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Judgment: approved by the Court for handing down | *Delivered:* **22/09/06**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GRAEME DRUMMOND FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND TAKEN ON 25 OCTOBER 2004 REFUSING AN APPEAL AGAINST A REVOCATION OF A FIREARM CERTIFICATE

GIRVAN J

[1] The applicant applied in January 2005 for leave to apply for judicial review in respect of a decision made by the Secretary of State on 25 October 2004 rejecting the applicant's appeal against a decision to revoke his firearm certificate. The court granted leave to apply on three grounds namely those set out in paragraphs 3(a), (b) and (e) in the Order 53 Statement. The permitted grounds were:

(a) the decision was unfair and the applicant was effectively prohibited from properly challenging any allegations made against him or challenging any adverse material considered in connection with the question of revocation of his firearm certificate and was unable to determine whether matters of substance raised by him in the context of the decision making process were adequately and effectively investigated;

(b) the decision was taken in breach of the applicant's legitimate expectation induced by the decision maker to the effect that the applicant would be afforded procedural protections in connection with the appeal ie that he would be given an opportunity to comment on the Chief Constable's background report once that had been received by the decision maker; and

(e) insofar as the decision maker actually determined that the applicant was involved or associated with proscribed organisations the decision make acted unreasonably in a manner that no reasonable decision maker would so act.

The court refused to grant leave on the grounds set out in paragraphs (c) and (d). These paragraphs read:

> "(c) The decision breached the applicant's rights of ownership, peaceful enjoyment and possession of his property, namely his guns and ammunition in a manner that was unfair, unlawful and disproportionate and in an manner which violated his rights under Article 1 of the First Protocol ECHR.
>
> (d) The decision breached the applicant's rights to a fair trial by an independent impartial tribunal in the determination of his civil rights in a manner that violated Article 6(1) ECHR."

The court heard argument from counsel at the leave hearing on 4 March 2005 and considered that the grounds pleaded at (c) and (d) had no prospect of success in the light of binding authority in this jurisdiction to which I shall later refer. There was at that stage no appeal against that decision to strike out those grounds.

[2] Essentially the basis upon which the applicant's firearm certificate was revoked was that the police were of the opinion that he was associating with members of a proscribed organisation. In due course and application was made for discovery of documents in the matter. That application came before Weatherup J who on 18 May 2006 gave a ruling on the issues raised in the application. In paragraph 7 of his judgment Weatherup J restated the general principles applying in applications for discovery in judicial review applications. He concluded that the applicant had not established any incompleteness or inaccuracy either in relation to the security information or a particular letter referred to by the applicant. In terms of discovery the applicant failed to establish the test for discovery in a judicial review application. However, Weatherup J went on in paragraph 14 of his judgment to opine that where the rules of disclosure that apply in judicial review are such that the applicant remains in a position where for public interest reasons he is unaware of the adverse material there may be a cause for complaint about the procedural fairness of the process (being the overall process that includes the original application to the police as well as the appeal to the Secretary of State and the application for judicial review). Ultimately the issue concerned the conflict between the general right to know and to respond

which would require the disclosure of at least the gist of the adverse information and the public interest which would require the non-disclosure of the intelligent information to the applicant. He pointed out that this was not an issue of article 6 fair trial rights but an issue of common law procedural fairness. That passage in paragraph [14] of Weatherup J's judgment relates to a central issue which has to be determined in the substantive application. In paragraph [16] of his judgment Weatherup J discussed possible mechanisms for dealing with the apparent possible unfairness in the procedure with the possible use of a special advocate procedure. He went on to conclude:

> "I am not advocating a particular solution. Dismissal of the application for discovery and the traditional disclosure grounds in judicial review leaves a void and I invite counsel to consider the matter and address the means of dealing with the issue. I do not accede to the respondent's contention that this case should proceed directly to a substantive hearing and invite the applicant to consider whether there are any steps that might be taken at this stage of the proceedings to address the issues considered above."

[3] Following the judgment of Weatherup J the applicant has brought an application for leave to reinstate as available grounds for leave the original grounds relied on in paragraphs (c) and (d) in the Order 53 Statement which the court had directed should be struck out. Mr Hutton argues that Weatherup J's ruling throws into more stark relief the issue as to the grounds which should be open to the applicant to argue at the full hearing. He rehearsed the argument (which he had already put before the court at the leave hearing) that the impugned appeal decision confirmed the revocation on 25 October 2004 imposing an obligation that the applicant surrender or legitimately dispose of his firearm. The decision determined or affected his right to ownership and possession of his firearm which must be seen as a chattel possession. The revocation determined his right to ownership and possession of that asset and brought into play article 1 Protocol 1. Counsel sought to distinguish the case from the Court of Appeal judgment in Re Chalmers Brown which dealt not with the rights over the firearm as a physical chattel but the question of whether a right to pursue a leisure activity engaged to article 1 Protocol 1. Mr Hutton relied on Re Misbehavin [2005] NICA 35 as establishing that the refusal by the authorities to allow the applicant to use his asset, namely the firearm was interference with his article 1 Protocol 1 rights. Where the right was engaged and there is an interference with it it is for the state to justify the interference. The respondent is required to show that he considered the article 1 right and that on consideration it was justified.

[4] In relation to the applicability of article 6 counsel contended that the applicant's private rights as opposed to any public law rights had been affected by the impugned decision. The whole bundle of rights of ownership possessed which necessarily the applicant could assert against the entire world had been affected by the revocation decision. Counsel argued that in Re Chalmers Brown the Court of Appeal confined itself to considering the applicability of Article 6 by the public law test rather than the private law test. It concluded Article 6 was not engaged. Counsel argued that the Court of Appeal had applied an inappropriate test. If article 6 was engaged the overall fairness of the decision making process was in issue. Weatherup J had highlighted the issue whether the judicial review case could provide a fair mechanism of review.

[5] Mr Maguire QC strenuously resisted the application to amend the Order 53 Statement. He did not seriously resist the argument that the court could revisit the question whether specific grounds could be relied on. He pointed out that the applicant had not appealed the decision to strike out paragraph (c) and (d). The Court of Appeal had jurisdiction and did exercise the power to strike out or reinstate struck out grounds relied on in a leave application (see for example the Court of Appeal decision in Re Downes). The present attempt to reinstate the grounds should not be seen as in any way linked to the judge's concern about the discovery issues. There can be cases where the court should be prepared to reinstate grounds refusing leave if there were factors justifying that course. Counsel relied on Re Chalmers Brown as establishing that neither article 6 nor article 1 Protocol 1 was engaged and the court in Re Liam Shannon followed the same approach. Re Misbehavin was dealing with a licence connected to commercial activity not with the licensing of a firearm for leisure purposes. The firearm could be sold without loss of value and the applicant never had an unconditional right to a firearm certificate which is a conditional authorisation under pain of revocation requiring the holder to conform with the requirements of the Firearms Licensing Authorities.

[6] The leave stage of a judicial review application serves as a useful check to ensure that an applicant has sufficient standing to bring an application and that the application is arguable. Under Order 53 rule 34 the court may direct or allow the applicant's statement to be amended on such terms as it thinks fit. Under section 18(2)(c) of the Judicature (Northern Ireland) Act 1978 where leave is obtained the grounds relied on and the relief granted shall be only those specified in the application. The court has under section 18 (2)(c) power to direct or grant leave for the application to be amended to specify different or additional grounds or relief. It is thus clear that in this jurisdiction the court has power to grant leave subject to striking out some of the grounds relied on and has power to permit amendment of the application to specify different or additional grounds. Whatever the earlier position may have been in England the position is similar now by virtue of CPR 54.12(1)(b) under

which the court may give permission subject to conditions on certain grounds only. The law in the two jurisdictions is thus essentially the same. Some guidance as to the proper approach of the court in a case such as this is to be found in Smith v Parole Board [2003] EWCA 1014. In that case a prison applicant sought to challenge the Board's failure to hold an oral hearing on the basis of articles 5 and 6 of the Convention. At the oral hearing of his leave application the judge granted permission under article 6 but not under Article 5 at the substantive application the judge refused permission for the Article 5 ground to be argued even though three authorities were advanced of which the claimant had been unaware at the permission stage. The Court of Appeal allowing the appeal accepted that where, on an application for leave, the judge has heard detailed argument before the grant of permission the judge at the substantive hearing would require significant justification before taking a different view in respect of the grounds which the claimant sought to advance. However if, bearing in mind the interests of the defendant, good reasons are shown the judge can allow arguments to be advanced which relate to a ground upon which permission had been refused. This is not limited to cases where fresh material arises or where there has been material change of circumstances although of course there has to be real justification for adopting this course and the parties are obliged to give as much notice as possible for their full case and bring forward their full arguments from the start. Lord Woolf stated:

> "It is not unusual for a situation to arise even in the course of a hearing where it becomes apparent to the judge conducting the hearing that the interests of justice would be best served by the hearing taking into account arguments and matters which relate to a ground in respect of which permission has been refused. There are going to be situations where good sense makes it clear that the argument should be wider than it would otherwise be if it was confined to the grounds were permission had been granted. As long as the judge recognises the need for there to be good reason for altering the view of the single judge taken at the permission stage no further sensible guidance can be provided."

In her article "Partial Permission: the Paradigm of Active Case Management" [2004] JR 26 Helen Mountfield states:

> "In the light of that approach it would seem safe for a claimant who wishes to reopen at the substantive hearing grounds upon which permission has been refused at the permission stage to adopt the notification procedure approved in Hunt and

> disapproved in Opoku and to give it a go. In any forum the advocate will face an uphill struggle to persuade one judge to consider arguments upon which another has refused permission. But, by avoiding a potentially unnecessary Court of Appeal hearing permitting a second bite of the cherry (on notice) is more in keeping with the overriding objective and if the judge in the substantive hearing is no more impressed than the permission judge that the applicant is still convinced the Court of Appeal is still there."

[7] Having regard to the proper approach applying in a case such as the present as stated in Smith v Parole Board the question is whether the interests of justice would best be served by permitting the applicant to bring back into the case the grounds which the court at an earlier stage considered were unarguable. The issue is whether the applicant has shown good reason for altering the view taken at that earlier stage.

[8] There is a challenge to the fairness of the procedures adopted and issues of fairness will arise whether or not Convention rights are in play as Weatherup J points out. If Convention rights are engaged then the level of scrutiny on the part of the court will or may be heightened and the court's approach to discovery of documents may be somewhat different. It is thus important to decide whether article 6 and article 1 Protocol 1 are engaged but the outcome to that question cannot be influenced by the possible shortcomings and the fairness of the procedure adopted or as to the fairness of the extent of or limitations on the powers of the judicial review court. Weatherup J's ruling of itself does not introduce new material which can affect the question.

[9] In Chalmers Brown the Court of Appeal held that article 6 was not engaged. It concluded that the decision in relating to the grant or revocation of firearm certificates does not fall within the definition of civil rights for the purposes of article 6. On the question of article 1 First Protocol applying the Court of Appeal applying the approach of the European Court of Human Rights in RC v UK concluded that the prevention of the enjoyment of a sport or hobby is not a deprivation of a possession. Mr Hutton contended that this part of the Court of Appeal's judgment failed to deal with the separate question whether the revocation of the license had the effect of depriving the holder of the firearm of the right to enjoy the chattel and thus failed to address the first part of the rule in indent 1 of article 1 Protocol 1. In Re Liam Shannon I did deal with the argument, concluding that the revocation of the certificate did result in the gun being no longer capable of use by the applicant but the applicant he was not deprived of the asset which he could dispose of by way of sale. The Court of Appeal in its judgment on that case

stated that the applicant could not point to any flaw in my reasoning and it ruled that the applicant had failed to make out an arguable case for challenging the decision to revoke the firearm certificate and it dismissed the application for leave to apply for judicial review. Unless these decisions are in someway overruled by or no longer consistent with Re Misbehavin they establish clearly that the applicant could not reply on article 1 Protocol 1 or article 6. Re Misbehavin (which is on appeal to the House of Lords) was dealing with a very different situation and was not in pari materia. It did not discuss the rulings in Re Chalmers v Brown or Re Liam Shannon. Sitting as a court of first instance I consider that I am bound by the approach adopted in Re Chalmers Brown and Re Liam Shannon.

[10] Accordingly, the applicant has failed to persuade me that I should effectively set aside my earlier order which directed that the ground (c) and (d) should be struck out. I accordingly dismiss the current application. My initial decision and this decision are, of course, subject to review by the Court of Appeal.