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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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DGD's Application [2011] NIQB 123

IN THE MATTER OF AN APPLICATION BY DGD
Revocation of Firearm Licence
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE MINISTER OF JUSTICE TAKEN ON OR ABOUT 3 MARCH 2011

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TREACY J

Introduction

[1] By this application the applicant challenges a decision of the Minister of Justice dated 3 March 2011 dismissing the applicant's appeal against the decision of the Chief Constable to revoke his Firearms Certificate.

Factual Background

[2] The applicant was granted a Firearms Certificate ("FAC") on 17 July 2005 to retain at *his* home address, 3 shotguns, a semi-automatic rifle and ammunition for sporting purposes and pest control. PSNI's Firearms & Explosive Branch ("FEB") were notified on 8 October 2007 of an incident in July 2007 when local police were asked to attend the applicant's home about an unrelated matter and to remove his firearms and ammunition. The applicant advised the attending officers that three of his firearms were being stored in a secure cabinet at his father's house, from where they were later retrieved and given to the police.

[3] Following the removal and retention of the applicant's guns by the PSNI he was informed by letter dated 3 February 2009 from the FEB that he was in breach of his FAC conditions as he had not been authorised to store his firearms at his father's

address and, therefore, he had allowed another person to have illegal access to them. They indicated that they were minded to revoke his FAC, as they were not satisfied that he was a fit person to possess firearms and ammunition without danger to public safety or the peace and invited him to make representations.

[4] The power of the Chief Constable to revoke on this basis is contained in Art 9(2) of the Firearms (NI) Order 2004 ("the 2004 Order) which provides as follows:

> **"9. ...**
>
> **(2) The Chief Constable may revoke a firearm certificate if he has reason to believe that the holder-**
>
> **(a) is not a fit person to be entrusted with a firearm; or**
>
> **(b) does not have a good reason for having in his possession, or for purchasing or acquiring, any firearm or ammunition to which the certificate relates."**

[5] In response to this invitation to make representations the applicant made the case that he had temporarily secured the weapons in the gun cabinet at his father's house. This was to promote the safety and security of the guns by minimising unauthorised access during his temporary absence on vacation when his own home would be unoccupied. His gun safety concerns having been heightened by the fact that an unidentified work colleague had some time earlier returned from holiday to find his firearms had been stolen. His father was, and remains, a longstanding FAC holder of many, many years. Both have been licensed holders of firearms without incident. Throughout his 20 years as a FAC holder the applicant stated he had been acutely aware of the need to store firearms safely and securely; subsequent to his marriage and leaving his parent's home he purchased his own gun safe and individual gun locks. He explained that his firearms were being held in his father's safe, were individually gun locked and only the applicant had the keys to those gun locks. He claims he was advised by the local Firearm Officer, Sergeant Terry Stewart, that as long as he told no-one and that his firearms were only held at his father's home for a short period of time this arrangement was acceptable. This dispelled the applicant's fears and resulted in him placing his firearms in his father's cabinet. The applicant explained that on return from a short holiday he only took one gun from his father's cabinet as there was no more space in the car because of the presence of his wife, child, luggage and shopping. He stated that it had been his intention to collect the remaining firearms the following day.

[6] As appears from the above narrative the applicant claimed that this temporary arrangement, was, for the reasons given, sanctioned by Sergeant Stewart

who was the local firearms officer at the material time. [I interpose to note that there was considerable debate before the Court about the allegedly differing accounts given by the applicant about the timing of this conversation and whether it was one or more conversations with Sergeant Stewart. This culminated in a third and final affidavit from the applicant, filed at the direction of the Court, dealing in somewhat more detail with this aspect. Although the FEB had earlier expressed some reservations about his earlier accounts and such claims can be difficult to substantiate the Minister (prior to Sgt Stewart being tracked down and spoken to) proceeded on the basis that "whatever may have been said by former Sgt Stewart [the Minister] was not persuaded that all necessary steps were taken to prevent unauthorised access to the guns". Sgt Stewart filed an affidavit in these proceedings deposing that he had no recollection of the conversation and, as such, could not categorically state that it did not take place. In these circumstances I do not propose to address this issue further].

[7] The FEB considered the applicant's comments but was not satisfied that he was a fit person to be entrusted with a firearm and revoked his FAC on 17 June 2010. Pursuant to Art74[1] of the 2004 Order the applicant appealed against the Chief Constable's revocation of his FAC.

[8] Following the lodging of the Notice of Appeal the Department of Justice Firearms & Explosives Branch corresponded with the PSNI Firearms & Explosives Branch, raised questions with the applicant and gave him the opportunity to make further representations. This culminated in a detailed submission by DoJ officials to the Minister for Justice prior to his personal consideration of the appeal.

[9] The report/submission to the Minister appended all the relevant documents and concluded with the recommendation that the Minister allow the appeal. This

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[1] **Appeal from decision of Chief Constable**

74.—(1) A person aggrieved by a decision of the Chief Constable under this Order may appeal to the Secretary of State if it is a decision to which this Article applies.

(2) On an appeal under this Article the Secretary of State may make such order as he thinks fit having regard to the circumstances.

(3) This Article applies to the following decisions of the Chief Constable under this Order—

(a)a refusal to grant or vary any certificate;

(b)a revocation of a certificate;

(c)a condition attached to any certificate or the variation of such a condition;

(d)a requirement to surrender a certificate of approval under Article 17(3) or 18(2);

(e)an order under Article 72(4).

(4) In this Article—

"certificate", except in the expression "certificate of approval", includes a permit or authorisation under this Order;

"grant" includes issue;

"revocation" includes—

(a)in relation to a firearm certificate, partial revocation under Article 9;

(b)in relation to a firearms dealer's certificate, the removal of a place of business under Article 32;

"vary any certificate", in relation to a firearms dealer's certificate, includes adding a place of business under Article 31.

report was signed by Nicola Ellis and the recommendation was approved by Eric Kingsmill and William Stevenson head of the Firearms & Explosives Branch of the Department of Justice. Mr Stevenson swore a very helpful affidavit explaining the procedural history of the appeal, exhibiting relevant documents including the submission to the Minister recommending that the appeal be allowed. The report/submission to the Minister is itself an extremely helpful document setting out with great clarity the background to the appeal. The report stated as follows:

> **"On balance, you might consider that DGD could be given the benefit of doubt, that he informed the PSNI of the arrangement and that he did everything practicable to secure his firearms and ensure there was no unauthorised access, by his father or anyone else, to his firearms while he was away.**
>
> **RECOMMENDATION:**
>
> **17. I recommend that you allow DGD's appeal.**
>
> **18. If you agree, we could point out to DGD that in future he would do well to inform FEB in writing of any such proposed arrangement and wait their written permission before implementing it."**

[10] That report was dated 22 February 2011 and Mr Stevenson has endorsed his agreement to the recommendation in manuscript on 23 February 2011.

[11] However, on 28 February 2011, the respondent Minister, as he was fully entitled to do, declined to follow the recommendation and in a very brief manuscript comment rejected the appeal for the following reasons:

> **"Appeal refused. I am not satisfied that DGD had properly secured his guns, which were certainly not in proper storage on his own premises. Whatever may have been said by former Sgt Stewart, I am not persuaded that all necessary steps were taken to prevent unauthorised access to the guns."**

[12] Before turning to the principal grounds of challenge I remind myself of the context of the present application which is that the Minister's decision is concerned with ensuring the important public interest that only fit persons are licensed to possess firearms. That is a judgment for the Minister to make on the basis of the material presented to him. It is not the function of this Court to substitute its judgment as to whether an applicant is or is not a fit person. That would be constitutionally impermissible.

[13] The applicant challenges the decision on a number of bases including *Wednesbury* irrationality and alleged disproportionality. However, the threshold of *Wednesbury* irrationality is high and in the context of the manifest public interest in play the Minister necessarily enjoys considerable but not unfettered latitude in forming that judgment.

[14] The applicant presented an elaborate attack on the impugned decision on the basis that the conditions of his licence did not specifically require him to store his guns *at his home address* and therefore he was not in breach of his FAC conditions. This, as Mr McMillen for the respondent has pointed out, entirely misses the point. The guns must be kept in a secure cabinet but *in the possession of the applicant*. This will normally be in the applicant's home in the cabinet that has been inspected in situ by the police. If the weapons are in the possession of anyone else that could involve the commission of a criminal offence although it has to be borne in mind that the applicant in this case has consistently made the case that the temporary relocation of his guns for a short period to his father's secure gun cabinet was authorised by the local firearms officer.

[15] The FAC authorises the applicant to have possession of the weapons identified in the certificate which must be securely stored in his inspected and approved gun cabinet. In his application for a FAC the premises at which they will be stored are identified as his home address which is then inspected as is the gun cabinet and the arrangements for storage. Whilst there are a number of situations in which it is clear the gun may not be so housed e.g. gun maintenance, transit, legitimate use etc the expectation is the gun will otherwise, absent approved arrangements to the contrary, be housed in the inspected gun cabinet in his house. More fundamentally however, only he is entitled to possess the weapons. The certificate authorises his possession which he cannot entrust to others not even his father who is a legitimate FAC holder. His father is not entitled to possess weapons not covered by his own certificate or to store such weapons.

[16] I therefore accept the respondent's argument that the submission based on the absence of a specific residence condition for the weapons in the FAC is devoid of merit and overlooks the fundamental point that the weapons must remain in the possession of the applicant, certainly not without PSNI approval for a proposed alternative arrangement. Such arrangements can and do take place with weapons being stored temporarily for example in police stations. Moreover the existence of such an arrangement is plainly not forbidden. Thus para18 of the submission to the Minister sought his agreement to point out to the applicant that in future he would do well to inform FEB in *writing* of any such proposed arrangement and wait their *written* permission. In other words, if such written permission was forthcoming there was, in their view, no legal bar to such an arrangement.

[17] The Minister's reasoning refusing the appeal is developed, without objection, in para8 of Mr Stevenson's affidavit:

> **"... The Minister took the view that the weapons were not stored in the gun cabinet that Sergeant Stewart had inspected and approved as suitable for those weapons. It is not considered that it is sufficient simply to say that they were stored in another gun cabinet elsewhere. The fact is that the applicant, at the time of the inspection of his gun cabinet, had told the police that he was intending to store the weapons at his home. It is important for police to be aware at all times where weapons are stored. This is for a variety of reasons."**

[18] At para11 Mr Stevenson states as follows:

> **"DGD contends that his father did not have access to his firearms as each firearm had its own individual lock and only he had the keys to these. Although we are unable to dispute this, it misses the point that the firearms were not with the recognised authorised person. The fact is that DGD Snr clearly did have access to the firearms. Even if he was not a person of ill intent if he was forced to open his gun cabinet the applicant's weapons could be taken. Gun locks are useful for preventing children or others from being in a position to use a firearm. Such locks will not stop persons who are prepared to go to the trouble of obtaining the weapons by force or threat. The whole scheme of the legislation and the enforcement mechanism relies on the weapons being kept by the FAC holder in a gun cabinet. It is not considered sufficient to say in terms 'well of course the other person had access to the firearms but there were locks on them'. "**

[19] And then at para13:

> **"... It is the Minister's view that the serious nature of handling firearms leaves no scope for informal arrangements. Further, such claims by an FAC holder are invariably difficult to substantiate, as DGD's situation demonstrates. The Minister takes the view that no matter what may have been said this does not remove the primary requirement imposed on the FAC holder to keep the weapons in his own possession. While is appears far from clear that Sergeant Stewart accepts the words attributed**

> **to him or that anything of relevance was uttered around the time of the incident giving rise to this matter this alleged arrangement, in the Minister's opinion cannot be allowed to prevail over the clear need to protect the public."**

[20] In light of the above I reiterate what I have already indicated which is that the applicant's submission based on the absence of a specific condition requiring the weapons to be stored in a gun cabinet at his house misses the point that, as the Minister put it, the applicants firearms were not with the recognised authorised person.

[21] The applicant has been deemed a fit person to hold firearms, and has done so without incident for in excess of 20 years. His guns are an established and important part of his life and indeed that of his father. His father's certificate does not appear to have been questioned as a result of the temporary arrangements that were entered into for the safe storage of the applicant's weapons. There is no suggestion of any other impropriety on behalf either of the applicant or of his father.

[22] The determination that the applicant is not a fit person within the meaning of the firearms legislation, the consequent revocation of his certificate and the requirement to surrender his guns was clearly a profound shock to the applicant. His affidavit evidence makes it clear that it has had a substantial impact not least because of his inability to pursue his legitimate sporting interests etc. In some jurisdictions the revocation of firearm licenses and the surrender of firearms have a more judicialised procedure referred to in some of the authorities that were opened before the Court. No issue is taken in this judicial review about the revocation model or its Convention compliance save perhaps for the proportionality argument grounded on Art1 of the First Protocol to which I shall later return.

[23] It is uncontentious that the procedure adopted on appeals against a revocation decision must be fair. The requirements of fairness as the Courts have frequently indicated are very context and fact sensitive.

[24] In the present case the DoJ was conspicuously assiduous in the gathering of information, making relevant enquiries and obtaining representations from the applicant. Their submission to the Minister was balanced, fair and favourable recommending the appeal be allowed.

[25] Nonetheless there is one aspect of this case which has troubled me from the outset which arises from a procedural misdemeanour of which the Minister is unlikely to have been conscious and which I have absolutely no doubt was entirely inadvertent. It may have been overlooked by the DoJ officials because their recommendation was favourable.

[26] As already observed the Minister departed, as he was entitled to do, from the recommendation of his very experienced officials. The report submitted however contained a striking allegation namely that the PSNI suspected that the applicant *permanently* stored his firearms at his father's address. This allegation is contained in a letter dated 22 November 2010 from the PSNI FEB which is summarised at para10 of the report to the Minister.

[27] The Minister may not have appreciated that this allegation had never been put to the applicant or that he had not been furnished with a copy of the correspondence dated 22 November from PSNI FEB. Whilst the applicant was given the opportunity to comment on all other matters of relevance he was not made aware of the contents of the letter containing the allegation nor that the submission to the Minister contained the allegation and exhibited the letter.

[28] Until the present proceedings commenced the applicant was unaware of this correspondence or of the fact that this suspicion was communicated to the Minister. At para 6 of his second affidavit he expressed particular concern about the belief on the part of the police that he permanently stored firearms at his father's address. He stated:

> "One matter of particular concern to me … in the submission to the Minister ... is a belief on the part of the police that I permanently stored by firearms at my father's address and that they found it unbelievable that I returned from holiday at exactly the same time police happened to be at my home on another matter. This has never before been suggested to me and I categorically refute it. I have an improved gun cabinet at my home which was installed there, at considerable expense, for the purpose of storing my firearms. The notion that I always stored the guns at my father's house is nonsensical."

[29] The difference between temporary storage in his father's gun cabinet (for the reasons given by the applicant) and *permanent* storage is significant and I cannot exclude the possibility that this materially influenced the Minister's decision - which was characterised as "robust" by Mr Stevenson at para 15 of his affidavit.

[30] As a matter of procedural fairness the applicant ought to have been informed of this striking allegation and given a full opportunity of meeting it. He wasn't. This was inadvertent and the Minister had no reason to be alert to the point. The difference between an allegation of temporary storage for the purposes and in the circumstances stated by the applicant is one case but the allegation of permanent storage is a materially more serious accusation of which the applicant was never made aware and never given the opportunity to contribute by way of representation.

I consider this procedurally unfair and that the decision must, on that account, be quashed. It is also impossible to exclude the possibility that this very serious allegation may have played a part in the Minister's decision. The Minister will have course made up his mind on the material submitted to him and that *included* this allegation and the letter which contained the allegation exhibited to the report forwarded to the Minister.

[31] It is always difficult, after the event, to unravel the conscious or unconscious prejudice that can occur when an allegation is made against an individual of which he was unaware and by definition therefore prevented from addressing. Given the robust nature of the Minister's decision in departing from the recommendation to allow the appeal one cannot, as I have already said, exclude its materiality. The principle upon the court is acting in arriving at the conclusion that the Ministers decision cannot stand is so well known that it scarcely requires recitation of authority. The presumptive requirement of sufficient disclosure to enable meaningful and focussed representations is well established and a useful summary of the principles is contained at para7-057 and para7-058 of *de Smith's Judicial Review,* 6th Ed. In *re McCallion & Ors* [2001] QBD 401 Kerr J quashed the Secretary of States refusal of compensation to two of the applicants because of the failure to advise them in advance of factors adverse to their applications and to give them the opportunity to make representations on them. In their cases the *submission* to the SOS, recommending refusal of compensation (under a statutory provision which empowered the SOS to award compensation to those otherwise ineligible under the statute), reference was made to adverse factors of which they were unaware and had not been made aware. There is an interesting discussion and application of the relevant principles at p410 letter c – p415 letter c.

Representation by Sergeant Stewart

[32] In respect of Sergeant Stewart the Minister in his decision stated that "Whatever may have been said by former Sgt Stewart, I am not persuaded that all necessary steps were taken to prevent unauthorised access to the guns". From this (and Mr Stevenson's affidavit) the applicant submitted it was clear that the Minister did not conclude that Sgt Stewart did not agree to the arrangement adopted by the applicant and had given him the benefit of the doubt on this issue.

[33] The applicant further submitted that the Minister in terms had indicated that even if Sgt Stewart expressly approved the temporary storage arrangements, this would make no difference to his decision. As a matter of both law and logic Mr Scoffield QC submitted this could not be a correct approach. In the first instance, a situation where an FAC holder has secured express approval of an arrangement from a designated firearms officer is completely different to a situation where the gun owner has adopted his own course without seeking advice or (worse) contrary to advice which has been given. In his skeleton argument he contended it lacks logic to say, in essence, that it matters not which of these situations was the true position in the present case. Additionally, since Sgt Stewart could have made a

representation which gave rise to a legitimate expectation on the part of the PSNI enforceable in public law terms, the Minister cannot say (in effect) that it is of no consequence what he said to the applicant.

[34] Given that the Minister was prepared to give the applicant the benefit of the doubt as to what was said to him by Sgt Stewart, Mr Scoffield submitted this was an extremely material factor to the exercise of judgment required by the Minister. The applicant submitted the course adopted by him was a responsible one in the circumstances. However, the fact that it was sanctioned by the local firearms officer who had checked and approved both the applicant's and his father's gun cabinets makes it utterly irrational, he submitted, for this to be used as a basis for the revocation of the applicant's FAC.

[35] There is considerable force in these submissions but I consider that the applicant may be reading a little too much into the Ministers reasons in contending that the applicant was being given the benefit of the doubt on this issue. There was before the Minister material which would have entitled him, like the PSNI, to be circumspect about relying on the applicant's uncorroborated and potentially inconsistent account of the timing and circumstances of the alleged informal authorisation. [An account which the Respondent claims has been called into further doubt by the applicant's third affidavit where he now claims that he had two relevant conversations with Sgt Stewart]. Such claims are as the Minister noted difficult to substantiate. The Minister may have been doing nothing more than parking a questionable claim and proceeding to make a determination on the undisputed substance. I have little doubt that had he been satisfied that authorisation had been established that this would have received the weight he considered it deserved. It wasn't a material factor because the Minister did not in my view, reading what he said in context and fairly, accept what the applicant said or proceed on that basis. That however is the fallacious basis upon which this particular submission is based and I reject it.

[36] Before leaving this subject I wish to observe that breach of FAC conditions does not *necessarily* mean that a person ceases to be a fit person within the firearms legislation. It may be and frequently no doubt will be compelling evidence justifying such a conclusion to those entrusted with making that judgment in the public interest. But it does not inexorably follow nor did anyone suggest that it did. The sole issue is whether the applicant is "a fit person to be entrusted with a firearm". The material relied upon to establish a reliable answer to this question has to be examined in its entire context. That assessment requires all relevant material and circumstances bearing on that judgment to be conscientiously taken into account and given such weight as the Minister adjudges appropriate following a fair procedure.

[37] There is no basis for the reasons challenge. The reasons have been given to the applicant and have also been set out in the respondent's affidavit. In ***Tennyson* [2001] NICA 38** the CA stated:

> **"28. It was also suggested that reasons should have been given by the Secretary of State for dismissing the appeal. We are far from saying that it is necessary as a matter of law for the Secretary of State in such a case to furnish reasons for his decision, particularly where the issues on which he had to decide were so fully spelt out in the notice of appeal and it was quite obvious why it was dismissed. If, however, there was any obligation to provide reasons that has now been done in detail in the course of these proceedings."**

[38] I also reject the applicant's contention that fairness in this case required a hearing. Provided the applicant is given a full opportunity to make representations and of meeting any relevantly adverse points against him this should usually meet the requirements of fairness in the context of a revocation appeal. It is of course open to the applicant to make such a request submitting why, if it is claimed to be so, fairness requires a hearing on the reconsideration which must now take place.

Proportionality

[39] In ***Re Chalmers Brown*** **[2003] NIJB 168** the Court of Appeal held that the right to a firearm certificate did not constitute a property right within Article 1 of the First Protocol - see para13 in particular. ***Chalmers Brown*** was itself based on a decision of the European Commission ***RC v United Kingdom*** **(Application no 37664/97).** The applicant suggests that the case of ***Brown*** was incorrectly decided. However it remains the leading authority in Northern Ireland ,has not been overturned and has been followed in a number of similar cases for example by Gillen J in ***Re Shannon*** and Girvan J (as was) in ***Re Drummond & Drummond***. I see no basis for distinguishing ***Brown.***

Conclusion

[40] The application for judicial review is allowed because of the procedural flaws set out earlier in the judgment. Accordingly the Ministers decision must be quashed and retaken following a fair procedure which will have the elements identified above.