[2021] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

APPLICATION NO COA2021APP00098

BETWEEN	**ROBERT IVEY**	**APPLICANT**
AND	**FIREARM LICENSING AUTHORITY**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Company for the applicant

Miss Courtney Foster instructed by Courtney N Foster & Associates for the respondent

6 July and 19 November 2021

BROOKS P

[1] On 19 June 2019, Mr Robert Ivey received a notice from the Firearm Licensing Authority ('the Authority') informing him that it had revoked his four firearm licences. The reason given in the notice was that "he was no longer considered fit and proper to retain a firearm licence". On 28 May 2021, a judge of the Supreme Court refused Mr Ivey's application for leave to apply for judicial review of the Authority's decision. Mr Ivey sought leave from the learned judge to appeal her decision, but she also refused that application.

[2] He has, therefore, renewed the latter application before this court. However, the Authority has resisted it. The Authority asserts that the learned judge properly refused Mr Ivey's application for judicial review, on the basis that there was a viable statutory

alternative to that process. That alternative, the Authority asserts, is for Mr Ivey to have appealed to the Review Board, which is established for that purpose, by the Firearms Act ('the Act'). The Authority contends that Mr Ivey failed to pursue the correct course and so he ought not to be given leave to appeal.

[3] The major issue for determination in this application is whether Mr Ivey's proposed appeal has a real prospect of success. This issue turns on the questions of whether:

(a) any arguable basis exists for challenging, by way of judicial review, the Authority's decision to revoke the licences, and in particular, whether:
   i. the Authority breached any of the procedural requirements of the Act;
   ii. the Authority breached the principles of natural justice; or
   ii. the Authority's decision was irrational;

(b) a viable alternative to an application for judicial review existed, within the 90 days allowed to Mr Ivey to have filed an application for judicial review; and

(c) the learned judge wrongly exercised her discretion in refusing Mr Ivey leave to apply for judicial review.

The Authority

[4] Before outlining the facts of this case it is necessary to outline the statutory framework against which the relevant events occurred. The Authority is the body that is established by the Act to regulate the licensing of firearms in Jamaica, and generally to execute the statutory duties assigned to it by the Act. It is comprised of five persons, who are appointed by the responsible Minister of Government ('the Minister'). The Authority, as part of its duties, grants, renews, varies or revokes firearm licences.

[5] For its due administration, the Authority has a staff, which is headed by a Chief Executive Officer ('the CEO'). The CEO is appointed pursuant to paragraph 12 of the Third Schedule to the Act, and is "responsible for the day-to-day management of the affairs of the Authority". The CEO is not a member of the Authority.

[6] Any person who is aggrieved by a decision of the Authority may apply to the Review Board, for a review of that decision. The Review Board, having considered the application for review, is required to submit its findings and recommendation to the Minister. It is the Minister who, upon receipt and consideration of the report of the Review Board, directs the Authority on the steps that it should take in the matter.

The factual background

[7] In support of his application for leave to appeal, Mr Ivey contended that the CEO spoke to him on two occasions, in late 2017, asking him about other firearm licence holders, for whom Mr Ivey had previously collected packages from the Authority. Mr Ivey did not provide any information to the CEO in relation to his queries, and, according to Mr Ivey, they had no other discussions about anything else. In or about October 2017, the CEO directed Mr Ivey to bring his firearms in to the Authority. Mr Ivey, instead, sought legal advice, and his attorney-at-law wrote to the CEO requesting clarification of the CEO's request.

[8] The next development was that police officers attended at Mr Ivey's home requesting his firearms. He refused to hand them over and the officers left. On 19 April 2018, Mr Ivey applied to the Authority for the renewal of his firearm licences. The Authority confiscated the weapons and the licences, ostensibly pending investigations. No details were provided.

[9] In January 2019, according to Mr Ivey, the CEO again unsuccessfully requested information from Mr Ivey about other people's firearms and licences. Mr Ivey said that he asked for the reason for the seizure of his firearms. The CEO's response, Mr Ivey said, was "you no throw lawyer pon me".

[10] On 19 June 2019, Mr Ivey received the revocation order from the Authority.

[11] Whereas, the CEO has not denied any of the assertions made by Mr Ivey as to the conversations between the two, the CEO stated that the Authority conducted investigations into "activities associated with" Mr Ivey and that he met with Mr Ivey as part of those investigations. The investigations, the CEO said, included, but were not limited to, considering an "intelligence report from the Jamaica Constabulary Force". The CEO deposed that while those investigations were underway, the Authority placed Mr Ivey's application for renewal of his licences "on hold". The CEO deposed that, based on the findings of the investigation, the Authority decided to revoke Mr Ivey's licences. The CEO stated that the Authority "may revoke a licence where a holder is deemed to be of an intemperate nature". He did not, however, specifically state that that was the reason for revoking Mr Ivey's licence. The CEO asserted that when the revocation notice was issued, Mr Ivey was informed of his right to "lodge a review of the decision with the Review Board".

[12] Mr Ivey did not file an application for a review by the Review Board, either within the time prescribed by the regulations established under the Act, or at all. He instead, applied for leave to apply for judicial review. It is that application that the learned judge refused.

Whether any arguable basis exists for challenging, by way of judicial review, the Authority's decision to revoke the licences

The submissions

[13] Mr Wildman, on behalf of Mr Ivey, argued that there were ample bases for challenging the Authority's decision, by way of judicial review, and that the learned judge should not have denied Mr Ivey his right to institute that challenge. Before revoking a licence, learned counsel submitted, there is a duty to grant a hearing to the person to be affected, and a duty to provide reasons, at the time of revocation, for a

decision to revoke. Learned counsel submitted that the Authority breached the principles of natural justice, in that, it did not comply with those requirements.

[14] Mr Wildman submitted that the result of these breaches is that the Authority's decision is "procedurally improper, null and void and of no effect". He relied on a number of authorities for those submissions, including **R v Devon County Council, ex parte Baker and another; R v Durham County Council, ex parte Curtis and another** [1995] 1 All ER 73 ('**R v Devon County Council**'), **R v Westminster City ex parte Emakon** [1996] 2 All ER 302, **South Bucks District Council and another v Porter** [2004] UKHL 33 **Naraynsingh v Commissioner of Police (Trinidad and Tobago)** [2004] UKPC 20 and **Burroughs and Another v Rampargat Katwaroo** (1985) 40 WIR 287.

[15] Learned counsel also pointed to Mr Ivey's unchallenged evidence as to his exchanges with the CEO, and argued that it is plain that the Authority's decision was irrational. The learned judge, Mr Wildman submitted, should therefore have granted leave to apply for judicial review of such a decision.

[16] Mr Wildman submitted that the learning on the requirements for executive decisions has evolved since the decision in **Raymond Clough v Superintendent Greyson and Another** (1989) 26 JLR 292, cited by Miss Foster, on behalf of the Authority. Such executive decisions, he submitted are now liable to judicial review. Learned counsel stridently stated that the new dispensation is that a decision maker must observe the principles of natural justice by not only affording a hearing to the party, which is likely to be affected by the decision, but also by giving reasons for the decision.

[17] Miss Foster, in supporting the learned judge's decision, submitted that the Authority is not required to afford Mr Ivey any audience, either in writing or orally, or conduct a full hearing in respect of any matter, which could lead to the revocation of a licence. The Authority was also, she argued, not obliged to provide reasons at the time

of informing Mr Ivey of its decision to revoke his licences. The obligation to allow audience and provide reasons, Miss Foster submitted, only arose when the statutory review process was activated. That process, she noted, has not been activated in this case. In any event, she argued, the Authority did provide Mr Ivey "with sufficient information on which [he] could reasonably have determined the basis on which [the Authority] considered that he was '*no longer considered a fit and proper person to retain a firearm* licence'" (paragraph 20 of her written submissions - italics as in original).

[18] On the issue of whether the Authority's decision was irrational, learned counsel contended that the CEO stated that the Authority relied on intelligence provided by the police. She contended that there was a need to balance the private interests of disclosure against the public interests of maintaining the integrity of the intelligence system. Miss Foster argued that the Authority was entitled to rely on the intelligence that it had received, and, therefore, its decision cannot be said to be irrational.

[19] Learned counsel submitted that the legislative framework in this country is different from that in Trinidad and Tobago, against which the decision of **Naraynsingh v Commissioner of Police**, on which Mr Wildman relied, was decided. Miss Foster argued that, whereas in Trinidad and Tobago, there is no provision for an appeal to a review board from a decision to revoke a firearm licence, there is a statutory appellate process in this country. It is upon an appeal being filed with the Review Board, learned counsel submitted, that the Authority is obliged to supply reasons for its decision.

[20] She relied, in part, on the cases of **McInnes v Onslow-Fane and Another** [1978] 1 WLR 1520, **Raymond Clough v Superintendent Greyson and Another** (cited above), **Re JR 20's (Firearms Certificate) Application for Judicial Review** [2010] NIQB 11 and **Aston Reddie v The Firearm Licensing Authority and Others** (unreported), Supreme Court, Jamaica, Claim No HCV 1681 of 2010, judgment delivered 24 November 2011.

The analysis

[21] Generally speaking, the obligation that is placed on a decision maker to afford a hearing to a person who will be affected by that decision, is dependent on the circumstances of the individual case. Lord Morris of Borth-Y-Gest in **Wiseman and Another v Borneman and Others** [1971] AC 297 ('**Wiseman v Borneman**') opined that the obligation to afford a hearing, in any particular case, turned on fairness. He said, in part, at page 309:

> "But ultimately I consider that the decision depends upon whether in the particular circumstances of this case the tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded."

[22] Where the legislature provides a procedure for the decision maker to follow, that procedure must necessarily be the standard for determining fairness. The court is, however, entitled to examine the legislation to determine whether it achieves objective fairness. Lord Wilberforce in **Wiseman v Borneman** explained this approach. He said at page 317:

> "I am not, therefore, satisfied with an approach which merely takes the relevant statutory provision...subjects it to a literal analysis and cuts straight through to the conclusion that Parliament has laid down a fixed procedure which only has to be literally followed to be immune from attack. It is necessary to look at the procedure in its setting and ask the question whether it operates unfairly to the taxpayer to a point where the courts must supply the legislative omission…."

[23] Carey JA, in **Raymond Clough v Superintendent Greyson and Another**, also spoke to the pre-condition of a demonstration of an inadequacy in the statutory procedure, before the court would intervene. He said, in part, at page 297B:

> "…If the Court is to intervene [by way of judicial review], it must be shown that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation…."

[24] The other principle of natural justice that is raised in the case at bar, is the obligation to provide reasons for a decision. Although generally, at common law, there is no obligation placed on the decision maker to provide reasons for the decision, this principle has long been under siege in favour of the principle of fairness in the particular circumstance. Where decisions are made in the context of statutory provisions, the question of whether the decision maker is obliged to provide reasons for the decision will also depend on whether the circumstances are fair.

[25] The majority of the decided cases, which have been brought to the court's attention, on the issues of affording a hearing, and providing reasons for decisions in administrative matters, all turn on fairness and the context of the relevant legislation. Cases flowing from the Act, both in its previous and present iterations, demonstrate that point.

[26] **Raymond Clough v Superintendent Greyson and Another** was decided before the creation of the Authority. At that time that that case was decided, the decision to grant, renew, vary or revoke firearm licences was entrusted to superintendents of police (referred to in the Act, at that time, as 'the appropriate authority'). In that case, this court ruled that the action of revoking the firearm licence did not require hearing from the licence holder beforehand, and that the decision maker was not obliged to give reasons to the licence holder, for the revocation. Carey JA described the, then, structure of the legislation and explained that, not only was there no obligation, at the first tier (the equivalent to the Authority), to afford a hearing or to give reasons for a decision, but that the matter of firearm licences required a different approach from other types of licences, such as where the licence holder's livelihood is at stake. He said, in part, at page 296F-I:

> "This then is the regime set up by statute, and it involves two tiers, and to be precise two individuals. Wherever executive action is involved, the law requires the official to act fairly. **But it is a misconception that at the first tier, there is necessarily and inevitably any requirement for a hearing so that the citizen might disabuse the first tier official of any wrong impression**. Lord Denning in

R. v. Gaming Board for Great Britain, Ex parte Benaim and Anor. [1970] 2 All E.R. 528 at p. 533 pointed out that there are no inflexible rules as to the applicability of the rules of natural justice. He said this:

> 'I think that the board are bound to observe the rules of natural justice. The question is: what are the rules?
>
> It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject-matter; . . .'

The subject matter in this case is the licence to hold or possess a firearm. **There is no constitutional or legal right to own a firearm or to be allowed to hold a firearm. The entitlement or to the refusal of or the revocation of a grant of a licence is in the hands of the police. The Firearms Act is concerned with the control of, the use, and misuse of firearms in this country. The incidence of violence involving guns is such that the greatest care has to be taken to ensure that such weapons do not fall into the wrong hands. The welfare and security of the entire country is at stake.** The national security must be a matter of the greatest concern. Criminal activity is unarguably a matter which affects national security.

The revocation of a licence to hold a firearm cannot, in my view, be equated to the revocation of a jockey's licence where a man's livelihood is at stake…." (Italics as in original, emphasis supplied)

[27] Carey JA found that, under the Act, as it then was, and in particular the relevant regulation under the Act that deals with appeals to the Minister, it was the Minister who was obliged to allow a hearing (but not necessarily by an appearance in person) and to provide reasons for the decision. The learned judge of appeal plainly stated his view that, based on the statutory regime, the aggrieved party has the right to be heard when the matter appears before the Minister. In that situation, the learned judge stated, there is no need for the court to intervene to cure any legislative omission. In referring

to section 36 of the Act, as it was before the establishment of the FLA, he said, at page 297B-G:

> "By Section 36 of the Act the appropriate authority is entitled to revoke the licence but that power is subject to a right of appeal to the Minister. It is at this point that the right to be heard operates, for by the Firearms (Appeals to the Minister) Regulations, the aggrieved party is able to present his side of the story. He is given no right to be seen but he must be heard. He can submit the grounds of his appeal. These regulations provide that the 'appropriate authority' must supply the reasons for its decision to the Minister. **There is no requirement that the reasons should be supplied to the aggrieved party by the 'appropriate authority'. In my view, this is of significance for it shows that the statute does not intend that any hearing should take place before the 'appropriate authority'...** It is at the hearing before the Minister that attacks on the basis of illegality, irrationality and procedural impropriety can properly be pursued…
>
> The Statute by allowing a hearing by the Minister, after revocation by another official, provided a procedure whereby the principles of natural justice, for example, reasons for the decision and a hearing, could be satisfied. I am quite unable therefore, to appreciate where the procedure in its setting operates unfairly to the holder of a Firearm User's Licence to the point where we are called upon to supply the legislative omission…." (Emphasis supplied)

[28] Carey JA, in the penultimate paragraph of his judgment, again discussed that, on an application for a review of a decision of a superintendent in respect of a firearm licence, it was the Minister who was obliged to afford the aggrieved party a hearing. He said, at page 299F-H:

> "Before parting with this case, I desire to observe that when a Superintendent of Police is exercising his power of revocation of a Firearm User's Licence, he is not required to act judicially; he is required to act fairly but that does not involve either hearing the holder or giving him reasons. For all practical purposes, it means having a prima facie case, or acting bona fide. He is obliged to give his reasons only to the Minister [if] the holder is aggrieved by the decision. **But the**

> **Minister is bound to hear him or his legal representative and the Minister is bound to provide him with the reasons for the decision to enable the holder, as an aggrieved party, to rebut any allegations made against him**. The Minister, it seems to me, must act fairly..." (Emphasis supplied)

[29] Downer JA also reasoned in that case, based on the then structure of the legislation, that there was no obligation for the first tier decision maker to afford a hearing to the person to be affected by the decision. He said, in part, at page 304A-C:

> "To my mind, the right to a hearing which includes considering written representations…is provided at the second tier which is called on appeal. This is a feature of modern legislation…There is, therefore, no omission by the legislature. **It was not necessary for the 'appropriate authority' to accord the appellant a hearing as any such hearing as is appropriate, is available before the Minister**. The contention by [counsel for Mr Clough] that there was a procedural impropriety by the Superintendent for failing to accord the appellant a hearing, therefore, fails. It failed because the 'appropriate authority' being an administrative officer can be satisfied by making investigations or by receipt of reports before he revokes. He must of course act fairly before he decides but the requirement for a hearing is at the second stage before the Minister." (Emphasis supplied)

[30] Both judgments speak to the first tier decision maker acting fairly. Carey JA explained that that meant that the decision maker should have a *prima facie* case before him or her, and act in good faith.

[31] Carey JA, in **Danhai Williams v The Attorney General and Others** (1990) 27 JLR 512 (also decided before the creation of the Authority), at page 514, reiterated the stance that the court had adopted in **Raymond Clough v Superintendent Greyson and Another**.

[32] The case of **Burroughs and Another v Rampargat Katwaroo** supports the principle that if the Authority "is satisfied" of a certain situation, on reasonable grounds,

it may revoke a licence without prior consultation with the licence holder. In that case, Bernard JA, sitting in the Court of Appeal of Trinidad and Tobago, stated, at page 302, that in order to impose an obligation to grant a formal hearing before revocation, the statute should either expressly so state or imply such a requirement.

[33] Bernard JA relied, in this context, on the judgment of Denning MR in **Kavanagh v Chief Constable of Devon and Cornwall** [1974] 2 All ER 697 ('**Kavanagh**'). In **Kavanagh**, the English Court of Appeal was treating with the Firearms Act 1968 of that country. The relevant framework of that legislation was loosely similar to the previous dispensation of the Act, in that the first tier decision maker was the chief officer of police for the relevant area. The court was, however, not dealing with a revocation of a licence but, instead, a refusal to grant a certificate, which would be the equivalent of a licence. Lord Denning stated, in part, at page 698:

> "In an appeal under the Firearms Act 1968, it seems to me essential that the Crown Court should have before it all the material which was before the chief officer of police. After all, the chief officer is the person to give the decision in the first instance. Under s 27 it is he who is to be 'satisfied'. Under s 34 he may refuse if he is 'satisfied' of what is said there. It is plain that he can take into account any information that he thinks fit. **He need not hold any hearing. He can decide on paper. If he refuses and the applicant appeals to the Crown Court, then the Crown Court must see whether or not the chief officer was right in refusing**." (Emphasis supplied)

The Privy Council, at paragraph 19 of **Naraynsingh v Commissioner of Police**, accepted as correct, the approach taken in **Kavanagh**.

[34] As was already pointed out, the judgments in **Raymond Clough v Superintendent Greyson and Another** and **Danhai Williams v The Attorney General** dealt with a dispensation of the Act, which existed before the establishment of the Authority. The prior legislative structure governing decision-making and any appeals from decisions, was, however similar to that in the present dispensation of the Act, in that an appeal lay from the first tier decision maker (at that time, a senior police officer)

to the Minister. The present structure stipulates that the appeal, which is ultimately considered by the Minister, must first be submitted to the Review Board.

[35] The issue of whether the Authority is obliged to afford Mr Ivey, or any licence-holder, a hearing, before revoking a firearm licence, has to be addressed in the context of the statutory framework. Under the Act:

a. the Authority makes the first tier decision in exercise of its functions under section 26B of the Act;
b. the Authority informs the licence holder of its decision to revoke (section 36(2) of the Act);
c. the licence holder is permitted to apply to the Review Board for a review of the Authority's decision (section 37(1) of the Act);
d. the Review Board conducts a review within 90 days of the application and makes a report to the Minister (section 37A(2) of the Act);
e. the Minister considers the report and gives directions to the Authority, as he thinks fit (section 37A(3) of the Act); and
f. if the Review Board fails to conduct a review or provide a report within the stipulated time "the Minister may hear and determine the matter under review" (section 37A(4) of the Act).

[36] As in the previous legislative dispensation, the Act does not specifically require the Authority to either afford the licence holder a hearing or to provide him with a reason for its decision to revoke the licence. Section 36 of the Act grants the Authority the power to revoke the licence if it is satisfied that a certain situation exists. The relevant portion of the section states:

> "(1) 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

…"

[37] Section 37 of the Act grants the licence holder the right to apply to the Review Board. The relevant part of section 37(1), which grants the power to apply for a review of a revocation of a licence, states as follows:

> "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) …
>
> (b)…
>
> (c) revoking or refusing to revoke any licence, certificate or permit; or
>
> (d)…"

[38] Section 37A of the Act speaks to the requirements imposed on the Review Board and on the Minister when an application for review is made. The relevant portion of the section states:

> "(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 the Authority such directions as the Minister may think fit."

[39] Although the application for review is made to the Review Board, it is the Minister who makes the decision. He, thereafter, gives directions to the Authority. It is

worthy of note that, unlike the earlier formulation of the Act, where the term "appeal" was used, the present provisions of the Act use the term "review" in describing the exercise which the Review Board is mandated to undertake. Nonetheless, the details of the Review Board's functions are more akin to an appeal, in the sense that the Review Board is required to conduct a hearing. Section 37A(2)(a) of the Act requires the Review Board to "hear, receive and examine the evidence in the matter under review". The previous iteration of section 37(1) of the Act spoke to an "appeal to the Minister against any decision of an appropriate authority". The Firearms (Appeals to the Minister) Regulations 1967 ('the 1967 regulations'), then, as now, require the Minister to consider the material that is placed before him, grant a hearing if he is so minded, and give directions to the appropriate authority, which is now the Authority.

[40] Despite the amendments to the Act, the two-tier structure described by Carey JA remains materially intact. It is the Minister who makes the decision at the second tier, under both iterations of the Act. The difference is that under the present dispensation, it is the Review Board that actually receives the application instead of the Minister. There is no material difference that would alter the stance of the court in relation to the obligations, or lack thereof, which are placed on the Authority, as opposed to those, which Carey JA opined, had been placed on the "appropriate authority" under the previous dispensation.

[41] In applying the reasoning in **Raymond Clough v Superintendent Greyson and Another** to the present statutory framework, the similarity to that which applied in the previous dispensation of the Act, dictates a finding that although the Authority is obliged to act fairly and in accordance with an ostensibly legitimate basis, it is not obliged to grant a hearing to a licence holder before revoking a licence. The Authority is also not obliged to give reasons for its decision to the licence holder. If, however, the licence holder requires a review, the Review Board must:

a. secure the Authority's reasons for its decision;

b. grant the licence holder a hearing, which need not be orally conducted; and

c. provide its recommendations to the Minister.

[42] In **Aston Reddie v The Firearm Licensing Authority**, McDonald-Bishop J (as she then was) considered the statutory framework under the present dispensation. She concluded that the similarities in the framework were such that the decision in **Raymond Clough v Superintendent Greyson and Another** was applicable in the current statutory framework. Her usual careful and thorough analysis of the legislation was of assistance in assessing the present case.

[43] Mr Wildman's reliance on the decisions of **Naraynsingh v Commissioner of Police** and **Burroughs and Another v Rampargat Katwaroo** does not assist in the assessment of the Act in this context. The decisions in those cases were based on a different statutory framework, which did not include an appeal process.

[44] The cases of **Ridge v Baldwin** [1964] AC 40 and **R v Devon County Council** among others, cited by Mr Wildman, emphasise the obligation placed on the decision maker to act fairly. That principle is accepted, indeed it is repeated by Carey JA and Downer JA in **Raymond Clough v Superintendent Greyson and Another**, but the application depends on the peculiarities of the legislation under review. To that extent, the decisions in the cases cited by Mr Wildman cannot assist Mr Ivey in demonstrating that the Authority ought to have given him a hearing prior to revoking his licences.

[45] The legislation in this case is not silent on the issue of a review of the Authority's decision.

[46] My Ivey, on the reasoning set out above, had no basis to apply for judicial review of the Authority's decision.

[47] It is, however, difficult not to feel empathy for Mr Ivey's situation. His uncontradicted account of his interaction with the CEO certainly gives the impression

that the CEO was acting in a manner that was arbitrary. On Mr Ivey's account, the CEO seems to have ordered the seizure of Mr Ivey's firearms because Mr Ivey had refused to answer questions about other people's firearms affairs, and because Mr Ivey had had an attorney-at-law ask for clarification of a demand to bring in his firearms.

[48] Although no finding is made with regard to Mr Ivey's assertions on those aspects, it must be noted that the CEO is not the Authority. The CEO is a member of administrative staff of the Authority. Paragraph 12 of the Third Schedule to the Act allows for the appointment of the CEO. It states, in part:

> "(1) Subject to subparagraph (3), and for the due administration of the Authority, the Board may, with the prior written approval of the Minister, appoint a Chief Executive Officer of the Authority,…
>
> (2) The Chief Executive Officer of the Authority shall be responsible for the day-to-day management of the affairs of the Authority…"

[49] As has been mentioned above, it is not the CEO who makes decisions to grant or revoke firearm licences. It is the Authority that does so. Section 26A of the Act allows for the establishment of the Authority and section 26B stipulates its functions. Paragraph 1 of the Third Schedule to the Act outlines the constitution of the Authority. The paragraph states:

> "The Authority shall consist of the following persons–
>
> (a) a person who has retired from the post of-
>
> (i) Director of Public Prosecutions; or
>
> (ii) Senior Civil Servant;
>
> (b) a retired Judge of the Court of Appeal or the Supreme Court;
>
> (c) a retired Police Officer not below the rank of Senior Superintendent at the time of retirement; and
>
> (d) two other persons who the Minister is satisfied are of high integrity and able to exercise sound

judgment in fulfilling their responsibilities under this Act."

[50] It is, therefore, not the revocation of the licences by the CEO, which Mr Ivey seeks to have set aside, but that of the Authority.

[51] What was Mr Ivey therefore, to have done after his licences had been revoked? The Act spells out the procedure carefully for him, yet he chose to ignore its provisions and apply, instead, for judicial review of the Authority's decision. This raises the second major issue to be decided in this case, which is whether Mr Ivey should be allowed to pursue the avenue of judicial review. The viability of the statutory review process is first to be considered.

Whether a viable alternative to an application for judicial review existed

The submissions

[52] On the issue of the availability and efficacy of the review process, Mr Wildman accepts the principle that judicial review is not available if there is a viable alternate remedy provided by the statute. He argued, however, that the review process stipulated in the Act was illusory as:

(a) the Review Board takes so long to act on any particular complaint that its process was not credible; and

(b) in any event, there was no Review Board in place when Mr Ivey's licences were revoked.

Learned counsel argued that, in those circumstances, Mr Ivey was entitled to utilise the remedy of judicial review and the learned judge erred in denying him that remedy.

[53] On the issue of the length of time that the Review Board took to carry out its duties in any particular case, Mr Wildman relied on the affidavit evidence of Ms Faith Gordon, who is an attorney-at-law employed to his firm. Ms Gordon deposed that the firm acted for several clients who had applied to the Review Board. She also deposed

that in those cases the Review Board and the Minister had failed to comply with the statutory requirement of section 37A of the Act. She cited one case in which court action had been taken as a result of that failure.

[54] Mr Wildman's other line of attack is that the tenure of the last Review Board expired in 2018 and it was in June 2020 that the appointment of a new Review Board became effective. Learned counsel argued that despite the fact that the Gazette, dated 16 June 2020, sought to assert that the appointment took effect from 20 May 2019, it could only properly take effect on the date of the publication of the Gazette.

[55] Mr Wildman relied, in part, for those submissions, on section 31 of the Interpretation Act, **Naraynsingh v Commissioner of Police**, **R v Hillingdon London Borough Council Ex parte Royco Homes Ltd** [1974] QB 720, **R v Chief Constable of the Merseyside Police, ex parte Calveley and others** [1986] 1 All ER 257 ('**R v Chief Constable of the Merseyside Police**'), **National Housing Trust v Treebros Holdings Ltd** [2018] JMCA App 21 and **Joachim and Another v The Attorney General and Another** [2007] UKPC 6.

[56] Miss Foster advocated for the application of the principle that judicial review was a remedy of last resort. She argued that a Review Board was in place at the time of the revocation of Mr Ivey's licences and he was, therefore, obliged to utilise the statutory remedy. Learned counsel submitted that the appointment of the members of the Review Board was valid despite the fact that the Gazette was published after the appointment became effective. She argued that the proviso to section 31 of the Interpretation Act allowed for the retroactive reach of the Gazette. In respect of the reported delay in the completion of reviews, Miss Foster submitted that the Act provided an alternative access to the Minister if the Review Board failed to perform its duty within the stipulated time.

The analysis

[57] In some of the decided cases cited by learned counsel, there are some very strong statements, which support the principle that, except in exceptional circumstances, where there is an alternative remedy available to the person aggrieved, the court will not normally grant that person leave to apply for judicial review. This principle is especially applicable if the alternative is provided by statute. Among the reasons given for supporting the principle are:

(a) unless a strict approach is used, the grant of leave to apply for judicial review, would risk undermining the will of the legislature as to its preferred approach (see **R (on the application of Christopher Wilford) v Financial Services Authority** [2013] EWCA Civ 677 ('**R v FSA**') at paragraph 23);

(b) unlike judicial review, the statutory remedy does not require leave and so may be swifter than the procedure involved in applying for judicial review (see **R v Birmingham City Council, ex parte Ferrero Ltd** [1993] 1 All ER 530 ('**Ferrero**') at page 537); and

(c) judicial review simply returns the parties to their original positions and does not decide the real issue (see **R v FSA** at paragraph 36).

[58] In **R v FSA**, Moore-Bick LJ, after a review of a number of the decided cases on the point, summarised the principle, and the reasons behind it, at paragraph 36:

> "The starting point, as emphasised by [the cases examined], is that only in exceptional cases will the court entertain a claim for judicial review if there is an alternative remedy available to the applicant. The alternative remedy will almost invariably have been provided by statute and where Parliament has provided a remedy it is important to identify the intended scope of the relevant statutory provision. For example, in the context of legislation to protect public health the court is very likely to infer that Parliament intended the

> statutory procedure to apply, even in cases where it is alleged that the decision was arrived at in a way that would otherwise enable it to be challenged on public law grounds, because it enables the real question in dispute to be decided. That will be particularly so if the procedure allows a full reconsideration on the merits of a decision which has direct implications for public health and safety. A remedy by way of judicial review, although relatively quick to obtain, simply returns the parties to their original positions. It does not enable the court to determine the merits of the underlying dispute. In a few cases strong reasons of policy may dictate a different approach: see *R v Hereford Magistrates' Court, ex parte Rowlands* [[1998] QB 110]; but such cases are themselves exceptional and do not in my view detract from the general principle. Ultimately, of course, the court retains a discretion to entertain a claim for judicial review, but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises." (Italics as in original)

[59] The mere fact that judicial review may provide a speedier, more effective or more convenient route for challenging a decision, does not by itself justify departure from the established principle (see **R v Chief Constable of the Merseyside Police** at pages 265, 266 and 267). In other words, the existence of a speedier and more convenient method does not necessarily constitute "exceptional circumstances".

[60] Examples of exceptional circumstances that will justify a grant of judicial review are, **R v Hillingdon London Borough Council** and **R v Chief Constable of the Merseyside Police**, on which Mr Wildman relied. The former was held to be an exceptional case because the decision of the local planning authority, against which judicial review was claimed, was likely to be overturned as a matter of law because it was, on its face, made without jurisdiction. The local planning authority sought to impose unreasonable (in a **Wednesbury** sense - **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1947] 2 All ER 680, [1948] 1 KB 223, CA) conditions on a building approval.

[61] In **R v Chief Constable of the Merseyside Police**, the Court of Appeal of England and Wales granted the applicants judicial review of a decision to separate them from their posts. It did so because of a procedural defect which prejudiced the applicants' prosecution of a statutory appeal. The defect was a delay of several years having elapsed before the authority informed the applicants that a complaint had been made against them. The delay meant that the applicants' access to records, other documentation and witnesses, had been severely prejudiced.

[62] In deciding whether any particular case meets the standard of being "exceptional", some guidance may be gleaned from the judgment of Moore-Bick LJ in **R v FSA**, where he said, at paragraph 30:

> "Arguments similar to those rehearsed in *Ferrero* were considered in *R v Falmouth and Truro Port Health Authority ex parte South West Water* [2001] Q.B. 445. The case concerned an application by the Health Authority to quash an abatement notice relating to the discharge of sewage into Carrick Roads. In his judgment, with which Pill L.J. (and on this issue Hale L.J.) agreed, Simon Brown L.J., having considered *Ferrero* in some detail, said at page 473D:
>
> > 'The lesson to be learnt is, I suggest, this. The critical decision in an alternative remedy case, certainly one which requires a stay, is that taken at the grant of permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will permission be appropriate in a case concerning public safety. **The judge should, however, have regard to all relevant circumstances which typically will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and (perhaps) the apparent strength of the applicant's substantive challenge**.'" (Italics as in original, emphasis supplied)

[63] Another issue to be considered in determining whether exceptional circumstances exist, is whether the statutory process would resolve the real question to be decided in that case. Taylor LJ explained the issue at pages 538-539 of **Ferrero**:

> "With respect to the learned judge, he did not, in my view, ask himself the right questions. **He asked whether, on a s 15 appeal, *Ferrero* could have aired their various complaints about the *Wednesbury* reasonableness of the council's decision lack of consultation and refusal to accept an undertaking in lieu of the notice** (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp*...) Having concluded they could not, he held they were entitled to proceed by judicial review. **He should have asked himself what, in the context of the statutory provisions, was the real issue to be determined and whether a s 15 appeal was suitable to determine it.** The real issue was whether the goods contravened a safety provision and the s 15 appeal was geared exactly to deciding that issue. If the goods did contravene the safety provision and were dangerous to children then, surely, procedural impropriety or unfairness in the decision-making process should not persuade a court to quash the order. **The determining factors are the paramount need to safeguard consumers and the emergency nature of the s 14 powers**." (Italics as in original, emphasis supplied)

[64] Mr Ivey has not demonstrated that exceptional circumstances exist in this case, in order to grant leave to apply for judicial review at this time. This is so for the following reasons:

a. the statutory review process is the more appropriate method of determining the real issue to be decided, which is whether he has been proved to be unfit to hold a firearm licence. The process of judicial review cannot decide that issue. It can only decide whether he was treated fairly at the first tier stage. The court does not have the information or the expertise which the Review Board would possess in considering an application for review.

b. the public interest requires that holders of firearm licences be fit to do so. The entities that are established by the Act are equipped to determine fitness. It is noted that in **Danhai Williams v The Attorney General and Others**, although this court quashed the decision of the Minister on the basis of an unfair procedure, it remitted the matter to the Minister to conduct a proper hearing.

c. the statutory review process is more likely to be swifter than the process for judicial review. The statutory process establishes a 90-day period for a decision to be made. It is true that there have been examples of a departure from that standard (**Raymond Clough v Superintendent Greyson and Another** being an example), but not only is that not sufficient to create exceptional circumstances, but the Act also provides a direct route to the Minister if the Review Board fails to execute its duties within the prescribed time. The reference, by Mr Wildman, to evidence of previous breaches is not of assistance as each case must turn on its own facts. In any event, the matter of the real question to be decided has to be considered.

[65] The other point raised by Mr Wildman, in respect of the issue of the alternative remedy, must also fail. Mr Wildman lays heavy emphasis on the fact that the Gazette announcing the appointment of the Review Board was dated after the expiry of the period allowed for Mr Ivey to have applied for a review. Learned counsel relied on the decision of this court in **National Housing Trust v Treebros Holdings Ltd**. In that

case, the court expressed the view that the court will take into account the contents of Gazettes. It said:

> "[35] Section 5 of the Jamaica Gazette Act stipulates that the publication of an official appointment in the Jamaica Gazette must be taken into account.
>
> …
>
> [37] The Act, being legislation, and the orders contained in the Gazettes, promulgated in pursuance of the Act, being subsidiary legislation, having been brought to the court's attention, cannot be ignored."

[66] The reasoning in that case does not assist Mr Ivey's case, in fact, it militates against him. It is in section 31 of the Interpretation Act that the issue is to be resolved. The section states:

> "(1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.
>
> (2) The production of a copy of the *Gazette* containing any regulations shall be *prima facie* evidence in all courts and for all purposes of the due making and tenor of such regulations." (Italics as in original)

[67] As pointed out by Miss Foster, the Gazette of 16 June 2020 does provide "otherwise", in that it stipulates an earlier date on which the appointment became effective. The relevant portion of the Gazette states:

> "APPOINTMENT
>
> No. 136
>
> In accordance with the powers conferred upon the Minister of National Security, by the provisions of the Firearm [sic] Act, the following persons have been appointed Chairman and members of the Firearm Licensing Authority (FLA) Review Board for a period of three (3) years with effect from May 20, 2019 to May 19, 2022.
>
> …"

[68] The Fourth Schedule of the Act describes the constitution of the Review Board. Paragraph 2 of that Schedule states that "The members shall be appointed by the Minister by instrument in writing and shall, subject to the provisions of this Schedule, hold office for a period of three years".

[69] The court was also provided with a copy of the Minister's letter, dated 3 June 2019, to the CEO informing him of the appointment of the members of the Review Board. Following the reasoning in **National Housing Trust v Treebros Holdings Ltd**, the court would take into account that the Review Board had been appointed from 20 May 2019 and, therefore, was in place on 19 June 2019, when the FLA issued the revocation notice to Mr Ivey.

[70] On the above reasoning, Mr Ivey has not demonstrated that he is entitled to be granted leave to appeal from the learned judge's refusal to allow him leave to apply for judicial review.

The learned judge's exercise of her discretion

[71] As this was an application for leave to appeal, the court was not provided with a copy of the learned judge's reasons for refusing to grant leave to apply for judicial review. The above reasoning has demonstrated that there is no basis for asserting that the learned judge erred in her decision.

A conundrum

[72] Unlike the situation in **R v Chief Constable of the Merseyside Police** and **R v FSA**, Mr Ivey did not seek judicial review after having initiated the statutory appeal process. He placed sole reliance on the application for judicial review. That application having been refused, if the time allowed by the statute has expired, Mr Ivey would be left without an opportunity to challenge the Authority's decision. Miss Foster submitted that he had left himself without a remedy on his own volition.

[73] The absence of a remedy in similar circumstance is what, in part, led to the grant of leave to apply for judicial review in **Fenton Denny v The Firearms Licensing Authority** [2020] JMSC Civ 97. In that case, Mr Denny also applied for leave to apply for judicial review without first pursing the statutory remedy. Whereas no comment is here made about the learned judge's exercise of her discretion in that case, it must be said that the preponderance of the authorities suggest that the statutory remedy should not be disregarded in the event that there is disagreement with a ruling by the Authority.

[74] The prospect of Mr Ivey being left without a remedy, albeit by his own action, is uncomfortable. There is, perhaps, some hope for him. It is noticed that there is now some inconsistency between the Act and the 1967 regulations. The new statutory framework of 2005 created the Authority. Section 37(1) of the Act, as mentioned above, stipulates that "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". The Act, however, does not specify the "prescribed time". The only reference to a time within which to apply for a challenge to a decision to revoke, is that made in the 1967 regulations. Regulation 3 of those regulations states:

> "(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." (Emphasis supplied)

Those regulations, refer to section 37 before it was amended in 2005. They, therefore, speak to an appeal being made by way of a notice, which is directed to the Minister.

[75] Learned counsel have indicated that no regulation has been created to mesh with the new framework created by the Act. Accordingly, a legislative gap exists as to

the method for applying to the Review Board for a review. The situation is not satisfactory. In the absence of appropriate regulations, it is recommended that, in Mr Ivey's case, either the Review Board, under the Act, or the Minister, by virtue of the regulations, should grant an extension of time within which to make his application to the Review Board for a review of the Authority's decision. The court having refused leave to appeal, it has no authority to make any order or any declaration that would have any coercive effect on either the Review Board or the Minister.

Costs

[76] Whereas costs are not usually granted in the Supreme Court against an applicant in applications for judicial review (see rule 56.15(5) of the Civil Procedure Rules 2002 ('the CPR')), that provision does not apply at the appellate level, as part 56 of the CPR is not incorporated into the Court of Appeal Rules. The difference in approach between the first instance and appellate stages in applications for judicial review, was considered by this court in **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Another** [2016] JMCA Civ 24A. Instead of applying the principle in rule 56.15(5) of the CPR, the court applied the general rule regarding costs, namely rule 64.6(1) of the CPR, which states:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

[77] The court may depart from the general rule if the circumstances so require. In this case, there is no need for departure. The Authority has completely succeeded in resisting Mr Ivey's application. Although Mr Ivey may have had a good reason to be dissatisfied with the treatment meted out to him by the CEO, he should have realised that there is a distinction between the CEO's actions and the decision of the Authority. Accordingly, he should have pursued the remedy afforded to him by the statute. A judge of the Supreme Court so indicated. His challenge to that decision was misguided. The Authority should have its costs of the application.

Conclusion

[78] Mr Ivey has not demonstrated that the learned judge made any error in her decision to refuse him leave to apply for judicial review. On the reasoning set out above, it has not been shown that the Authority erred in its procedure in revoking Mr Ivey's licences. Nor has it been shown that exceptional circumstances exist to justify implementing judicial review, whilst the statutory alternative allows for an effective challenge to the Authority's decision.

[79] Mr Ivey, if he is so minded, should apply to the Review Board or to the Minister for an extension of time within which to apply to the Review Board for a review of the Authority's revocation of his firearm licences.

EDWARDS JA

[80] I have read, in draft, the judgment of Brooks P and agree with his reasoning and conclusion. I have nothing to add.

DUNBAR-GREEN JA (AG)

[81] I too have read the draft judgment of Brooks P. I agree with his reasons and conclusion and have nothing to add.

BROOKS P

ORDER

(1) The application for leave to appeal from the decision of the Supreme Court handed down herein on 28 May 2021 is refused.

(2) Costs to the respondent to be taxed if not agreed.