[2023] JMSC Civ 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV03532

BETWEEN	**HARTFORD MONTIQUE**	**APPLICANT**
AND	**FIREARM LICENSING AUTHORITY**	**RESPONDENT**

IN CHAMBERS

Mr Hugh Wildman instructed by Hugh Wildman & Company for the Applicant.

Ms. Alanna Wanliss, Legal Officer, Firearm Licensing Authority

Mr Hartford Montique, present

Heard: January 17 and March 8, 2023.

Application for leave to apply for judicial review – Seizure of firearm pending investigation into criminal charges – Whether seizure is in contravention of the Firearms (Prohibition, Restriction and Regulation) Act 2022 or Firearms Act, 1967 – Delay as a bar – Alternate remedy provided in stature – Firearms Act, 1967 applied

WINT-BLAIR J

[1] This is an application for leave to apply for judicial review. The applicant by way of notice of application[1] seeks the following:

> *i) A Declaration that Section 20 of the Firearms Act [2022] or its predecessor Section 26 in the repealed Firearms Act, does not permit the Respondent to detain the Applicant's firearm pending the determination of the Respondent's investigation.*
>
> *ii) A Declaration that only the Minister of National Security acting under Section 82(1) of the Firearms Act is empowered in the interest of national security to require the Applicant to deliver to the Respondent the Applicant's firearm on terms and conditions specified in Section 82(2) of the Firearms Act.*
>
> *iii) A Declaration that the continued detention of the Applicant's firearm by the Respondent for purposes of conducting an investigation is illegal, null and void and of no effect.*
>
> *iv) An order of certiorari quashing the continued detention of the Applicant's firearm by the Respondent.*

Background

[2] The applicant, Hartford Montique, is a musician and promoter and had first been granted a firearm licence by the Firearm Licensing Authority ("the Authority") in 2002. He said he had successfully renewed his firearm licence, every year until 2018. In 2018, the applicant attended the offices of the Authority and was informed by a member of staff that there was information that he had a conviction. The applicant, had been charged in 2005 for the offences of assault occasioning bodily harm, malicious injury to property and unlawful wounding, but has not been convicted. His firearm was seized on

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[1] Filed on November 22, 2022

that same day by the respondent to perform an investigation into the criminal matters, it has not been returned to him nor has he received a revocation order from the respondent.

Submissions on behalf of the Applicant

[3] Counsel for the applicant submitted that the respondent is not empowered under the Firearms Act (Prohibition, Restriction and Regulation) Act 2022, to seize the applicant's firearm, pending an investigation as such seizure in the absence of a revocation order is ultra vires, and that action is deemed a nullity.

[4] It submitted that on a plain reading of the Act and in absence of any implied powers within that Act, the respondent is not clothed with any such power of seizure. Counsel submitted that a literal approach should be taken in interpreting the statute and that the statute clearly does not permit the respondent to seize and detain the applicant's firearm.

[5] It submitted that the case of **Commissioner of Independent Investigations v Police Federation**[2], applies to the instant case, where the court stated that the approach to statutory interpretation must be one that gives the statute its plain and ordinary meaning, unless to do so would result in some manifest absurdity. The Privy Council found that no manifest absurdity was created when the statute was interpreted to deny INDECOM the power to arrest and charge anyone during the course of its investigation for a substantive offence.

[6] The denial of the implication of the power to seize a firearm during the respondent's investigation is even more strong, having regard to Section 35A of the Firearms Act, 1967 which has now been incorporated into Section 82(1) of the Firearms Act (Prohibition, Restriction and Regulation) Act 2022.

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[2] [2020] UKPC 11

[7] It is submitted that once Parliament passed the Firearms Act (Prohibition, Restriction and Regulations) Act, 2022, the respondent was given certain powers in respect of the issuing and revocation of firearm licences, among other things. The Minister has been specifically empowered by Parliament to have a licensed firearm holder surrender his firearm, where such surrender, is necessary in the interest of national security. It is submitted that this is the only basis on which a licensed firearm holder can be deprived of his firearm, in the absence of a revocation order. Accordingly, there is no available remedy to the applicant for the seizure and detention of his firearm, in absence of a revocation order, since the Act does not provide a remedy for such seizure and detention of the firearm.

[8] In the absence of the revocation of a licence, if the respondent deems it fit to have a licensed firearm holder surrender his firearm, this must be done through the Minister and not by the respondent. Further, the respondent has no inherent power to seize a firearm during an investigation as this is outside the scope of its powers. Counsel relies on the cases of **Carlton Smith, Lascelles Taylor v Commissioner of Police et al**[3] and also the case of **National Transport Co-operative Society Limited v Attorney General of Jamaica**[4].

[9] In the instant case, it is submitted that the Minister has not issued a notification for the applicant to surrender his firearm, pursuant to Section 35A (2) of the Firearms Act, 1967 or Section 82(1) of the Firearms Act (Prohibition, Restriction and Regulation) Act 2022. The respondent's action, is a usurpation of the Minister's power under Section 35A. Therefore, when the respondent seized the applicant's firearm on the basis that it was investigating the applicant, it acted ultra vires, its actions should be deemed a nullity and an order of certiorari should be granted to quash it.

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[3] [2015] JMCA Civ 58

[4] [2009] UKPC 48

[10] In respect of this nullity, counsel submitted that any decision taken by the respondent other than to return the applicant's firearm and renew the applicant's firearm user licence will be incurably bad as any act flowing from the nullity is void. Counsel relies on the case of **Macfoy v United Africa Company Limited**[5], where Lord Denning stated at page 3:

> *"The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity…"*

[11] It is further submitted that the applicant was not served personally or by Gazette or by newspaper with any notice by the Minister to surrender his firearm, prior to the detention of his firearm by the respondent nor was he served at any time following the act of detention. On this basis, it is contended that the respondent continues to act illegally, its actions being in breach of the Act.

[12] The respondent lacks the authority to use its powers for a special interest, even in instances where the object may be in the public's interest. This accords with the principle established in **Pyx Granite Co. Ltd v Ministry of Housing and Local Government**[6].

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[5] [1961] UKPC 49

[6] [1958] 1 QB 554

[13] It is contended that the actions of the respondent are illegal and arbitrary and represent a wanton disregard of the applicant's rights and demonstrates an abuse of power. It is further submitted that the issue of delay does not arise, in respect of the application for leave to apply for judicial review, since the seizure and detention of the applicant's firearm by the respondent is a continuing act.

Respondent's Case

[14] In order to be successful in the application for leave for judicial review, it is submitted that the applicant must demonstrate that the respondent in seizing and detaining his firearm, had committed a breach of law, practice or procedure and/or acted irrationally. It is the respondent's case that the applicant's firearm was seized and detained, in order to conduct an investigation into the charges of assault occasioning bodily harm, malicious injury to property and unlawful wounding, against the applicant which are considered to be egregious in nature. The seizure of a firearm by an Authority so empowered has been demonstrated in previous cases. Counsel relies on the case of **Fenton Denny v The Firearm Licensing Authority,**[7] in which the applicant's firearm was similarly seized during his last renewal application, in order to investigate an outstanding criminal case from 1999, despite successfully renewing his on two previous occasions.

[15] Section 26B(2)(c) of the Firearm Act grants the respondent the power to:

> *"…do all such other things as it considers necessary or expedient for the purpose of carrying out its functions under this Act."*

[16] It is submitted that, in the instant case, a *nolle prosequi* was entered in the matter against the applicant, solely on the basis that the proceedings against the applicant may be commenced *de novo* so soon as another criminal matter concerning the extradition of the applicant, had been settled.

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[7] [2020] JMSC Civ 97

[17] Although, the respondent was advised by the applicant that he was never convicted, had the respondent not seized and detained the firearm and conducted an investigation into the matter, the firearm would have remained in the possession of a holder, who the respondent would later consider to be unfit to remain in possession of it.

[18] It is submitted that the Board of the Authority formed the view that the applicant is no longer fit and proper to remain in possession of a firearm, for the reason that there are multiple criminal charges laid against the applicant. A decision was made on September 23, 2022 to revoke the licence issued to the applicant. It is trite law that the dismissal of a criminal charge does not prevent the Authority from finding that an applicant is not fit and proper pursuant to Section 36(1)(a) of the Firearms Act.

[19] In the case of **Steadman Broderick v Firearm Licensing Authority**[8], Hart-Hines J (Ag) stated at paragraph 24:

> *"…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 license holder make him/her unsuitable to continue to hold the licence…"*

[20] Accordingly, the use of the word "*otherwise*" in Section 36(1)(a), provides a wide range of factors that the respondent may take into consideration and the respondent must be satisfied that these factors when considered, render the applicant unfit to be entrusted with a firearm.

[21] It is submitted in respect of the revocation order, that the order is currently being prepared and will accordingly be served on the applicant. Once the order is served, the applicant will have available the statutory remedy under Section 37, to challenge the revocation.

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[8] [2020] JMSC Civ 197

[22] It is therefore submitted that the seizure and continued detention of the applicant's firearm by the respondent, during the renewal process was neither illegal, irrational or procedurally improper but rather was done in the interest of justice and public safety.

[23] The threshold test for leave to apply for judicial review is set out in the Privy Council decision in **Satnarine Sharma v Carla Brown Antoine, Wellington Virgil and another**[9]. It is submitted that the court must be satisfied that there is an arguable ground for judicial review having a realistic prospect of success not subject to a discretionary bar such as delay or an alternative remedy. In addition, Rule 56.6 (1) of the Civil Procedure Rules 2002 ("the CPR"), mandates that the applicant act promptly and within three months of the decision when making an application for leave for judicial review.

[24] The applicant is challenging the seizure and detention of his firearm by the respondent. The seizure and detention of his firearm occurred on August 21, 2018 and thus he has failed to act promptly in making his application for leave to apply for judicial review. It is submitted that in light of his undue delay and any lack of good reason for this delay, there is a discretionary bar of delay applicable to the applicant's case and thus, time should not be extended in which the applicant may apply for leave for judicial review. Therefore, the applicant's application for leave to apply for judicial review should be refused.

The Evidence

[25] In his affidavit[10], Mr. Montique depones that he visited the respondent's offices in 2018 for recertification. Once there, he was informed that he had to have his fingerprints taken. He was informed that there was information that he had been

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[9] [2006] UKPC 57

[10] Filed November 22, 2022

convicted. The applicant deponed that he indicated to the staff member that he has been charged but not convicted.

[26] He further stated that his firearm was immediately taken from him when he attended the offices and that he has not been served with a notice of revocation.

[27] He stated that to date, he has made numerous enquiries of the respondent but to no avail. As a result of the seizure of his firearm, he is now exposed to criminal elements as he is a well-known musician and promoter.

[28] The affidavit[11] of Letine Allen, Director of Compliance and Enforcement at the Authority, states that the firearm user's licence issued to the applicant was due to expire on August 23, 2018 and that he attended the offices of the respondent on August 21, 2018, in order to renew the said licence. Ms. Allen stated that it was at this time, that the respondent became aware of the adverse information against the applicant and his firearm was seized with the intention of carrying out an investigation into the matter.

[29] The investigation conducted by the respondent, revealed that in 2005, the applicant was charged for the offences of assault occasioning bodily harm, malicious injury to property and unlawful wounding. A *nolle prosequi* was entered solely so that the proceedings against the accused may be commenced *de novo* as soon as the extradition matter had been settled. This information is contained in a letter dated September 11, 2008, from the Clerk of Courts at the Saint James Resident Magistrate Court marked LA1.

[30] Ms. Allen further deponed that despite the applicant not being convicted of the offences for which he was charged, the respondent is not prevented from finding that the applicant is no longer a fit and proper person to be in possession of a firearm. The case of **Aston Reddie v Firearm Licensing Authority and Others[12]**, is relied on to

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[11] Filed January 4, 2023

[12] HCV 1681 of 2019

support the position that neither convictions or acquittals by a court are conditions precedent for the Authority to act under the Firearms Act, as it has an independent right to assess the situation and come to a determination.

[31] The Board of Authority in this case, conducted its own assessment and having considered the findings of the investigation, formed the view that the applicant was no longer fit and proper to be in possession of a firearm, despite the applicant not being convicted of the offences for which he had been charged. As a result, the Board made the decision to revoke his licence on September 23, 2022 on the ground that the applicant was no longer fit and proper to be in possession of a firearm.

[32] Ms. Allen further deponed that a revocation order is being prepared by the Authority, which will be served on the applicant in short order and which would allow the applicant, if he chooses to do so, to apply to the Review Board under Section 37 of the Firearm Act for a review of the decision.

Discussion

Application for Leave

[33] An application for leave to apply for judicial review must be made promptly, and in any event, within three (3) months from the date on which the grounds for the application arose for the first time.[13] Where an order of certiorari is being sought to quash a judgment, order, conviction or proceedings, pursuant to CPR 56.6(3), the date on which the grounds for the application first arose is *"… taken to be the date of that judgment, order, conviction or proceedings."*

Delay

[34] Judicial review is a remedy of last resort. Consequently, the date on which the grounds for leave first arose is properly the date of the impugned decision of the

[13] Rule 56.6(1) of the CPR

Authority to seize the firearm. There has been no communication of the decision of the Board to revoke the licence to the applicant as he has not been served with a notice of revocation. The only decision he is aware of, on the evidence is that the firearm would not be returned to him based on the need for an investigation.

[35] The impugned decision of the Authority which Mr. Montique is seeking to quash having been made on the August 21, 2018, the date on which the grounds for leave would first have arisen was some four (4) years and three (3) months before the application for leave was in fact filed. Both sides have submitted that during this period, Mr. Montique could not have availed himself of the statutory remedy available to him under the Firearms Act to appeal to the Review Board as there was no issuance of the notice of revocation. I will return to this undisputed position later on.

Extension of time

[36] The application for leave was filed on November 22, 2022, some four years and three months after the date of seizure, it was not promptly made. Where an application for leave to apply for judicial review has not been promptly made, the court is nevertheless permitted to extend the time within which to make the application if there is an application before the court to extend time and if there is good reason for doing so pursuant to CPR 56.6(2) which provides:

"However the court may extend the time if good reason for doing so is shown."

[37] It is argued on the part of the applicant that time has not begun to run in this matter, as the respondent has failed to serve a notice of revocation regarding the firearm user's licence at issue and is therefore engaged in a continuing unlawful act. The applicant in those circumstances, is entitled to the grant of leave *ex debito justitiae*.

[38] In response, the respondent argues the Board of the Authority exercised its discretion, not to renew the firearm user's licence on the basis that the applicant is not fit and proper and a notice of revocation is being prepared which will be served on the

applicant. There has been no explanation for the length of time taken to either investigate the matter or to communicate the decision to revoke.

[39] In the case of **Regina v Secretary of State for the Home Department ex parte Anufrijeva,**[14] the House of Lords said time runs when the decision is communicated or received. At paragraph 26 of the judgment Lord Steyn said:

> *"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system…"*

[40] The learned authors of De Smith's Judicial Review state the following:

> *"With respect to timing and delay, the "grounds for the application" arise when the public authority does an act with legal effect, rather than something which is preliminary to such an act. The subjective experience and state of knowledge of the claimant are not relevant in determining a start date, though those facts may be relevant to whether time should be extended. The primary requirement is always one of promptness, and permission may be refused on the ground of delay even if the claim form is filed within three months.* ***A breach of a public law duty is a continuing one and does not necessarily make it irrelevant to take into account the date at which the breach began in considering any question of delay****. There is no general legislative formula to guide the court on issues of delay. Factors taken into account include: whether the claimant had prior warning of the decision complained of; and whether there has been a period of time between the taking of the decision impugned and its communication to the claimant.*

[14] [2003] UKHL 36

> *Good reasons for delay may include time taken to obtain legal aid; the importance of the point of law at stake; or that the claimant is awaiting the outcome of consultation. The mere fact that permission is granted does not mean that an extension of time for making the application is given; an express application for extension of time must be made.*[15]

[41] An applicant must therefore plead the substantive act or decision by which he is aggrieved, and this must be evident by his pleadings. This means that the applicant must know and state what was the impugned act or decision, in order to know when time begins to run. This is what grounds the application.

[42] Support for this approach is to be found in the well-known observations of Lord Diplock in **O'Reilly v Mackman**[16] to the effect that the public interest in good administration, requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary, in fairness to those affected by the decision.

[43] In light of the foregoing, on the threshold issue of delay in the making of the application for leave, the factors taken into account include the fact that the decision to revoke has not been communicated to the applicant up to the date of the affidavit of Ms. Letine Allen. There was no prior warning of the need to detain the firearm, the lengthy time period between the decision to detain and the decision to revoke, neither of which have been communicated to the applicant.

[44] The applicant makes the argument that his firearm has been unlawfully seized and relies on its continued detention. The evidence of the date on which this event took place is set out in the evidence of the respondent, as the applicant failed to give any other date except 2018. That date, August 21, 2018, was the date on which the applicant became aware that his property was taken away and why. In this regard, the

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[15] DeSmith, Judicial Review, 6th edn, page 842-843

[16] [1983] 2 AC 237, 280-281

case of **R (on the application of Anufrijeva) v Secretary of State for the Home Department** mentioned above is instinctive:

> *"The House of Lords made the point that because of the constitutional implications of people's property being taken away, one cannot ascribe time to any date other than the date when the Applicant became aware of the decision because it has constitutional implications.*[17]*"*

[45] The applicant had knowledge of the seizure as it was from him personally. However, the applicant cannot successfully argue that the information disclosed by the investigation was unknown to him.

[46] Having decided that the application has not been filed promptly and is far outside of the date when the grounds first arose, there is no application before this court for an extension of time.

[47] It is noteworthy that as from the applicant himself, there is no evidence before the court as to the reason for his delay between the date of seizure in 2018 and the date of the filing of this application. What has been placed before this court is the submission that time did not begin to run. There is an insufficient demonstration on the evidence of any good reason for an extension of time, as is required by Rule 56.6 (2.)

[48] Consequently, even if it were permissible to extend time, the applicant has not given evidence of a good reason such that the court may act on any such application for an extension of time to be granted in his favour. This finding is sufficient to establish that there is in fact a discretionary bar to this application. As a result, having failed the test for promptness, this application for leave to apply for judicial review cannot but fail. Delay is therefore a bar to the grant of leave to apply for judicial review.

[49] However, for completeness, I will go on to consider whether there is another discretionary bar to the application.

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[17] [2003] UKHL 36

Alternate remedy

[50] The statute provides for an appeal to the Review Board constituted by Section 37A of the Firearms Act. By Section 37 of the Act, an aggrieved party as defined by Section 37(3) means:

> *"In this Section the expression "aggrieved party" means* ***the applicant for*** *or the holder of* ***any licence****, certificate, exemption or permit* ***in respect of the refusal to grant*** *or the amendment or the revocation of which an application for review is made and the owner of the firearm or ammunition to which such application, licence, certificate or permit relates."*

[51] The holder of a licence may within the prescribed time and in the prescribed manner, having paid the prescribed fee, 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 sub-section (4) of section 35A."*[18]

[52] 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.

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[18] Section 37(1)

[53] It is open to the respondent, based on its governing statute, not to renew a licence or not to recertify at its discretion. This is in effect, a refusal to grant a licence. A licence holder whose licence is not renewed or recertified would no longer be the holder of a valid licence and would as a consequence be exposed to criminal charges, should the firearm be returned to him, moreover, this would be so at the behest of the respondent.

[54] In this case, had the firearm been returned to the applicant on August 18, 2018 he would have been without a valid licence on August 24, 2018, as no licence was granted to him on August 18, 2018 (his licence expired on August 23, 2018). It would be within this narrow window which would be determinative of whether or not the applicant was entitled to have the firearm returned to him.

[55] It is here that I recall that the applicant gave evidence that the firearm was taken from him when he attended the office **before** his fingerprints had been taken and **before** he was told about the information related to a conviction. That means he interacted with other staff members at the Authority, who did not view him with suspicion or seized the firearm from him based on any adverse information. This paints a different picture of the steps taken by the respondent than it would at first appear.

[56] Ms. Allen said the applicant came in to renew his licence. Mr. Montique said he went in for recertification of the licence. In my view, the seizure of the firearm from the applicant for recertification or renewal for the purposes of an investigation, is capable of review by the statutory body instituted for this purpose. It is the evidence that there was a distinction between being on charges as indicated by the applicant and being convicted as was the information of the respondent. In the context of a licence, which was set to expire on August 23, 2018, the matter was one which was under investigation as at August 18, 2018.

[57] It is for the applicant to show exceptional circumstances, which would allow him to bypass the appellate procedure set out in the statue and to apply instead for judicial review.

[58] The case of **R v Chief Constable of the Merseyside Police, ex parte Calveley and others**[19] stands for the proposition that 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 There has to be evidence of circumstances which led to a decision or action likely to be overturned as a matter of law. This will constitute exceptional circumstances.

[59] In the instant claim, there is no evidence of exceptional circumstances. Rather, there have been submissions regarding the decision of the respondent to seize the firearm as being ultra vires and the failure of the respondent to issue a notice of revocation. The court requires evidence upon which to act.

[60] The statutory review process is the more appropriate method of determining the real issue to be decided, which is whether the applicant is unfit to hold a Firearm Users Licence. That was the decision, which was made by the Authority when it failed to renew or recertify the licence which was set to expire on August 23, 2018.

[61] The process of judicial review cannot decide that issue. It can only decide whether the applicant was treated fairly by the respondent. The court does not have the information or the expertise which the Review Board would possess in considering an application for review. The application for review which ought to have been made was pursuant to the refusal to grant the application for recertification. The seizure of the firearm was a preliminary step in that process. The decision with legal effect was that of the refusal of the Authority to recertify the licence which expired on August 23, 2018.

[62] Secondly, public interest requires that holders of firearm licences be fit to do so. The entities that are established by the Act are the ones with the expertise to decide on issues regarding fitness.

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[19] [1986] 1 All ER 257, at pages 265, 266 and 267

[63] Thirdly, 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 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.

[64] I need not move on to the next ground having come to these conclusions. However, in the event that I am wrong I will go on to look at arguability.

Whether the application disclosed any arguable ground for judicial review with a realistic prospect of success

[65] The applicant was advised that he had been convicted of an offence, he disputed this position, stating that he had merely been charged. An investigation took place, the respondent acquired a letter from the St. James Parish Court regarding the status of the criminal matters against the applicant, it is dated September 11, 2008. The reason for that date is not in evidence.

[66] The instant claimant, relies on the seizure of the firearm while criminal charges are extant, for if they are not, there is no evidence before this court to the contrary.

[67] It is in the evidence of the applicant that he attended upon the offices of the respondent for recertification. This is different than renewal. At this stage, the licence would have expired on the birthday of the applicant, the applicant has not supplied any information to this court as to the date the licence would have expired (being his birthday), or the date of his visit for recertification. He said the firearm was immediately taken from him when he reported to the office for recertification. His fingerprints were taken.

[68] Ms Letine Allen in her evidence says that the applicant attended to renew his licence on August 21, 2018, she gives evidence as to the date of its expiry as August 23, 2018. This is different than recertification.

[69] Recertification and renewal engage separate Sections of the Act. Renewals engage Section 44 of the Firearms Act and concern duty payable annually to the Collector of Taxes. Recertification concerns the expiry of the licence and engages Section 34 of the Act. The applicant would have previously satisfied the criteria set out in Section 28 and 33 and 44 of the Firearms Act in order to be qualified for recertification pursuant to Section 34 of the Act.

[70] It is not disputed that the firearm was taken from the applicant, and not returned to him. The statute does not use the word *seized* and Mr Wildman contends that the respondent cannot *seize* the firearm as this is not within its power of functions. His submissions were narrowly focused without giving regard to the application sought by Mr. Montique as on the uncontroverted evidence before the court, there was no valid Firearm Users Licence in existence after August 23, 2018. It is this decision, which was capable of review when all of the circumstances are viewed objectively. The context in which the respondent acted has to be taken into account.

[71] The applicant contends that the recently promulgated Firearms (Prohibition, Restriction and Regulations) Act, 2022 governs the issues raised on this application. I disagree as the actions of the respondent complained of in this case were then governed by the Firearms Act, 1967. There was no other statute then in existence. The court cannot place retrospective effect on the actions of the respondent.

[72] The respondent argues that to be successful at the leave stage, it is for the applicant to show that the seizure and detention of the firearm licensed by the respondent was a breach of the law, practice or procedure or irrational.

[73] There must be some basis for challenging the decision making process which is sought to be impugned. The actions of the respondent are subject to review by a statutory process. This has not been engaged for the reasons set out above. It is to the court that the applicant now seeks relief.

[74] In considering the nature and gravity of the evidence, both sides have no factual dispute. The issues to be decided are the construction of the provisions of the statute conferring power on the respondent under the Firearms Act, 1967.

[75] The applicant has furnished no evidence to this court, regarding criminal court proceedings in which he may have been or is still involved. There is a duty of candour on his part. The evidence as to criminal proceedings was not set out in the applicant's affidavit in this court. Rather, it was disclosed in the affidavit of Ms. Letine Allen filed on January 4, 2023. Whether the extradition proceedings have been settled is a relevant factor in the decision making process of the respondent, as would be any criminal charges to commence *de novo*, it is noted that all of this is absent from the applicant's evidence. The pending criminal charges are capable of being construed as a *prima facie* case in terms of a decision to be made whether to grant a licence by the respondent. There is no issue of bad faith. The decision of the respondent was based on the material before it. The next step, was to inform the licence holder of its decision, which it is argued would trigger the right to review. I disagree that this is a case in which the notice of revocation would trigger a right of review by the Review Board. In the case at bar, it was the decision not to grant a licence, the existing licence having expired which operated against the applicant.

[76] The evidence of Ms. Allen, is that the Board did its assessment, considered the findings of the investigation and formed the view that the applicant was no longer fit and proper despite the applicant being charged and without being convicted. A decision to revoke was made on September 23, 2022. There is no evidence that the said decision was communicated to the applicant and the respondent has yet to serve the notice of revocation on the applicant. The decision not to grant the licence had legal effect and was capable of review long before the decision to revoke the licence was made.

[77] The submissions of the applicant fail to acknowledge the power given to the Authority, under Section 26B(1)(b) of the 1967 Act which sets out the functions of the Authority to grant or renew firearm licences, certificates or permits.

[78] It could not be seriously argued that previous renewals therefore ought to lead to an automatic renewal. It was incumbent on the applicant, to put this court in a position to decide on the question of arguability.

[79] This is made even more stark in that, the applicant failed to himself, adduce any evidence to show that he placed before the Authority any material upon which it should have exercised its discretion in his favour. The burden of proof rests with the applicant, to satisfy the court on a balance of probabilities that leave should be granted. The parties have an obligation to put the court in a position to decide on the issues raised in the case before it. This is consistent with each party's responsibility, to assist the court in advancing the overriding objective of dealing justly with cases[20]. Given the nature and gravity of the evidence, the applicant has failed in his duty to advance a challenge to the impugned decision to seize the firearm. The applicant has failed to discharge that responsibility.

[80] The Authority has a duty to act fairly and the decision of **Raymond Clough v Superintendent Greyson & Anor[21]**, stands for the proposition that it should have a *prima facie* case before it and to act in good faith. In that case, the words "*otherwise unfitted*" or "*fit and proper*" have been judicially defined by the Court of Appeal:

> *"In the present case, we are called upon to construe a phrase "otherwise unfitted" in the Firearms Act. In my view, "otherwise" has the ordinary dictionary meaning of "in other respects". The list of disabilities forms no particular class; a drunkard and a mad man have altogether dissimilar characteristics. The intention of the statute is an important aid to construction.* ***The plain intention of the statute is stringently to control the possession of firearms****. The fact that a specialized Court has been created to adjudicate in gun related offences is more than ample proof of that*

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[20] CPR Rule 1.1

[21] (1989) 26 JLR 292

intention. As undoubtedly it is the police who are charged with enforcing the law, it would be absurd to suggest that a licence holder could commit gun related offences or any other serious criminal offence for that matter and be immune from having a licence previously issued to him, revoked by the "appropriate Authority". The conclusion is, in my judgment, irresistible, that "otherwise unfitted" includes a person who is involved in criminal activity. Such a person, Mr. Grant contended, fell entirely outside the class or genus which the Section prescribed. I am quite unable to accede to that proposition."

[81] I am mindful that at the leave stage, this court is only concerned with whether the threshold is met. It is here that I go the arguability of the applicant's case as set out in **Sharma v Brown-Antoine[22]:**

"…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."

[82] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. in explaining the

[22] [2006] UKPC 57

concept of ‘arguable ground with a realistic prospect of success’, stated a paragraph 11 that:

> *“It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success.”*

[83] There is simply no utility in keeping cards close to one’s chest at this stage, for it is the strength or quality of the evidence adduced by the applicant that is required to be placed before the court for its decision on a balance of probabilities. The burden is on the applicant to adduce evidence which demonstrates that there was a breach of a public duty on the part of the Authority. This he has failed to do.

[84] Orders:

1. The orders sought in the notice of application for leave to apply for judicial review are refused.

2. No order as to costs. This order is made subject to the filing, and serving of written submissions on this issue within seven days of the date hereof. The issue of costs will be determined on paper. The failure to file submissions means the order as to costs shall stand.

Wint-Blair, J