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2015/11114

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY E.H.

AND IN THE MATTER OF A DECISION BY THE MINISTER OF JUSTICE MADE ON OR ABOUT 9 OCTOBER 2014

Between

E. H.

Applicant

and

THE MINISTER FOR JUSTICE

Respondent

_____

DEENY LJ

Introduction

[1] The applicant by these proceedings seeks Orders of Certiorari and Mandamus and a declaration with regard to a decision of the Minister for Justice ("The Minister") to uphold an earlier decision by the Chief Constable of the Police Service of Northern Ireland ("the Chief Constable") to refuse to grant and renew the applicant's firearm certificate.

[2] The court had the benefit of very thorough written and oral argument from Mr David Scoffield with Mr Wayne Aitchison on behalf of the applicant and Dr Tony McGleenan with Mr Donal Lunny for the Minister of Justice.

[3] Although the debate ranged widely over two days of hearing earlier this year, when I was assisting with the judicial review list, it seems to me, having considered

learned counsel's submissions, that there are, in reality, three issues for decision by the court.

(i) Firstly, was the decision of the Minister flawed in public law terms to the extent necessary to grant the applicant one of the reliefs sought?

(ii) Secondly, was the applicant correct in asserting that Article 74 of the Firearms (Northern Ireland) Order 2004 ("the 2004 Order"), as amended is incompatible with Article 6 and Article 1 of the First Protocol of the European Convention of Human Rights?

(iii) Thirdly, was the applicant debarred from any relief on either of these grounds because of delay on his part?

[4] When granting leave in regard to this application Treacy J maintained in place an order of 19 February 2015 restricting publicity about the applicant's name and address as the matter did relate to firearms. He left the issue of delay to the substantive hearing.

Factual Background

[5] The applicant is a lifelong country sporting enthusiast. He had a certificate to hold a semi-automatic shotgun from 24 February 2007 to 23 February 2012, the most recent of a number he had held over 30 years. He regularly shot for sporting purposes or to kill vermin on the lands of local landowners.

[6] Having applied for a licence for this weapon he received on 3 January 2013 a letter dated 9 December 2012 from the PSNI Firearms and Explosives Branch ("FEB") communicating that the police were no longer satisfied he was a fit person to hold firearms and refusing his application. This refusal arose principally from the following circumstances. The home address notified to the police of the applicant was at an address in Portadown, where he had a secure cabinet for his weapon as required. However, in August 2011 the police searched an address in Craigavon, for reasons, the court was told, wholly unrelated to the applicant. The applicant was there, he said, because this was the address of his partner. He denied living at this address but said he visited it from time to time. The police found in a locked cabinet there the firearm registered to the applicant's home address in Portadown.

[7] There were exchanges by correspondence and otherwise between the applicant and police but ultimately the police notified a refusal to grant his firearm certificate on 13 May 2013 on the basis that he was not keeping the firearm at the address certified on the certificate. Following the refusal of 13 May 2013 the applicant appealed this determination to the Minister of Justice. There were further submissions but on 9 October 2014 the Minister upheld the decision of the Chief Constable to refuse the licence.

Relevant Statutory Framework

[8] The relevant parts of Articles 5 and 74 of the Firearms (Northern Ireland) Order 2004 provide as follows:

> "5.—(1) If he is satisfied that the applicant can be permitted to have in his possession without danger to public safety or to the peace the firearm or ammunition in respect of which the application is made, the Chief Constable may grant a firearm certificate.
>
> (2) The Chief Constable shall not grant a firearm certificate unless he is satisfied that the applicant—
>
> (a) is a fit person to be entrusted with a firearm; and
>
> (b) has a good reason for having in his possession, or for purchasing or acquiring, each firearm and any ammunition to which the certificate relates.
>
> …
>
> 74.—(1) A person aggrieved by a decision of the Chief Constable under this Order may appeal to the relevant authority if it is a decision to which this Article applies."

[9] It is common case that at the time in question that appeals went to the Minister of Justice.

[10] It can be seen therefore that the Chief Constable is obliged to be satisfied that the applicant is a "fit person to be entrusted with a firearm".

[11] Article 6 of the 2004 Order empowers the Chief Constable to impose conditions on a firearms certificate. Furthermore, by Article 6(2) he may at time by notice in writing vary or revoke the conditions or attach conditions to the certificate. Article 8 of the 2004 Order provides, inter alia, that a certificate must "specify any condition subject to which the certificate is held". Certificates unless otherwise provided revoked or cancelled will continue in force for 5 years.

Applicant's Case on First Issue

[12] I shall deal with the three issues identified above separately. The strongest and essential point made on behalf of the applicant is this. On 9 December 2012 a letter written by a Mr O'Loughlin on behalf of PSNI informed the applicant that the Chief Constable was minded to refuse him a certificate because he had acted in

"obvious breach of the security conditions on your certificate", a breach which the author of the letter considered to be "absolute and complete".

[13] However, submits the applicant, if one reads Conditions 3, 4 and 5 of the conditions which are actually on the existing certificate governing the storage of his weapons, he was not in breach of those conditions.

[14] By Condition 3 there is a reference to a change of "permanent address". However, the applicant denies that he had a permanent address change to his partner's address in Craigavon (the "Craigavon address"). He merely stayed there from time to time with his partner.
There was no finding of fact to the contrary by the Chief Constable.

[15] He complied with Condition 4 which required that the firearms and ammunition "must at all times, when not in actual use, be kept in a secure place and out of reach of children". As mentioned above the firearm in his partner's home was in a secure gun cabinet.

[16] Condition 5 emphasises the importance of securely storing the firearm, including a requirement that gun cabinets must be secured to the fabric of the building. There is no record in the police documents of whether the gun cabinet at the Craigavon address was secured to the fabric of the building. Therefore, it cannot safely be inferred that it was not. Therefore, he was not in breach of that condition either. In any event it was qualified by a "reasonably practicable" condition.

[17] The applicant acknowledges that at the time the firearms certificate ought to have complied with Form 8 in the Schedule to the 1995 Regulations by virtue of Regulation 8(8). That Condition read:

> "Unless otherwise specified, all firearms and ammunition held under the certificate must be stored securely at your residence when not in use."

That particular provision is no longer in force but was at the relevant time. The applicant, however, points out that in fact the PSNI had not put this condition in his certificate. It could not, therefore, and should not have been held against him.

[18] The applicant appealed to the Minister. Obviously this mistake of fact, as the applicant submits it is, regarding a breach of the condition might have been remedied before the Minister. However, in fact that was not the case. His written conclusion included the following statement:

> "By his own admission, Mr H was storing a shotgun on occasions at his (ex-partner's) house, not his own and has failed to notify this address, even though he had considered doing so. He accepts that he should have

> notified this address and his solicitor accepts his actions 'constitute a breach of the conditions' or implied conditions." (Authorial emphasis throughout)

[19] The applicant contends this was a double error on the Minister's part. First of all he believed there had been a breach of condition and secondly that the applicant's solicitor had accepted that.

[20] The applicant submits that the only evidence of any admission was in the letter of Mr H's solicitor, Mr Morris, of 8 November 2013. The relevant passage reads as follows:

> "It is clear that, whilst Mr H was spending a lot of time at his ex-partner's address at one stage, he was not permanently living there, and there was nothing to suggest that he was. Nor was there any suggestion that he was storing his firearm there on a permanent basis. Therefore, his actions could not, in any fair and reasonable sense, be said to constitute either a clear nor an obvious breach of the above condition and, at their height (for the reasons discussed below) we suggest that Mr H's actions must only be considered by the Minister to be an implied breach of his firearm conditions. The fact remains that it does not state anywhere in Mr H's firearm certificate that a temporary change of address for storage of the firearm needed to be notified to the police."

[21] I think the applicant's counsel are harsh in their castigation of the Minister in regard to their second point. It seems to me perfectly understandable that this letter should be taken by the Minister to be an admission of "an implied breach of his firearm conditions".

[22] What I will have to consider in due course is how that impacts on the granting of a remedy in these proceedings.

[23] I note the supplementary point briefly made by the applicant that the Minister recorded that the applicant had a criminal record and had failed to properly store a firearm once in the past. These points were not pressed by the applicant, quite rightly as they were, in my view, considerations that in all the circumstances of this case could be taken into account by a Minister exercising discretion of this kind.

Respondent's Case On First Issue

[24] The respondent's counsel point out that the applicant should have been well aware that he was required to give his home address to the police and that therefore knowledge of that to the police was of importance.

[25] They take the point addressed by me at paragraphs [18]-[19] above that the solicitor's letter was indeed a partial admission of breach of an implied condition.

[26] They also point out that in his amended Reasons for Appeal at paragraphs 2(b) and 2(c) at page 263 of the exhibits of the affidavit of Robert Kidd one finds the following statements from the applicant:

> "I remain very sorry that I was not aware that the right thing to do was to notify police that I intended to store my guns at somewhere other than my home address …
>
> Despite the fact that I am sorry for not having notified police about my intention to store my firearm somewhere other than my home address, on a temporary basis and despite the fact that I now accept that I should have done so, I do not think it logically follows that I am now unfit to be trusted with a firearm …"

[27] Counsel point out that the admission in that second quote from paragraph 2(c) of his earlier documents was repeated in his own affidavit of 3 February 2015. Furthermore, his solicitor's letter of 8 November 2013 goes on, at trial bundle page 272, to effectively repeat the concessions and apologies of Mr H.

[28] Counsel put forward the matter of the record addressed by me above at paragraph [21] pointing out that the applicant himself cited his own record in his appeal reasons [page 258]. Furthermore, he had never signed his previous licence as he was obliged by law to do but that had not been put in the balance against him.

[29] The respondent further points out that the applicant muddied the waters even more in his affidavit when at paragraph 56 he said that he accepted there was a condition "because I was spending so much time there at that point" i.e. at his partner's house.

[30] I have refreshed my memory of and taken into account the other submissions of counsel. In the course of the argument Dr McGleenan submitted that this was clearly a decision which was within the range of reasonable responses open to the Minister. That expression is indeed used in the Departmental Solicitor's letter of 8 January 2015. But at page 180, paragraph 5(a) (iv) it is preceded by the sentence:

> "The Minister considered same and having done so, concluded in all of the circumstances that the applicant's breach of the relevant FAC condition rendered him unfit to be entrusted with a firearm."

That is of importance in deciding the weight to be given by the court to that belief on behalf of the Minister.

Conclusion on Issue 1

[31] The applicant contends that the conclusion of the Minister that the applicant breached a condition when in fact he did not do so was a mistake of fact. Error by way of mistake of fact was dealt with by the Court of Appeal in Northern Ireland in the *Department of Education v Cunningham (a minor)* [2016] NICA 12. I dealt with it, when delivering the judgment of the court, at [71]-[77], slightly adapting the dictum of Carnworth LJ in *E v Home Secretary* [2004] EWCA Civ. 49. *Cunningham* lays down these requirements for a finding of unfairness based on error of fact.

[32] Firstly, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence in a particular matter.

[33] Secondly, the factual evidence must have been "established" in the sense that it was uncontentious and objectively verifiable.

[34] Thirdly, the applicant (or his advisors) must not have been responsible for the mistake.

[35] Fourthly, the mistake must have, on the balance of probabilities, played a material but not necessarily a decisive part in the Tribunal's reasoning.

[36] I apply that decision, binding upon the courts in this jurisdiction, to the facts of this case.

[37] I find as a fact that the certificate issued to Mr H did not include a condition that he was obliged to notify the police if he was storing his firearm from time to time at another place. He was obliged to store it securely wherever it was but on his particular certificate no condition requiring notification of temporary storage elsewhere had been included. A mistake of fact has been established.

[38] Given the text of the Minister's decision and the acknowledgement by his advisers subsequently in correspondence it is clear that his belief that the applicant had been in breach of a firearms condition was far from tangential but did play a material part in the Minister's reasoning. The applicant therefore satisfies, I conclude, the first, second and fourth of the criteria for a finding of unfairness based on an error of fact i.e. it related to an existing fact, it has been established and verified and it did play a material part in the decision.

[39] For completeness I reject the argument on which the respondent's counsel fell back on at one point that there was an implied condition that he should give such notice even if it wasn't set out in his firearm certificate. Failure to comply with a condition in a firearm certificate is a criminal offence pursuant to Article 6(5). It

would be entirely unsound to imply a condition into a firearm certificate the non-compliance with which could expose the holder of the certificate to penal sanctions.

[40] The third issue is whether the appellant or his advisers were responsible for the mistake. This is an issue in this case over which, I confess, I have pondered for some time. It seems to me that the applicant and his advisers were to a significant degree responsible for the error by the words that were used by the applicant himself and, to a degree, by his then solicitor. This stemmed, it is true, from the original assertion by the Department as long ago as December 2012 that he was in breach of such a condition. But there was no effective denial of that until counsel were instructed in this application.

[41] The language used by him and on his behalf, in four separate documents, does make him sufficiently responsible for this error in the decision, arising from the particular facts. I have concluded that it would be unfair to the Minister and contrary to public policy to declare unlawful a decision based on an error for which the applicant was largely responsible. It was not a single slip of the pen by the applicant but a repeated apology and concession. The other matters raised by the applicant would not render unlawful the Minister's upholding of the Chief Constable's decision. The repeated tragedies in the United States are a reminder of the value of strict firearms control in this country. It would be entirely inappropriate for the courts to lightly undermine that. The words of Article 5(2) of the Order requiring the Chief Constable to be satisfied that the applicant is a fit person mandate a precautionary approach. I refuse Orders of Certiorari or Mandamus in all the circumstances of this case and a declaration.

[42] However, it is appropriate to make one further point. I do find that the applicant was not in breach of a condition of his licence in 2012 by keeping his firearm from time to time at his partner's house, even though he "was spending so much time there". This would allow him now to apply afresh for a firearm certificate without the refusal of the certificate in 2013 in the circumstances at that time being held against him. The fact of the storage in Craigavon as a breach of condition would not be a proper factor to be put onto the scales against him. This will allow a fresh consideration of his fitness as a person to hold a firearm certificate.

Applicant's case on Second "Convention" Issue

[43] It is the applicant's contention that Article 74 of the Firearms (Northern Ireland) 2004, as amended, is incompatible with Article 6 and Article 1 of the First Protocol of the European Convention of Human Rights. As set out above Article 74 of the Order gives right of appeal to a person aggrieved by a decision of the Chief Constable in relation to Firearms Certificates to appeal to "the relevant authority" which at the time in question was the Minister. It is the contention of the applicants that this does not comply with the European Convention because Article 6 and the First Protocol are engaged and therefore the applicant contends that he is

entitled to a fair and oral hearing in public before an independent and impartial tribunal. He points out that such a right exists in the other jurisdictions within the UK; see Section 44 of the Firearms Act 1968. It is not in dispute that the appeal to the Minister would not meet all of those requirements.

[44] The applicant acknowledges that it faces the formidable obstacle of a contrary decision of the Court of Appeal of Northern Ireland in *Re Chalmers Brown's Application for Judicial Review* [2003] NIJB 168.

[45] The court there was hearing an appeal from Kerr J who dismissed the appellant's application for judicial review of a decision by the Secretary of State for Northern Ireland refusing renewal of a firearms certificate and affirming the decision to the same effect of the Chief Constable of the Royal Ulster Constabulary. The court held, per Carswell LCJ, at [13] as follows:

> "The prevention of the enjoyment of a sport or hobby is not the deprivation of a possession. In RC v UK App No: 37664/97 the Commission held manifestly ill-founded applications by a number of applicants who had lost the right to pursue shooting as a leisure activity in consequence of legislation controlling the use of handguns, declaring that the right to pursue a hobby cannot be said to constitute a "possession" for the purposes of Article 1 of the First Protocol."

[46] The Lord Chief Justice went on to find that even if Article 6 rights were engaged this was the type of case in which the requirements were met by a right of appeal by way of judicial review.

[47] The applicant contends in the face of that binding decision that this court should distinguish it on the basis that the arguments advanced in the present case are not those dealt with in the Court of Appeal's judgment in the Chalmers Brown and/or that it was wrongly decided in the light of subsequent authority from the European Court of Human Rights.

[48] In support of that contention Mr Scoffield relies in particular on *Uzukauskas v Lithuania* [2010] (Application No: 16965/04). In that case the Strasburg Court, when considering a case in which the applicant held a firearms licence and was not granted a new licence, thereby compelling him to surrender his firearms to the authorities, held as follows at paras 38 and 39:

> "38. Lastly, the Court notes the applicant's argument that the revocation of his firearms licence had meant that he was obliged to hand in the guns which he already owned to the State authorities for disposal, albeit in exchange for money (see paragraph 10 above). There can

> be little doubt that this involved an interference with another civil right, guaranteed both by Article 23 of the Lithuanian Constitution and Article 1 of Protocol No.1 to the Convention, that is to say, the right to the protection of property.
>
> 39. In the light of the above, the Court finds that Article 6.1 is applicable to the impugned proceedings under its civil head. Consequently, the Government's objection that the applicant's complaint is incompatible *ratione materiae* must be dismissed."

[49] The applicant submits that a similar conclusion was reached by the court in *Pocius v Lithuania* (Application No.35601/04).

[50] I have considered these authorities and the supplementary submissions of Mr Scoffield. These include the point that Mr H is in a different position from someone applying for the first time for a firearm certificate. By virtue of Article 13 of the 2004 Order he must surrender his firearm if his firearm certificate is not renewed.

Respondent's case on the Second "Convention" Issue

[51] Dr McGleenan submits that the decision of the Court of Appeal in *Chalmers Brown* is binding on me despite the two European cases which might indicate the possibility of a different view being taken.

[52] He submits that in any event even if Article 6 was engaged it is not breached here.

[53] He relied on the decision of Treacy J in *Re DGD's Application* [2011] NIQB 123 which followed *Chalmers Brown*.

[54] He also relied on the decision of Horner J in *Re GMJ's Application* (Unreported 23 December 2014). This was a case again of a man who had a firearm for sporting purposes whose application to vary the firearms on the certificate ultimately led to him being refused a certificate. One finds the following at paragraph [40]:

> "[40] Mr Scoffield QC seeks to distinguish this case [from Chalmers Brown] on the basis that in that case the court focused wrongly on the "right to pursue a hobby" as a relevant possession, rather than the effect of the revocation of the licence on the applicant's property rights in his actual firearms. I do not consider that this case can be distinguished. The issue was the same. This court is duty bound to follow the decision of the Court of Appeal even, if it is claimed, it is inconsistent with

> subsequent decisions of the European Court of Human Rights: e.g. see The Queen (In the Application of Debbie Purdy) v Director of Public Prosecutions and another [2009] EWCA Civ. 92."

[56] The respondent further relies on the decision of Girvan J in *Re Liam Shannon's Application* [2005] NIQB 5. This is of particular assistance to the court as it also involved a person who already had a certificate being subsequently deprived of it on the grounds of his lack of fitness. I refer in particular to the following passages from the judgment:

> "[12] It is clear from Re Chalmers Brown that the right to hold a firearm certificate is not an incident of an applicant's private life protected by Article 8. Nor is the prevention of the engagement in a sport or hobby a deprivation of a possession the purposes of Article 1 Protocol 1(6) as I see it (see also RC v UK Application No.37664 – 97). The applicant has failed to persuade me that there are any special or peculiar circumstances in the present case to suggest that either Article is permanently engaged. The revocation of the certificate does result in the firearm and ammunition being no longer capable of use by this applicant but he is not deprived of the asset of which he can dispose by way of sale.
>
> [13] Further, in Re Chalmers Brown the Court of Appeal upholding Kerr J (as he then was) held that Article 6 is not engaged in relation to decisions on the grant of firearm certificates. Even if Article 6 were engaged the court concluded that the right to judicial review is sufficient to satisfy the requirements of the Article."

[57] Counsel for the respondent submitted that this decision had been approved on appeal to the Court of Appeal although no judgment has been located. But he refers to a further judgment of Girvan J in *Re Graeme Drummond's Application* [2006] NIQB 69, again a revocation case, leading to an application for reinstatement. I note that in paragraph 5 of that judgment Girvan J said the following:

> "[5] 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 to the requirements of the Firearms Licensing Authorities."

He went on:

> "[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 some way 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."

[58] Counsel therefore submits that the arguments being advanced by Mr Scoffield had in fact been advanced before Girvan J and rejected by him and his rejection had been upheld by the Court of Appeal. Therefore, I am further bound to reject the submissions in the submission of counsel.

[59] The same applicant then came before me in *Graeme Drummond's Application* [2006] NIQB 81. I said the following, inter alia:

> "[5] The learned judge refused leave on the grounds that there was a breach of Article 1 of the First Protocol of the European Convention on Human Rights or a breach of Article 6(1) of the same. It will be noted that this possession of firearms is for recreational purposes by the applicant and not for his employment. I respectfully agree with the view of Mr Justice Girvan in that regard. I consider that it would be inappropriate to apply the full protection of Article 6 in particular to a situation where a person is applying for a Firearms Certificate. There is no human right to possess a firearm. There is no right to damages for refusal of the same. No punishment is being inflicted upon the applicant although no doubt he is significantly put out by the revocation of the certificate. The important object with regard to firearms is to prevent them coming into the possession of persons who are for one reason or another unfit to possess them. See Article 28 of the Firearms (Northern Ireland) Order 1981."

[60] I note that I came to accede to Mr Drummond's application because in the process adopted in that case by the Secretary of State or the Minister on his behalf I considered that procedural fairness and the doctrine of legitimate expectation required him to write to the applicant before a decision was taken so that he was apprised of the grounds on which the Secretary of State planned to uphold the decision of the Chief Constable. That is a reminder that one does not need an oral hearing or the full panoply of Article 6 in order to ensure fairness.

Conclusions on the second "Convention" Issue

[61] I reach the following conclusions in the light of the submissions of counsel and consideration of the authorities.

[62] Firstly, I continue to be bound by the decision of the Court of Appeal in *Chalmers Brown*. The very issue of whether a court is bound by a decision of a higher court in the United Kingdom where there are inconsistent decisions of the European Court of Human Rights was addressed by the House of Lords in *Kay & Others v Lambeth LBC and others* [2006] UKHL 10. Seven members of the House sat. The matter is authoritatively dealt with by Lord Bingham at paragraphs 41-44:

> "41. The House has had the benefit of carefully considered submissions on this issue. In a written case submitted on behalf of JUSTICE and LIBERTY as interveners it is contended that the lower court is free to

follow, and barring some special circumstances should follow, the later Strasbourg ruling where four conditions are met, namely (1) the Strasbourg ruling has been given since the domestic ruling on the point at issue, (2) the Strasbourg ruling has established a clear and authoritative interpretation of Convention rights based (where applicable) on an accurate understanding of United Kingdom law, (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision, and (4) the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within section 6(2) of the 1998 Act. The appellants' formulation was to very much the same effect, although they did not suggest that the domestic court should follow the Strasbourg ruling, only that it might; they emphasised that the inconsistency between the otherwise binding domestic decision and the later Strasbourg ruling should be very clear; and they elaborated somewhat the conditions pertaining to primary domestic legislation. The First Secretary of State, after a judicious review of the arguments for and against the Court of Appeal's approach, favoured a (strictly circumscribed) relaxation of the doctrine of precedent in the circumstances of the *Leeds* appeal. He proposed that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg Court on the same point. But the inconsistency must be clear. A mere tension or possible inconsistency would not entitle a lower court to depart from binding domestic precedent. The respondent gave a guarded answer. A lower court may decline to follow binding domestic authority in the limited circumstances where it decides that the higher courts are bound to resile from that authority in the light of subsequent Strasbourg jurisprudence.

42. While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in *London Street Tramways Company Limited v London County Council* [1898] AC 375, it described the use of precedent as:

> "an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules:" *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Limited* [1972] AC 1027, 1053-1055, are too well known to call for repetition. They remain highly pertinent.

43. The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the *Leeds* case find a clear inconsistency between *Qazi* and *Connors*. The respondents and the Court of Appeal in the *Lambeth* case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed (*ibid,* p 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

44. There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration

> between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply."

[63] It is clear therefore that I am bound by the decision in *Chalmers Brown*. However, in the hope, perhaps forlorn, that our Court of Appeal will not be troubled by this now much canvassed point I will add this. The decisions relied on by the applicant claim the application of Article 6 of the European Convention because the European Court found in the Lithuanian case that Article 1 of the First Protocol applied. I set this out:

> "**Protection of Property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[64] It does not logically follow that because the European Court, expressly in the light of the constitution of Lithuania, concluded the deprivation of a firearm constituted the engagement of Article 1 of the First Protocol that it would find the same in the context of the strict firearms laws which apply in the United Kingdom. The margin of appreciation to be left to a signatory of the Convention would, in my view, extend to concluding that it was in the public interest that someone in the position of the Chief Constable or the Minister of Justice in Northern Ireland would

be entitled to make a decision revoking a firearms licence without an oral hearing or the application of Article 6 at large.

[65] The Human Rights Act 1998 only obliges the court to "take account of" decisions of the European Court. For convenience I refer to the judgment of the Court of Appeal in *Re McCaughey and Quinn's Application* [2010] NICA 13. That arose from the decision of the European Court of Human Rights in *Silih v Slovenia* [2009] ECHR 571. I cited *Kay v Lambeth* as I have done above here and noted that counsel accepted that the Court of Appeal in Northern Ireland was bound by the previous decision of the House of Lords in *McKerr*. I went on:

> "[13] It should further be borne in mind that this decision of the European Court in *Silih* is not actually binding on the United Kingdom. Article 46 of the European Convention reads as follows:
>
> **Binding force and execution of judgments**
>
> (1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> (2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."
>
> [14] The United Kingdom was not a party to Silih; nor was Article 36 invoked. Article 36(1) affords a High Contracting Party a right to take part in hearings but only if one of its nationals is an applicant. By contrast the President of the Court under Article 36(2) may invite any High Contracting Party which is not a party to the proceedings or any party concerned, who is not the applicant, to submit written comments or take part in hearings. However, there is no suggestion that the President chose to do so in Silih. The matter was argued before the European Court only by lawyers from Slovenia. McKerr and the earlier decisions of the House of Lords were not cited in argument. One would therefore hesitate to presume that it was intended to apply to the domestic law of another Member State and to widely differing factual circumstances."

[66] The fact that the Supreme Court then chose to follow *Silih* rather than the earlier decision of the House of Lords in *McKerr* does not invalidate those observations which are applicable here. There is no point in persons complaining

about the interference of the European Court in our domestic law if in fact they have not interfered but our domestic courts have chosen to follow their decisions when they were not obliged to do so. At that point it becomes the responsibility of the judges of the United Kingdom and not of the differing European Courts.

[67] I agree with the views expressed in the cases cited above by three of my colleagues that procedural fairness here does not require a hearing or anything more than the process currently adopted, provided it is fairly implemented. That process, of course, involves and includes the right to seek judicial review of the administrative decision by the court.

[68] The Minister is independent of the police although he has an overall responsibility for furnishing a budget to the police service of Northern Ireland. While no doubt it might be valid to suggest that the Minister would not be quick to overrule the decision of the Chief Constable in a matter relating to firearms nevertheless a decision which failed to conscientiously grant a consideration on appeal from the Chief Constable is open to scrutiny in court.

[69] This decision has been subject to intense scrutiny. The courts must be careful not to create or encourage a situation where an administrative decision is struck down automatically because learned senior and junior counsel identify some modest lacuna or imperfection in the decision or in the reasons advanced for it. It is wholly impracticable for Ministers and administrators to consult counsel before every decision.

[70] I accept the submission of the respondent's counsel that a precautionary approach is justified here. In any event the respondent's counsel pointed out that the Minister in these appeals from the Chief Constable has found in favour of applicants in more than one-fifths of the cases. Clearly the Minister and those officials advising him are not merely applying a rubber stamp.

[71] For my own part I conclude that requiring a citizen to hand in a firearm which he uses only for sporting purposes and which he is free then to sell to some other person with a firearm certificate, because the Chief Constable is not satisfied that he is a fit person to continue to have a firearm, is a de minimis interference with his property rights.

[72] In all the circumstances therefore I consider that the applicant has not established a general point relating to Article 6 and Article 1 of the First Protocol of the Convention.

Delay

[73] In the circumstances the issue of delay can be dealt with in short compass. The application was not brought promptly nor indeed within the 3 month time limit laid down in Order 53. The applicant partly justifies that by a delay on the part of

the respondent in responding to a letter seeking information after he was told the decision. He further justifies it due to a delay in obtaining legal aid. Members of the public might be surprised that financial support from the state by way of legal aid is available for somebody who has been deprived of their sport or hobby rather than their home or livelihood or physical integrity. However, that is a matter for the Legal Services Agency. I imagine the grant of it here may have been related to the suggestion that there was a wider point of European law.

[74] If there had been a significant injustice done to the applicant or an important principle to be thrashed out it may be that the court might have been willing to extend time here as has happened in other cases. However, I have concluded that the applicant is not entitled to succeed, on Wednesbury grounds or in pursuit of any claim under the European Convention. In the circumstances I refuse to extend time and I reject the application on the grounds of delay also.

Summary

[75] The Minister was influenced by a mistake of fact in reaching his decision but the Applicant and his former solicitors were largely responsible for that mistake. Therefore, no relief is granted pursuant to the decision of the Court of Appeal in *Department of Education v Cunningham* [2016] NICA 12 at [71]–[77].

[76] This court is bound by and follows the decision of the Court of Appeal in *Re Chalmers Brown* [2003] NIJB 168 that Article 74 of the 2004 Order is not incompatible with Article 6 and Article 1 of the First Protocol of the European Convention for Human Rights.

[77] The applicant did not bring his application promptly, nor within three months. The Court declines to extend time.