in respect of which had been revoked since July 27, 2020. The FLA is required to give notice of a revocation to an applicant. In this instance, the notice was tardy, but that tardiness in a sense, inured to the benefit of the applicant to the extent that he was allowed to be in possession of the firearm for a number of months after the revocation. ***Section 36(2) of the Act*** does not specify the time frame within which the notice is to be given after revocation, but the fact that the applicant is left in possession of a firearm without the required licence or permit dictates that notice should be given promptly.

[57] That failure to act appropriately in any event cannot form the basis for judicial review and does not define the appropriateness of the decision to revoke the licences. I will examine the decision to revoke against two criteria: firstly, against the question of whether a reason for the revocation was given and whether there was a basis for arriving at that reason. Secondly, I will look at the question of the appropriateness and need for a hearing at the revocation stage in the context of this case, against the background of the relevant statutory provisions and case law.

Whether a reason was given for the revocation?

[58] There is no question that the FLA is required to have a valid reason for the revocation of a licence. Even though there is not statutory requirement to give one, as in, making the applicant aware of that reason, I do believe that it is prudent that that reason be provided to the firearm holder. Fairness to my mind not only requires that there is a valid reason for making a decision, but fairness must also mean that in a scenario where there is provision for a process of review of the decision to revoke, the affected licence holder is not left completely in the dark. It is only in the context of a reason for the decision that one may properly be able to state a basis for a review of that decision. The applicant contends that, he was not given a reason for the revocation, and that the FLA contradicted itself. It cannot be said in this instance that a valid reason was not given, as the reason stated falls squarely within the letters of the act.

[59] In this instance, although the FLA simply regurgitated one of the bases stated in the legislation on which a firearm licence may be revoked, and did not spell out in the document provided to the applicant (the Firearm Licensing Authority Revocation Order) the basis on which it arrived at the particular reason given, the applicant would have been cognizant of at least some of the bases. There was the irrefutable fact that he had twice been charged for committing offences involving the use of his firearm in respect of which he held the licence. He was cognizant of the fact that the FLA had concerns over the fact of his being charged. He was also cognizant of the circumstances of his discharge in relation to those charges. He had not been tried and acquitted. As was detailed in Mr Allen’s affidavit, in one instance, a witness had

died and in the other, the witness did not attend. The Court is mindful of the applicant's evidence that in one instance, the complainant who was his father in law had attended court and denied that there was an incident. The applicant was allowed to give a statement to the FLA regarding the matter.

[60] The conduct complained of could not fall within any of the specific infringements enumerated in ***section 36*** which entitles the FLA to revoke the licence. The FLA relied on the category of ***"otherwise unfitted to be entrusted" with a firearm or ammunition"***, under ***section 36(1) (a) of the Act.***

[61] It is more a question of whether the circumstances explained by the FLA in evidence in this matter, which formed the basis for the revocation fit within the reason given. It is important to emphasize before moving on, that the applicant was aware of at least part of the reason now stated in affidavit evidence.

[62] It was opined in the case of ***Aston Reddie v the Firearm Licensing Authority and Others***, that it was not necessary that a firearm holder be convicted of an offence for the FLA to revoke his licence. Indeed, conviction of various offences forms discrete grounds for revocation. That is not to say that the FLA may not act on alleged conduct of an individual with respect to his firearm as a basis for revocation, simply because that alleged conduct did not result in conviction. The FLA it goes without saying, is an administrative body and not a court of law.

[63] The evidence that investigations reveal that the applicant is of intemperate behaviour did not form part of the reason given to the applicant for the revocation. I accept Mr. Wildman's submission, that the reason of intemperate behaviour stated in the affidavit evidence cannot be said to fall within the category of the 'catch all' of being otherwise unfitted to be entrusted with a firearm or ammunition, for the reason that there is specific reference in the statute to one being of intemperate behaviour. That specific reference although falling within the same subsection as that addressing the category of *"otherwise unfitted to be entrusted"* with a firearm or ammunition, is in my view, a separate basis on which a firearm licence may be revoked.

[64] In the circumstances, all that happened is that the FLA provided an additional reason by way of evidence, as forming the basis or part of it, for the revocation, which it did not alert the applicant to in the revocation document. I do not see it as a matter of the FLA contradicting itself. Neither do I think that the fact of giving an additional reason for the revocation, can form the basis of an arguable ground with a realistic prospect of success.

Whether the FLA ought to have afforded the applicant a hearing?

[65] This is not a case where it can be said that the FLA acted on no evidence or no proper basis. It also cannot be said that the applicant was given any opportunity to contest the allegations at a hearing, albeit he was given an opportunity to put forward his side to allegations based on which he was charged. I say this for the reason that Mr Allen's affidavit evidence which was not refuted, is that the applicant provided a statement in which he explained the circumstances of the charges against him and indicated that he was innocent of the allegations made against him. The giving of a statement does not equate to a hearing in the conventional sense but it is arguable that the FLA had done sufficient in the light of the fact that the Authority had an absolute discretion to determine the steps it takes and the procedure it adopts in carrying out its functions under the act and especially in the context of the existence of our present system with the opportunity for review and the attendant procedure of hearing, receiving and examining evidence in the matter. I wholly adopt the reasoning of McDonald Bishop in ***Aston Reddie v the Firearm Licensing Authority and Others*** which was reproduced at paragraph 44 above.

[66] At paragraph 35 of ***Robert Ivey***, the Court of Appeal reiterated that the issue of whether the FLA was obliged to afford the applicant in that case a hearing had to be addressed within the context of the statutory framework. The court then examined the provisions of ***sections 36(2)***, ***37***, and ***37A***, of the act and observed at paragraph 36 that, the act does not specifically require the FLA to afford the licence holder a hearing or to provide him with a reason for its decision to revoke. The Court of Appeal also made the observation in the ***Robert Ivey*** case, that the case of ***Naraynsingh***

as authority that there should be a hearing, is not particularly helpful to an applicant in the context of our legislation when the urging of the applicant is that the FLA should conduct a hearing in order to guarantee fairness.

[67] It seems to me that the finding in ***Fenton Denny*** that there was an arguable case on the basis of fairness was in part premised on the learned judge's position that, the court was unable to say that there was anything pointing to a prima facie case on which the respondent acted. She made that observation although she noted that the respondent had referred to complaints about the applicant's repeated use of violence and the evidence that investigations were done and a decision made based on the findings.

[68] The applicant in **Fenton Denny** had argued that he was not given an opportunity to be heard and that the respondent FLA acted unfairly in that he was not provided with a gist of the reasons why it was determined that he was not a fit and proper person. One of the distinctions between this case and that of Fenton Denny is that the judge had taken the view that the applicant had lost the opportunity to pursue an appeal before the review Board, hence he had not really had an opportunity to be heard.

[69] It is arguable that there was sufficient foundation on a purely prima facie basis for the FLA to have come to the conclusion that the applicant was no longer considered fit and proper to retain a firearm licence, which is the same thing as saying that he was ***"otherwise unfitted to be entrusted"*** **with a firearm or ammunition** as per ***section 36(1) (a) of the Act***. He had twice been charged for offence including the use of the firearm with respect to which he held the licence. Also, there was evidence that further investigations had been conducted and the applicant was allowed an input. The FLA must have formed a view adverse to the applicant after the information gathering process, in order to have revoked his licence. It cannot in those circumstances be said that the decision was irrational.

Did the applicant have an alternative remedy available to him?

In circumstances where the review was not conducted within the 90 days' period, how was the process to have the minister consider the appeal to be initiated?

[70] It is convenient to discuss these issues together. ***Rule 56.3 (3) (d)*** requires an applicant to state in his application whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.

[71] The Regulations made pursuant to ***section 48 of the Firearms Act***, but which governs ***section 37 of the Act***, are ***The Firearms (Appeals to the Minister) Regulations, 1967***. It is provided therein that:

> *"3.- (1) Every appeal under section 37 of the Act shall be commenced by notice in writing addressed to the Minister and filed within twenty-one days of the date on which the decision from which the applicant is appealing is communicated to him, or within such longer period as the Minister may in any particular case allow.*
>
> *(2) The applicant shall state in his notice his grounds of appeal and shall forward a copy of such notice to the appropriate authority.*
>
> *4. Within fourteen days of the receipt of a notice of appeal, the appropriate authority shall forward to the Minister a statement in writing setting out the reasons for the decision from which the applicant is appealing together with a copy of every other document relating thereto.*
>
> *5.- (1) The Minister may, in his discretion, permit any applicant to appear before him to put forward arguments in support of his appeal.*
>
> *(2) Any applicant permitted to appear before the Minister as aforesaid may do so in person or may be represented by counsel or solicitor if he so desires.*
>
> *(3) Where the Minister permits an applicant to appear before him he shall invite the appropriate authority to be represented at the hearing if the appropriate authority so desires.*
>
> *6. So soon as may be practicable after the filing of all documents or the conclusion of the hearing of the appeal, as the case may be, the Minister shall communicate his decision in writing to the applicant and to the appropriate authority and give to the appropriate authority such directions as may be necessary."*

[72] In the interpretation section which is section 2, it is stated that the applicant means the person appealing from a decision of an appropriate authority.

[73] It has been difficult to unearth whether those regulations remained in force after the advent of the FLA. From all indications the Regulations are still applicable. It is abundantly clear based on the provisions of the Regulations that it is the applicant who should initiate the process of appeal to the Minister.

[74] As the parties observed, the Act does not speak to who should invoke the process so that the Minister can hear the appeal, in circumstances where the Review Board fails to act in a timely manner. Even in the absence of Regulations stipulating who should initiate the process, it is the applicant who is inconvenienced and it is he who wishes to have a resolution to the matter. Prudence would require that he initiates the process in light of the fact that he would then be relying on the very body which he rightly complains has failed to act in a timely way, to bring the matter to the Minister's attention.

[75] It was open to the applicant to initiate the process before the Minister. Mr Allen deponed that the applicant did not approach the Minister to hear and determine his matter when the Review Board failed to act within the stipulated 90 days.

[76] That was an obvious avenue for redress. The Minister usually acts after receiving a written report of findings and recommendations of the Review Board. However, in circumstances where the Board has failed to act, the Minister himself would hear and determine the matter. It must therefore be said that this was an avenue open to the applicant to pursue. That avenue in the circumstances was an alternative remedy. In ***Fenton Denny***, Thomas J considered the fact that by the time of his application, the applicant had lost the opportunity to avail himself of his alternative remedy. She seemed to have considered that as a basis on which it could properly be said that he then, had no available alternative remedy. If the reason the applicant lost the opportunity to avail himself of an available remedy is of his own doing, then I do not share the view that he should be treated as an applicant without an alternative

remedy, so that he should be granted leave. The case of ***Durity v the Attorney General of Trinidad and Tobago [2002] UKPC 20***, was a constitutional motion. The question whether the claimant had an alternative remedy and whether the existence of such remedy meant that the claim was an abuse of process was considered. In the course of the judgment, the Judicial Committee of the Privy Council opine that:

> *"When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in* ***Harrikissoon v A-G of Trinidad and Tobago*** *[1980] AC 265, [1979] 3 WLR 62, 268 of the former report. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."*

[77] The applicant in this case has in effect given a reason for not pursuing the alternative remedy. That reason is that it was the Minister who ought to have initiated the process and not himself. Clearly, he was wrong. That reason in my view does not offer a reasonable explanation for not pursuing that remedy. Case law establish that once the alternative remedy would be an adequate remedy and it has not been pursued, then there should be some reasonable explanation. Thus, in circumstances such as the present, where an applicant's loss of an opportunity to avail himself of an alternative is a result of his own doing, he cannot to offer the lost opportunity as a valid explanation and be heard to say he has no adequate alternative remedy. There is no reason why the observation made by the Judicial Committee of the Privy Council, should not be applicable where the lost opportunity is in relation to an administrative tribunal and not a court.

What is the construction to be placed on the use of the word "shall" in stipulating the period of 90 days for the review to be completed?

[78] ***Regina v Soneji and Bullen [2005] UKHL 49***, was concerned with the interpretation of an aspect of the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995. The defendants had had confiscation orders made against them. They had appealed on the basis that the orders were made more than six months after sentence. The prosecutor appealed to the House of Lords saying that the fact that the orders were not timely did not invalidate them. More specifically, one question which arose was whether provisions to the effect that the court shall not specify a period which goes beyond a certain time limit, unless it was satisfied as to the existence of exceptional circumstances, which meant that the court's jurisdiction was ousted where there was nonconformity with that provision as to time the limit. If the defendants prevailed it meant that at the time the court exercised the power of postponement, but failed to comply with the requirement to not specify a period which went beyond a certain time limit, the court lost its jurisdiction to make confiscation orders. The court of appeal found that the court lost jurisdiction where there was noncompliance. The House of Lords observed that the consequence of noncompliance has to be seen in the light of the purpose of the statutory provision.

[79] At paragraph 14 of the judgment, Lord Steyn identified what he rightly regarded as the core problem. He said:

> *"14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in* ***Wang v Commissioner of Inland Revenue*** *[1994] 1 WLR 1286, 1294D-1295H."*

[80] He relied on a passage from ***London & Clydeside Estates Ltd. V Aberdeen District Council [1980] 1WLR 182*** at 189E to 190C of the judgment which is to the following effect:

> *"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless, I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the*

court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

[81] Thereafter, his Lordship made the following pertinent comments:

> *"This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."*

[82] At paragraph 23, Lord Steyn opined as follows:

> *"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. In my view it follows that the approach of the Court of Appeal was incorrect."*

[83] In ***Richard Joachim and Glenford Stewart v The Attorney General of St Vincent and the Grenadines and Ephraim Georges [2006] UKPC 6 (24 January 2007)***, one of the Commissioners in a Commission of enquiry was appointed by an instrument which had not been gazetted. By ***section 16 of the act*** pursuant to which the commission was appointed, it was provided that all commissions are to be published in the gazette and that the appointment shall take effect from the date of such publication in the gazette. There was never any publication in the gazette. Among the challenges by the appellants was that to the validity of the instrument by which that particular commissioner was appointed. The Judicial Committee of the Privy Council found that, the instrument of appointment not ever having been published in the gazette, could not form the legal basis for the commissioner's powers under the commission. The Board went on to say that the approach to be taken is

that established by the House of Lords in ***Soneji*****,** particularly paragraph 23 of Lord Steyn's speech. Lord Brown of Eaton-Under-Heywood then went on to say:

> *"Essentially the question to be asked is whether Parliament can fairly be taken to have intended the consequences of non-compliance to be total invalidity (or, in the present case, total ineffectiveness, since the appellants rightly recognise that the second respondent's appointment under the Second Instrument is valid and would immediately take effect if ever the Instrument comes to be published in the Gazette). The answer their Lordships unhesitatingly give to that question is that Parliament must indeed be taken to have intended the consequence of non-publication of the commission to be total ineffectiveness. That intention is as plain as can be from the last ten words of section 16: "and shall take effect from the date of such publication."*

[84] Without repeating them, I fully agree with Miss Hall's submissions outlined at paragraphs 22 and 23 above.

[85] In this instance, the purpose of the statutory provision is to ensure that an aggrieved applicant is afforded a review of the decision made by the FLA. It is hardly likely to be the case that a body which is not even the decision making body, but one which is required to provide its report and make recommendations, would be prevented from carrying out its mandate because it has not strictly complied with a timeline for doing so.

[86] The statute also gives an alternative route where there is noncompliance with the timeline on the part of the Review Board. Thus, it could hardly be the case that it was Parliament's intention that if the Review board did not act within the 90 days, it could no longer act or that any purported action/decision thereafter would be null and void. Importantly, the route of direct appeal to the Minister, is couched in terms which makes it an option open to an applicant. The statute says that the Minister may hear and determine the matter. The manner in which this aspect of the provision is stated is suggestive that the direct route to the Minister is an elective option, where there is not a timely decision. The other obvious avenue would be to await a review by the Board, or take steps to compel the Board to act, albeit outside of the stipulated timeline.

The absence of a hearing before the Review Board?

[87] Miss Tabia Duhaney deponed to an affidavit on behalf of the first respondent. Her evidence is that on July 15, 2021, the Review Board received an application for review of the FLA's decision to revoke the applicant's firearm licence. She stated that the applicant's application was considered October 20, 2022, and the Board submitted its findings and recommendation to the Minister for his consideration on November 7, 2022.

[88] It became apparent during the course of submissions that the end result was that the Minister has since written a letter to say that he accepts the findings and the recommendation of the Review Board. It cannot be said that the review process was carried out in the matter anticipated by ***section 37A of the Act***.

[89] Conspicuously absent from the applicant's grounds of appeal, is any assertion of the matters that the applicant raised in his affidavit in support of this application. I find it prudent to state the grounds of the applicant's appeal before the Review Board in its fulsome form. The following are the applicant grounds of appeal:

> *1.* "*The Applicant was a member of the Jamaica Constabulary Force from November 2004 to the 18th day of February 2015;*
>
> *2. During his tenure as a member of the Jamaica Constabulary Force the Applicant was given the responsibility of utilizing a Government issued firearm which was left in his possession at all time. That Firearm was left with the Applicant to "keep and care".*
>
> *3. There has been no complaints in relation to the Applicant's use of this Government issued Firearm;*
>
> *4. The Applicant was granted a Firearm's Users Licence in 2013. That Licence is identified as 2013-017679.*
>
> *5. Since the granting of the said Firearm's Users Licence (and prior thereto) the Applicant has not infringed the law.*
>
> *6. Since the granting of the said Firearm's User Licence the Applicant has not used the Firearm in any unlawful or illegal way.*

7. The Revocation Orders states-" The Reason for this revocation is because you are no longer considered fit and proper to retain a Firearm Licence". No reason has been advanced or given to the Applicant as the basis on which he is now not considered fit and proper to retain a Firearm Licence.

8. The Applicant since his departure from the Jamaica Constabulary Force has been gainfully engaged as a Businessman. The Applicant is the owner and operator of George Inn Restaurant, Bar and Pastry, which is situated at Main Street, Bog Walk in the parish of St. Catherine. That enterprise was established in May 23, 2015 and continues to grow as a business. The Applicant is precariously exposed in his direct and daily operation of the business without protection of his licensed Firearm. The revocation of the Applicant's Firearm User's Licence has there placed the Applicant in a precarious position.

9. There has been no change in the Applicant's circumstances form the date of when the Applicant was seen as a fit and proper to hold a firearm.

10. The Applicant has a fixed place of abode at Lot 385 Winona Drive, Garveymeade, Portmore, St. Catherine. The Applicant is the owner of this property.

11. The Applicant relies on the documents in the schedule of this Appeal in further support of his Appeal."

[90] It is arguable that the applicant did not place before the Review Board matters that would have allowed the Board to form the view that a hearing in the way of taking evidence, cross examining and the like was as a matter of fact necessary. As was observed in the case of ***Symbiote Investments Limited v Minister of Technology [2019] JMCA App 8***, the common law duty of procedural fairness does not always require an oral hearing, but there are some instances when an oral hearing may be beneficial, so that a tribunal may be able to communicate its concerns to the party which is likely to be affected by the decision.

[91] Taking into consideration that the grounds before the court was not the same grounds placed before the Review Board by the applicant, it may be that the Review Board considering the grounds placed before it, did not find it necessary to have an oral

hearing. Miss Tabia Duhaney in her affidavit at paragraph 5, deponed that consideration of the applicant's application for review was done on paper.

[92] It is not known whether the statement provided by the applicant was supplied to the Review Board. However, in all the circumstances, based on the provisions of ***section 37A of the Act***, and especially in the light of the absence of a full hearing before the FLA, it is debatable whether the applicant would have an arguable case that he should have been afforded the opportunity to put forward evidence, since what he had stated were according to him, grounds. This is especially in light of the mandate of the Review Board. In my estimation, notwithstanding this commentary, the applicant faces a dilemma. This is because of the manner in which he has couched the grounds relating to the Review Board, the second respondent. The formulation of the applicant's proposed grounds renders it unnecessary for this court to say, whether or not the absence of a hearing in the conventional sense, would form the basis for granting leave.

[93] The applicant, in one of the declaration he proposes to seek, if granted leave to apply for judicial review, is asking the court to say that the decision not to determine the applicant's appeal within the 90 days' period is illegal, null and void. The court has found that it is not. In another, he is asking the court to find that the decision by the Review Board refusing to determine the matter in the 90 days' period be quashed. Nowhere has he signified his intention to seek an order or declaration relating to any failure to act in a manner that a quasi-judicial body, such as, the Review Board is to act.

[94] This court is cognizant that the applicant in the proposed orders relating to the Review Board, speak to a failure in determining the appeal in accordance with the provisions of ***section 37 of the Act***, but there is a specific complaint which is that the Review Board did not hear the appeal within the 90 days. The complaint was not that the Review Board did not comply with the dictates of ***section 37 of the Act*** generally, or with any other specific aspect of it, but that it did not comply with the specific requirement to act within 90 days. In arguing before the court Mr. Wildman observed

that the applicant was not afforded a hearing before neither the FLA or the Review Board and so he has an arguable case for the revocation to be quashed.

[95] As Miss Hall rightly contends, the applicant did not challenge the decision of the Review Board. This court recognizes that at the time of the filing of this application, the Board had not yet provided its findings and recommendation to the Minister. If the applicant so desired, he had the opportunity to amend his application.

DISPOSITION

[96] The applicant has not put forward any ground which forms the basis of an arguable case with a realistic prospect of success with respect to the complaints of irrationality or procedural impropriety or illegality, in the revocation process before the FLA (grounds i, ii and iii of the application) and he is not entitled to leave on any of those grounds.

[97] The finding of this court is that the relevant law supports a finding that the second respondent, the Review Board, was competent to give a decision after the expiration of the 90 days stipulated in ***section 37A***, for the review to be carried out. It is evident from that finding that the declaration and order (numbers (iv) and (v) in the Notice of Application) seeking to impugn the conduct or lack thereof on the part of the Review Board, cannot be pursued.

[98] The finding of this court that there is no arguable ground with a realistic prospect of success that the duty was that of the Minister to initiate the process for him to hear and determine the applicant's appeal, in circumstances where the Review Board failed to act in a timely manner, (grounds vi and vii) means that the applicant is not entitled to pursue the grounds encompassing illegality of the Minister's non -action.

[99] Further, having regard to the conclusion that the applicant did not avail himself of the alternative remedy available to him before approaching this court, even though he has now lost the opportunity to avail himself of that remedy, he is not entitled to be granted leave to apply for judicial review.

[100] The applicant's Notices of Application for Court Orders filed September 5 and 6, 2022, are in the result, refused. There shall be no order as to costs. Leave to apply is granted to the applicant.

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Andrea Pettigrew-Collins

Puisne Judge