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(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 HUGH HERDMAN FOR JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Hugh Herdman for judicial review of a decision by the minister of state, Desmond Browne MP, rejecting the applicant's appeal against the refusal of the Chief Constable to grant him a firearms certificate for a personal protection weapon (PPW).

Background

[2] In 1993 the applicant was a witness in the prosecution of a leading loyalist Ulster Volunteer Force member. At the request of the police he had held a number of meetings with this individual which were videotaped. He also had a number of telephone conversations with this person that were taped. The evidence that was thus obtained was crucial in the successful prosecution of the individual concerned who ultimately pleaded guilty to charges of extortion and was sentenced to a period of imprisonment.

[3] Unsurprisingly it was concluded that the applicant's life was at risk as a result of these events. He was admitted to a witness protection scheme and relocated in England where he lived in a number of different houses. He has returned to Northern Ireland, however, despite the obvious risk to his life. He wishes to be near his family and to be with his girlfriend. Unfortunately she suffers from cystic fibrosis and needs the support of her own family in Northern Ireland.

[4] The applicant has been told that the person who was convicted of the extortion offences has issued a death threat against him. That person has now been released from prison having served his sentence. Mr Herdman has been made aware of other threats to his life. Certain paramilitary elements have intimated to a friend of the applicant that he will be killed if he falls into the hands of their organisations. So called leading loyalist figures have indicated that he would only be allowed to return to Northern Ireland "in a box". Others have approached his sister inquiring as to the applicant's whereabouts.

[5] The applicant applied to the Chief Constable for a firearms certificate for a personal protection weapon. On 15 February 2001 the firearms licensing branch of the Royal Ulster Constabulary wrote to him refusing the application and stating that it was satisfied that the applicant had no good reason for possessing a firearm. On 26 March 2001 Mr Herdman appealed this decision to the Secretary of State under article 55 of the Firearms (Northern Ireland) Order 1981. On 23 July 2001 a letter was sent to the applicant from the firearms and explosives branch of the Northern Ireland Office. NIO referred to the fact that the basis on which the Chief Constable had refused the application was that he considered that the applicant did not have good reason for having a personal protection weapon. He was asked to reply with his observations on this statement.

[6] Mr Herdman replied to the NIO letter on 30 July 2001. He repeated the concerns that he had expressed in his appeal to the Secretary of State against the refusal by the Chief Constable of the firearms certificate and outlined the events described in paragraph 4 above, on this occasion naming the two men who were alleged to have made the threat that he would only be allowed to return to Northern Ireland in a box.

[7] On 23 August 2001 a submission was made by Ms Norma Downey of the firearms and explosives branch of NIO to the minister who was to take the decision under article 55 (Mr Browne). She referred to the Chief Constable's policy of granting a firearms certificate for a personal protection weapon only where he had intelligence that indicated that there was a *specific* threat to the life of the person applying. She suggested that this was a reasonable policy. After referring to previous convictions of the applicant, Ms Downey's recommendation was expressed in the following terms: -

> "While [the firearms and licensing branch] are rightly concerned by Mr Herdman's criminal record it is 9 ½ years since his last conviction. During that time he has not come to the adverse attention of the police and it would, therefore, appear that he has made a sustained break with his criminal past. It would be reasonable to

> assume that he has been rehabilitated and could be granted a FAC. However, the Chief Constable has no intelligence of a **specific threat** to Mr Herdman's life and he does not, therefore, meet the criterion for a PPW.
>
> I recommend that Mr Herdman's appeal be refused on the grounds that he does not have a good reason for acquiring a PPW."

[8] On 30 August 2001 the personal secretary to the minister wrote to Ms Downey referring to the assertion of Mr Herdman that the two named paramilitaries had said he would only be allowed back to Northern Ireland if dead and raised a number of queries. These were: -

> "1. What is our assessment of that assertion? Do we believe it? Or do we assess that it is fabricated?
>
> 2. If we assess that it is probably true, is it a specific threat?
>
> 3. If it does not satisfy that criterion, what does it amount to?
>
> 4. In any event, what criteria do we apply to (*sic)* to deciding whether a specific threat exists? And
>
> 5. Have we, in all previous cases where a FAC is granted for a PPW, required to be satisfied of the existence of a specific threat from our own intelligence or have we relied upon information from other sources such as the applicant himself?"

[9] On 29 October 2001 the firearms and explosives branch wrote to Mr Herdman informing him that they were taking further views from the police. They suggested that he should report the allegation that the persons named in his letter of 30 July 2001 had made the threat described in that letter and that the police would carry out an investigation "into these serious criminal allegations". Mr Herdman replied on 5 November 2001 stating that he would not be prepared to give evidence against the named men since they were people who ordered executions.

[10] On 15 November 2001 a further submission was made to the minister based partly on the response of the police to the various queries that he had raised. The police had been asked by the branch to comment on the following questions: -

> "What is the police's assessment of Mr Herdman's claims that two UDA/UFF leaders said that the only way that he would be allowed back to NI would be if he were dead? If they assess that it is probably true, does it amount to a specific threat?"

The police replied: -

> "The police have no intelligence to corroborate the alleged comments and cannot assess it. They say that Mr Herdman should report the matter to them with names of witnesses etc with a view to a full criminal investigation."

The firearms and explosives branch commented on this reply as follows: -

> "It seems highly unlikely that Mr Herdman would agree to this and even if he did an investigation could well take a long time and eventually prove inconclusive."

The second query put to the police was: -

> "What criteria do you apply to deciding whether a specific threat exists?"

The police replied: -

> "A specific threat is determined by SB [special branch] source information that the applicant is being targeted for murder by a paramilitary organisation. Alternatively a specific threat may be determined following a murder attempt on the applicant's life, if the application follows in a reasonable time.
>
> If the applicant makes unsubstantiated allegations, as Mr Herdman has done, then the police would invite him to provide information on which to base a proper investigation."

The third query was: -

> "Will the Chief Constable only be satisfied of the existence of a specific threat it this is indicated by

> intelligence from his own sources? The rigid application of a policy to all cases without due regard to individual circumstances would not be reasonable."

The police reply was: -

> "In the case of a PPW a specific threat is the only way to meet the good reason criterion. Mr Herdman's circumstances do not amount to a specific threat but may amount to a general threat.
>
> Possession of a PPW must only be permitted in exceptional circumstances, hence the specific threat criterion. Any diminution of the criterion will lower the threshold for all applicants."

NIO commented on this as follows: -

> "One might reasonably argue that Mr Herdman's circumstances <u>are</u> exceptional and that the specific threat criterion, while a reasonable general rule of thumb, should not necessarily be absolute in all cases. The risk of retaliatory action by paramilitaries in his case must surely be very high indeed and one might imagine that his circumstances must get him as close to the specific threat criterion as it is possible to get without actually meeting it. The argument that the floodgates will open if his case is allowed is not convincing. There will surely not be very many cases of people who have stood up to paramilitaries in this way and, even if there are, one could argue that they deserve all the help that they can be given. It does not seem entirely unreasonable that he should wish to abandon the witness protection programme and return home to Northern Ireland."

[11] The submission also dealt with the question whether in all previous cases there had had to be a specific threat from police intelligence sources before a firearms certificate was granted. The firearms branch comment on this question was: -

> "Since the specific threat criterion became the standard some years ago (previously a general

> threat had been enough) we are not aware of any successful appellant who did not meet that criterion but this is an unusual case."

[12] The submission also advised the minister that the police had confirmed that there was no current intelligence to indicate a specific threat against Mr Herdman. The police suggested that he could not have been concerned about the threats as otherwise he would not have returned to Northern Ireland. They also stated that in their experience "many people have given evidence against top UDA figures and when the trials have been completed have returned to live in Northern Ireland without interference."

[13] The recommendation of the firearms branch to the minister was in these terms: -

> "5. There seem to be two ways of viewing this case. On the one hand to take the police view that the threshold of the Chief Constable having specific intelligence of a serious terrorist threat to the person's life (or there having been an actual murder attempt) is a reasonable one and Mr Herdman clearly does not reach this threshold.
>
> 6. On the other hand one might argue that the Chief Constable's policy should not be inflexible and account should be taken of other exceptional circumstances – the exception proves the rule. Doing so would not necessarily put the Chief Constable's general principle at risk. Mr Herdman's case might fall into that category and I have considerable sympathy for him. He must have upset the UDA/UFF a great deal.
>
> 7. It is a difficult decision but on balance I am inclined to think that Mr Herdman's case does <u>not</u> quite reach the high standard normally required for the Chief Constable to permit a person to have a PPW. I note the police comment that many people have given evidence against top UDA figures and have returned after the trials to live in Northern Ireland without interference. **I recommend that the appeal be refused on the grounds that Mr Herdman does not have a good reason for a PPW**."

[14] The minister agreed with the recommendation and rejected the applicant's appeal. He wrote on the submission: -

> "The police comment about others from similar backgrounds who are safe is ultimately persuasive. Although I think this is a marginal case – on balance I agree with the recommendation."

The judicial review application

[15] For the applicant Mr Larkin QC argued that the Secretary of State had effectively adopted the same test as the Chief Constable *viz* that the applicant had to show that he was subject to a serious terrorist threat and that this had to be confirmed by intelligence sources available to the Chief Constable. Such a requirement was, Mr Larkin said, at odds with the statutory test set out in article 28 (2) of the 1981 Order which prohibits the issue of a firearms certificate unless the Chief Constable is satisfied that there is a good reason for the applicant to have a firearm. It was not possible, Mr Larkin claimed, for the minister to "define down" the good reason provision in paragraph (2) of article 28 and to substitute for that stipulation the requirement that there be a specific threat to the applicant confirmed by intelligence information.

[16] The application of the 'specific threat' test to the applicant's case represented a fettering of the minister's discretion, Mr Larkin submitted, and was also a violation of the applicant's rights under article 2 of the European Convention on Human Rights. Neither the Chief Constable nor the minister had taken article 2 into account in reaching their decision to refuse the application for a firearms certificate.

[17] For the minister Mr Maguire argued that the words "good reason" in article 28 (2) did not require definition but application. He did not dissent from the proposition that the minister had applied the same criterion as to the need for a specific threat as had the Chief Constable but he suggested that they were perfectly entitled to devise a policy for dealing with this type of application and that provided it was not applied inflexibly the use of such a policy was unobjectionable. The minister was clearly aware that he could depart from the policy and his careful evaluation of the competing arguments demonstrated that the applicant's case was considered on an individual basis.

[18] Mr Maguire argued further that there was no breach of article 2 of the Convention. In order that article 2 be engaged there had to be a "real and immediate" risk to the life of the applicant. No such risk had been shown, he suggested. In any event, even if it was engaged, it did not follow that article 2 required that a firearms certificate be issued. The applicant had been informed that assistance was available from his local crime prevention officer.

He had not sought that assistance. He had also been informed that the police stood ready to investigate allegations about threats to him if he reported these to them. He had not done so. The steps taken by the police were sufficient, Mr Maguire argued, to satisfy the respondent's duty under article 2 to take reasonable measures for the safety of the applicant.

The policy

[19] A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust – *Halsbury's Laws of England Vol 1 (1) para 32.* But the decision maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the policy - *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

[20] A policy may operate to place an illegitimate fetter on the exercise of discretion in two ways. The policy may be intrinsically inflexible in erecting an unacceptably high threshold for an applicant to cross. Alternatively if the policy is applied too rigorously and there is a lack of preparedness on the part of the decision maker to entertain exceptions to it.

[21] I have held that the policy devised by the Chief Constable to deal with applications for a firearms certificate is not intrinsically inflexible – *Re Martin Meehan's application* (2002) NIQB 45. It is clear, however, that there must be a readiness to recognise exceptions to that policy if warranted by the specific circumstances of a particular case. This requirement is not satisfied by a routine examination of the particular facts that arise in an individual application. There must be a rigorous inquiry as to whether those circumstances justify an exception being made to the general policy. Put simply, the minister must not only be conscious of the particular circumstances of the applicant he must also scrupulously consider whether those circumstances warrant a departure form the normal rule. The need to do so is more critical where the policy erects a high – albeit not unacceptably so – standard.

[22] The policy operated by the Chief Constable (and adopted by the minister) creates a significant hurdle for any applicant for a firearms certificate. If that applicant has not been the victim of a murder attempt he must show that there is a specific threat to his life from terrorists. By specific in this context one must, I think, assume that the Chief Constable means a threat personalised to the applicant and made in precise terms. Beyond this, however, the threat must be confirmed from intelligence sources. As Mr Larkin pointed out, this requirement goes well beyond the bare language of

article 28 (2) which provides that the Chief Constable may grant a firearms certificate if satisfied of certain conditions. The relevant conditions are: -

> "(2) In the case of an applicant—
>
> (a) who is resident in the United Kingdom, or
> (b) who is resident in a country outside the United Kingdom and has elected, in pursuance of paragraph (4), to have this paragraph apply to him,
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> a firearm certificate shall not be granted unless the Chief Constable is satisfied that the applicant—
>
> (i) is not prohibited by this Order from possessing a firearm, is not of intemperate habits or unsound mind and is not for any reason unfitted to be entrusted with a firearm; and
>
> (ii) has a good reason for purchasing, acquiring or having in his possession the firearm or ammunition in respect of which the application is made; and
>
> (iii) can be permitted to have that firearm or ammunition in his possession without danger to the public safety or to the peace."

[23] The minister was presented with two alternative approaches in the submission of 15 November 2001. The first was to accept that "the threshold of the Chief Constable having specific intelligence of a serious terrorist threat to the person's life (or there having been an actual murder attempt) [was] a reasonable one and Mr Herdman clearly [did] not reach this threshold." The second possible approach mooted for the minister was that "the Chief Constable's policy should not be inflexible and account should be taken of other exceptional circumstances – the exception proves the rule".

[24] I consider that this was an impermissible portrayal of the alternatives available to the minister. The minister should have been advised that it was in all circumstances necessary to treat the policy as not inflexible. He should have been advised that the policy should be departed from if the particular circumstances of this case were deemed to constitute a good reason for the applicant being granted a firearms certificate. Precise advice to this effect was especially required because of the obvious errors in the approach of the Chief

Constable as evidenced by the replies to the queries put to the police by the firearms branch of NIO.

[25] The police had claimed that in the case of a PPW a specific threat is the only way to meet the good reason criterion. This amounts to the fixing of an inflexible policy. On the approach of the police, unless a specific threat has been made, an individual could *never* demonstrate a good reason for having a firearms certificate for a PPW. This cannot be right. It restricts the range of consideration of the decision-maker (the Chief Constable) of the exercise of his statutory power and therefore is not consistent with the purpose of the legislation.

[26] Furthermore the police reply indicates that the only circumstances in which a specific threat will be deemed to exist is where there is special branch information to that effect. Again this cannot be a correct approach. If the applicant had asked the police to investigate the allegations about the specific threats that had been made by named individuals and these had been verified in the course of conventional police inquiries, it could not be claimed that a specific threat did not exist. To restrict the circumstances in which a specific threat would be recognised to those where special branch information verified such a threat imposed an obvious fetter on the exercise of the Chief Constable's discretion.

[27] While there is no direct evidence that the minister followed the approach of the Chief Constable in these two vital areas, it is inconceivable that it did not influence him. He had been advised that Mr Herdman's circumstances *were* exceptional and that the risk of retaliatory action against him was very high. He had also been told that Mr Herdman's circumstances were "as close to the specific threat criterion as it is possible to get without actually meeting it". In effect the only basis for concluding that the applicant did not have a good reason for having a firearms certificate is that he did not meet the Chief Constable's criterion.

[28] It is of course the case that the minister had been advised that other persons had given evidence against UDA leaders and had returned to Northern Ireland and lived here safely. This fact alone, while relevant to Mr Herdman's application, could not transform the applicant's case, judged on its individual merits, from one where there was good reason for granting a firearms certificate to one where that was no longer appropriate. If (as the minister had been advised) the circumstances of the applicant's case were exceptional they could not be rendered less so by the experience of other individuals.

[29] I have therefore concluded that the minister failed to have adequate regard to the exceptional nature of the applicant's case. He had certainly considered the applicant's circumstances but he was not sufficiently alert to

the need to acknowledge that an exception should be made in Mr Herdman's case, notwithstanding his failure to achieve the standard set by the Chief Constable. In particular, he failed to recognise the flaws in the approach of the Chief Constable and was thereby diverted from the necessary concentration on the essential question posed by the legislation *viz* whether there was a good reason in Mr Herdman's case for granting a firearms certificate.

Article 2 of ECHR

[30] Mr Larkin accepted that for article 2 of the Convention to be engaged it had to be shown that there was a real and immediate risk to the life of the applicant – *Osman v United Kingdom* [1999] EHRLR 228. I do not consider that the evidence adduced by the applicant establishes the existence of such a threat. I am not persuaded that article 8 is engaged, therefore.

[31] One may observe, however, that the adoption of the policy by the Chief Constable to refuse a firearms certificate to an applicant who is not the subject of a specific threat verified by special branch sources may well fall foul of article 2. One can readily envisage circumstances in which a real and immediate threat exists but has not been confirmed by intelligence and where it is reasonable that the individual affected should have a PPW. The strict application of the present policy by the Chief Constable would result in such an individual being refused a certificate.

[32] As to the applicant's assertion that the minister failed to have regard to article 2, there is no evidence to sustain that claim. In paragraph 4 (iii) of the first affidavit of Eric Kingsmill, a principal in the police division of the Northern Ireland Office, filed on behalf of the respondent, it is averred: -

> "In approaching his decision the minister who has personally been dealing with firearms appeals for some time was well aware of his duties as a public authority under the Human Rights Act 1998 and of the need for him to take into consideration all relevant articles of the European Convention on Human Rights, including articles 2 and 8 …"

There is no reason not to accept this statement.

Conclusions

[33] It has not been established that there is a breach of article 2 of the Convention or that the minister failed to have regard to potential rights of the applicant under that provision. I am satisfied, however, that the minister's discretion was unduly fettered by an undue concentration on the question

whether the applicant satisfied the test set by the Chief Constable for fulfilment of the need to show that there was a good reason for the applicant to have a firearms certificate. Instead of approaching that question in an open and flexible way, the minister focussed on whether the applicant had shown that there was a specific terrorist threat to him and whether such a threat had been authenticated by special branch sources.

[34] I will therefore make an order of certiorari quashing the decision of the minister.