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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY
WILLIAM FRAZER FOR JUDICIAL REVIEW

WEATHERUP J

The applications for Judicial Review.

[1] The applicant has made two applications for Judicial Review. The first concerns a decision of the Secretary of State for Northern Ireland dated 16 September 2003 refusing the applicant admission to the Key Persons Protection Scheme ("the Scheme"). The second concerns the decisions of the Secretary of State dated 2 June 2003 rejecting an appeal from two decisions of the Chief Constable of the Police Service of Northern Ireland, in the first place refusing a variation of the applicant's firearms certificate, and then revoking that firearms certificate.

THE APPLICATION UNDER THE SCHEME

[2] The Scheme is a non-statutory discretionary scheme operated by the Secretary of State. The aim of the Scheme is stated to be to protect those whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of Government, the effective administration of Government and/or the criminal justice system, or the maintenance of law and order. Admission to the Scheme may in the first place apply to persons working in specified jobs or occupations who will normally qualify for inclusion if assessed by the Chief Constable as being under serious or significant threat (the occupation criterion). Secondly, admission to the Scheme may apply to persons not engaged in one of the specified occupations, but who perform a wider public role which makes a positive and helpful contribution to the realisation of the objectives of the Scheme; admission to the Scheme being subject to the person being assessed by the Chief Constable as under serious or significant threat (the wider public role criterion). Thirdly, for those

not satisfying the occupation criterion or the wider public role criterion the Secretary of State operates a residual basis for admission where there are compelling political reasons. Fourthly, the Secretary of State may agree to provide home protection measures outside the Scheme in cases where a person is under imminent risk. In the year to October 2003, 900 applications were received for admission to the Scheme.

[3] The Chief Constable applies six levels of threat. The highest level is level 1 described as "imminent" where there is specific intelligence showing that the target is at a very high level of threat and that an attack is imminent. Level 2 is "serious" where there is specific intelligence of recent events or a target's particular circumstances indicating a likely high priority target and a high level of threat. Level 3 is "significant" where recent general intelligence on terrorist activity, the overall security and political climate or the target's general circumstances indicate a likely priority target and a significant level of threat. Level 4 is "moderate" where a target's circumstances indicate that there is potential for being singled out for attack and a moderate level of threat. Level 5 is "low" where there is nothing to indicate that the target would be singled out for attack and there is a low level of threat. Level 6 is "negligible" where a target is unlikely to be attacked and there is a negligible level of threat.

The decision.

[4] Application was made on behalf of the applicant for admission to the Scheme in April 2002, September 2002 and January 2003 and on each occasion the applicant was refused admission to the Scheme. The final refusal was on 16 September 2003 and is the subject matter of this judicial review. The applicant set out in written particulars in support of his application to the Secretary of State, details of the threats that had been made against him and of police messages that he had received and accounts of intimidation and threats. He included with his application to the Secretary of State statements concerning the nature of his work in the community. This included his involvement with Families Acting for Innocent Relatives ("FAIR"). In his affidavit he describes FAIR as an outspoken victims' group that operates in the South Armagh area. He was also involved with Northern Ireland Terrorist Victims Together, which he describes as an umbrella ground representing victims and speaking out on victim and criminal justice related issues. Further he furnished evidence of support for his application from various public figures. The main focus of the applicant's approach was directed to establishing that he was engaged in a wider public role that warranted home protection under the Scheme.

[5] The Secretary of State obtained advice from the Chief Constable and the applicant was assessed as being at significant risk, and accordingly he satisfied the risk requirement.

[6] Apart from obtaining police advice that confirmed that the threat to the applicant was significant, internal advice was obtained by officials from the Political Affairs Branch, the Victims Liaison Unit and the civil representative.

[7] Officials in the Northern Ireland Office prepared a submission to the Minister for decision on behalf of the Secretary of State. Under the first ground for admission to the Scheme, the occupation criterion, the applicant did not qualify. On the second ground, the wider public role criterion, the submission to the Minister stated:

> "Mr Frazer argues that he is fulfilling a public role through his involvement with FAIR and his outspoken criticism of republicanism in South Armagh. In considering this issue you will wish to note that colleague in Political Affairs Branch, Victims Liaison Unit and the local civil representative suggest that Mr Frazer does not satisfy this criteria, ie he is not making a positive and helpful contribution to the realisation of the objectives of the Scheme"

As to the third ground, namely compelling political reasons, it was noted that the applicant argued that he held a very high public profile and it was stated that:

> "In view of this you may conclude that his role of spokesperson for FAIR is now such as to justify his inclusion in the Scheme for political reasons. That said should you do so in this case others from various community groups will understandably expect similar treatment."

As to the fourth ground, namely protection outwith the Scheme, it was noted that previous admissions on this ground had been to persons under imminent (level 1) threat and it was added that:

> "This level of threat is considered under Article 2 of the ECHR to be real and immediate.
>
> In Mr Frazer's case the Chief Constable considers him to be under a significant threat. You will therefore wish to consider whether Mr Frazer merits protection outwith the normal Key Persons Protection Scheme procedures. In doing so you may wish to consider the wider implications of any positive decision with any human rights obligations the State may have."

[8] The applicant did not satisfy the occupation criterion. The officials submission considered the applicant's case under the second, third and fourth grounds referred to above, namely the applicant's wider public role, compelling political reasons and protection outwith the Scheme. It was recommended that the application be refused. The Minister sought further advice on the nature of the threat faced by the applicant and accepted the recommendation of officials and refused the application. The decision letter dated 16 September 2003 referred only to the first and second criterion, namely the occupation criterion and the wider public role criterion, but it is apparent from the officials submission and the affidavit sworn on behalf of the Respondent that consideration also extended to protective measures based on political reasons as well as outwith the Scheme. The decision letter concluded –

> "The Minister does not believe that you satisfy either the first or second criterion listed above.
> The Minister has asked me to suggest that if you remain concerned about your personal security you should contact your local District Commander or seek advice from your local Crime Prevention Officer."

<u>The Grounds for Judicial Review.</u>

[9] The applicant's grounds for judicial review can be considered under the following headings -

I. Procedural unfairness

II. Failure to give reasons

III. Failure to take into account certain relevant considerations

IV. Taking into account irrelevant considerations and operating a discriminatory scheme.

<u>Procedural unfairness.</u>

[10] The applicant contends that it was procedurally unfair of the respondent not to specify to the applicant the factors adverse to the application so that the applicant might make informed representations. In particular the applicant identifies the respondent's internal advice as representing adverse factors of which the applicant had no notice. The Political Affairs Branch response had been that the applicant did not have any political profile. The Victims Liaison Unit response had been that FAIR was a Unionist based group mainly made up of ex-security force personnel. The civil representative response had been that the applicant and FAIR were seen to

be controversial. The officials submission to the Minister indicated that those responses suggested that the applicant did not satisfy the wider public role criterion in that he was not making a positive and helpful contribution to the realisation of the objectives of the Scheme. The applicant objects to the non disclosure of adverse factors, and having had sight of the officials submission takes issue with the content of the responses as well as the conclusion drawn in the officials submission.

[11] On the other hand the respondent contends that the contents of the responses were not adverse but rather were neutral. It is said that the burden was on the applicant to satisfy the requirement that the applicant was making a positive and helpful contribution to the realisation of the objectives of the Scheme and it is said that the internal responses and the conclusion drawn from those responses as stated in the officials submission were to the effect that the eligibility criteria for admission to the Scheme had not been satisfied.

[12] It is common case that this application must be processed in accordance with the requirements of procedural fairness. If there are adverse factors that are unknown to an applicant, and there is no public interest inhibiting their disclosure, then fairness may require that an applicant has the opportunity to address the adverse factors. Whilst stated in the context of the exercise of statutory powers the remarks of Lord Mustill in *Doody v Secretary of State* [1993] 3 All ER92 at 106g-h included the following-

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.
>
> (6) Since the person affected usually cannot make worthwhile representation without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[13] The replying affidavit of Ronald Armour on behalf of the respondent avers that the internal responses do not contain anything significantly adverse to the applicant. While the Political Affairs Branch considered that the applicant did not have any political profile the applicant described this as patent nonsense. He refers to his public profile, his work with the organisations with which he is concerned, his media involvement, as well as his history as an independent candidate in Assembly elections. On the other hand the respondent replies that the applicant has held no elected position, is not a party activist, but is rather in the category of hundreds if

not thousands of persons who are active in pressure groups or who have stood unsuccessfully for election or who have been involved in the process of working for a particular position in relation to an aspect or aspects of public policy. The applicant relies on the Victims Liaison Unit's response itself as suggesting that the applicant had a political profile. That response included reference to FAIR as a Unionist based group mainly made up of ex-security force personnel with a victim support role and receiving public funding and maintaining a web site. Further the civil representative's comment that the applicant and FAIR are seen as being controversial is said by the applicant to be inconsistent with the absence of political profile. On the other hand the respondent indicates that none of these matters establishes a wider public role that is of the significance required for admission to the Scheme.

[14] Whether an applicant reaches the threshold of satisfying the wider public role criterion is a matter of fact and degree. A public role has clearly been established by the applicant but it is not every public role that qualifies for admission to the Scheme and the Secretary of State has to make a value judgment. I accept that the factors noted in the internal responses are not adverse to the applicant but rather are neutral matters and as such they are not sufficient to enable the applicant to reach the threshold. I accept the respondent's submissions on this point. The applicant had the opportunity to expand on his public role as he saw fit and he made representations to that effect, as did others on his behalf, but the role that he outlined was not considered sufficient to warrant inclusion in the Scheme.

[15] Further, the applicant sought the gist of the police response to the Secretary of State. It is apparent from the evidence that the police assessment forwarded to the Secretary of State amounted to a statement of the level of threat as being significant, and did not contain an intelligence report. Accordingly the applicant received the police assessment that was made available to the decision maker. In any event the assessment was sufficient to satisfy the level of threat required by the wider public role criterion.

Reasons.

[16] The applicant contends that the respondent failed to give any or adequate reasons for the decision to refuse the application. The applicant was informed that he did not satisfy the eligibility criteria for inclusion in the Scheme. The respondent on affidavit described the wider public role criterion, and at hearing described the other criteria, as involving a value judgment and stated that as a general proposition it would be difficult to encapsulate the basis for the judgment in an individual case.

[17] There is no general duty to give reasons and the issue is whether a failure to gives reasons amounts to unfairness. Lord Bingham's summary of principles in *R v Ministry of Defence, ex parte Murray* [1998] COD 134 at 136-137 includes in the factors in favour of not giving reasons that to do so would " call for articulation of sometimes inexpressible value judgments"

[18] The applicant had made a number of applications under the Scheme and concentrated on establishing entitlement under the wider public role criterion. A sufficient wider public role cannot be defined with any degree of precision and must involve a value judgment where the boundary between the successful and the unsuccessful is inexpressible. Similarly, the residual grounds of compelling political reasons and protection outwith the Scheme involve inexpressible value judgments. In any event the Respondent's affidavit explains the reason for refusal to an extent that enables the applicant to mount a challenge to the decision.

Relevant Considerations.

[19] The applicant contends that the respondent did not take into account relevant considerations, namely the applicant's wider public role. Considerable information was furnished by and on behalf of the applicant in relation to his wider public role and the applicant complains that that information was not included with the official submission. The officials submission referred to the applicant's role in very brief terms and attached a background note on FAIR. In essence the applicant contends that the official submission did not seek to make out the positive case that the applicant made and adopted a slant in relation to the applicant's case that was incorrect. In reaching a conclusion on these applications the decision-maker may call for further background material, if required. It is in the nature of ministerial decision making that officials have access to all papers relating to the application, initiate relevant inquiries in relation to the subject matter and prepare submissions that summarise the issues and make recommendations. It is not necessary that a copy of every particular furnished with an application be placed before the decision maker provided that the essence of the matter is before the decision maker, all relevant considerations are adverted to and the opportunity exists for the decision maker to have access to all particulars furnished and any other information considered relevant to the application. In the present case I am satisfied that the decision-maker was aware of the relevant considerations in relation to the applicant's wider public role.

Irrelevant Considerations.

[20] The applicant contends that the respondent has taken into account irrelevant considerations, namely the applicant's political views. Further the applicant contends that in so doing the respondent operates the Scheme in a discriminatory manner. The applicant contends that he is perceived as having a particular political stance, which is described in the applicant's skeleton argument as one that has "often been characterised as anti-agreement". The affidavit filed on behalf of the respondent sets out that many successful applicants for inclusion in the Scheme "hold political views which are not just different from but antagonistic to the views of the Minister who admitted them to the Scheme". There is no basis for concluding that the respondent's approach was based on the applicant's political position.

[21] The response of the Victims Support Unit did refer to the applicant as maintaining a web site "which responded to political news reports negatively". However that comment was not contained in the officials submission to the Minister and Mr Armour avers that the comment was removed because it was not considered that the reference was helpful and would assist the Minister to make a decision. While these remarks were clearly an adverse factor referred to by the Victims Support Unit they were not a factor presented to the decision-maker.

[22] The third ground for inclusion in the Scheme is based on compelling political reasons. The officials submission admitted of the Minister concluding that the applicant's role as spokesman for FAIR was now such as to justify his inclusion in the Scheme for political reasons. The nature of this ground is not further defined but as the respondent asserts that the applicant has not been excluded from the Scheme by reason of his political views or by reason of his outspoken views it is concluded that compelling political reasons for inclusion are not based on the political views of an applicant. Indeed were it the case, as the applicant contends, that the applicant was treated unfairly by reason of his political views, the officials submission might not have left it open to the Minister to conclude that the applicant's role as spokesperson for FAIR was now such as to justify his inclusion in the Scheme.

Protection outwith the Scheme.

[23] The fourth ground for the provision of protective measures arises outwith the Scheme, and to date appears to have been applied to cases where the threat was assessed as imminent. However it is apparent from the terms of the officials submission that protection outwith the Scheme is not limited to such cases as it was left open to the Minister to apply this ground to the applicant and in doing so to have regard to the States human rights obligations.

[24] The developments in relation to the positive obligations of the State in response to a real and immediate risk to life were discussed in relation to the operation of the Scheme in *Re W's Application* [2004] and may be summarised as follows.

(1) Article 2 of the European Convention provides for the right to life in terms that "everyone's right to life shall be protected by law". This has been interpreted as including a positive obligation to protect life and "it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". *Osman v United Kingdom* (1998) 29 EHRR 245.

(2) *Lord Saville v Widgery Soldiers* (2001) EWCA CIV 2048 concerned the risk to soldiers giving evidence to the Saville Inquiry at the Guildhall in Londonderry. In the Court of Appeal Lord Phillips approach was to consider first the nature of the subjective fears that the soldier witnesses were likely to experience

if called to give evidence in the Guildhall, to consider the extent to which those fears were objectively justified and then to consider the extent to which those fears, and the grounds giving rise to them, would be alleviated if the soldiers gave their evidence somewhere in Great Britain rather than in Londonderry. That alleviation then had to be balanced against the adverse consequences to the Inquiry of the move of venue, applying common sense and humanity. The result of the balancing exercise determined the appropriate decision. This was a course that it was believed would accommodate both the requirements of Article 2 and the common law requirement that the procedure should be fair.

(3) The issue has been considered in relation the admission of prisoners into a protected witness unit where the Prison Service act on advice from the police in *R (on the application of DF) v Chief Constable of Norfolk Police and Secretary of State for the Home Department* (2002) EWCH 1738 (Admin). Crane J having considered *Osman* and *Widgery Soldiers* stated that the requirement that the authorities knew or ought to have known of the risk will usually be satisfied much more readily in relation to a prisoner. The authorities are in a position to take measures to avoid any risk to an extent much greater than are the police in relation to a member of the community. The authorities are likely to be less inhibited with the provision of a protective regime is unlikely to affect the rights of others (para 37). Consideration was given to what a 'real and immediate' risk involved in the prison context. A real risk is one that is not simply a fear felt by the prisoner, but is disclosed by all the information available. Immediacy requires that the risk must be present and continuing (para 38).

(4) In *R (on the application of Bloggs) v Secretary of State for the Home Department* (2003) EWCA CIV 686, a further case on protection for a prisoner, the Court of Appeal reviewed the decisions. It was stated that if a risk to life is not "real", it is not a risk to life. If a risk to life is not "immediate" in the sense that it is not present at the time or during the period when it is claimed that a protective duty is owed by a public duty it is not a risk that can engage Article 2. It is a future risk that may, at some later date do so. To be a candidate for engaging Article 2, all that is needed is "a risk to life". To engage it depends, in the circumstances of each case, on the degree of risk, which necessarily includes consideration of the nature of the threat, the protective means being or proposed to counter it and the adequacy of those means (para 61). Further it was stated that it could be unhelpful to attempt to identify some sort of broad band of thresholds of risk for different categories of case (para 62). The starting point is that the right to life under Article 2 is unqualified (para 64). However despite the fundamental and unqualified nature of the right to life it is still appropriate to show *some* deference to and/or to recognise the special competence of the (Prison Service) in making a decision going to the safety of the inmates life. The intensity of the court's review is greater – perhaps greatest in an Article 2 case – that for those human rights where the Convention requires a balance to be struck (para 65).

(5) Carswell LCJ visited this issue in *Re Meehan's Application* (2004) NIJB 53 and agreed with the approach of the Court of Appeal in *Lord Saville of Newdigate v Widgery Soldiers,* which was considered not to be inconsistent with that of the ECtHR in *Osman v United Kingdom.* The approach of the court should be to ascertain the extent or degree of risk to life, take into account whether or not that risk had been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there were cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. The court should then balance all the considerations in order to determine whether there had been a breach of Article 2 (para18).

(6) The approach to Article 2 obligations is not based on an applicant reaching a threshold of risk set at different levels in different contexts, but rather about balancing the risk against reasonable measures to reduce the risk. The relevant risk must be real and immediate where a real risk is one that is objectively verified and an immediate risk is one that is present and continuing. The reasonable steps required by the authorities depend upon the degree and character of the risk and the anticipated effect of the proposed measures. Carswell LCJ in *Re Meehan's Application* put four factors in the balance, first, the extent or degree of risk, second, whether the State creates the risk, third, the difficulties involved in reducing the risk, and fourth, any public interest in not taking action.

A schedule of levels of risk may not be helpful in determining the appropriate response to a real and immediate risk. Inclusion in the Scheme may or may not be the appropriate response to a real and immediate risk. The degree and character of a risk that is classed as significant or serious may be such that it does not warrant the home protection measures accorded by the Scheme, but rather some different measures depending on the degree and character of the risk. On the other hand the degree and character of a lesser risk may require appropriate action that includes some home protection measures. The operation of the Scheme and protection outwith the Scheme is but one part of the measures operated by public authorities in relation to threats to the lives of citizens. Whether one or more of the available arrangements should be applied to a particular case must depend on the nature and extent of the threat in question and the circumstances of the case.

The starting point for the State must be to address the requirements of Article 2 by reference to the balancing exercise. Admission to the Scheme or protection outwith the Scheme may be a means of meeting Article 2 obligations in a particular case. However other means may be more appropriate to meet Article 2 obligations, again depending on the circumstances of the particular case.

The Secretary of State's approach to Article 2.

[25] The risk to the applicant was assessed by police as "significant." The police definition of that level of risk refers to recent general intelligence on terrorist activity, the overall security and political climate or the target's general circumstances indicating that he is likely to be a priority target and is at a significant level of threat. That risk is real as it is objectively verified and it is immediate as it is present and continuing. The State is required to take reasonable steps in response to that risk.

[26] Of note in relation to protection outwith the Scheme is the reference in the officials submission to an imminent (level 1) threat and the comment that "This level of threat is considered under Article 2 of the ECHR to be real and immediate." There may be some doubt whether that comment was intended to state that only an imminent risk can be considered real and immediate for the purposes of Article 2. However it is clear from the more recent officials submission of April 2004 in *Re W's Application* [2004] that a real and immediate risk was interpreted by officials as involving an imminent (level 1) threat only and that Ministers have been briefed accordingly in relation to protection outwith the Scheme. I find that in the present case the Minister was briefed on the basis that, in considering applications to the Scheme, a real and immediate risk for the purposes of Article 2 only arises in relation to an imminent threat.

[27] As appears from the discussion of Article 2 above a "real and immediate" risk is not limited to one that is "imminent". It appears that the introduction of the fourth ground for home protection, namely measures outwith the Scheme, purports to address the State's Article 2 obligations in respect of those who do qualify for inclusion in the Scheme. This approach excludes from home protection measures outwith the Scheme those who are subject to a "real and immediate" risk that is less than "imminent". I am satisfied that this approach is flawed.

[28] Had the officials submission recognised that a "real and immediate" threat for the purposes of Article 2 extended beyond an "imminent" threat and applied to the "significant" threat to the applicant the outcome may have been different. The outcome would not necessarily have been different because the balancing exercise may have resulted in the conclusion that the measures in place were sufficient. However the approach adopted by the officials submission leaves out of account a relevant consideration namely that the applicant faces a real and immediate risk to life.

[29] Accordingly I am satisfied that the decision of the Secretary of State in relation to protection outwith the Scheme must be quashed.

THE APPLICATION FOR A FIREARMS CERTIFICATE.

[30] The applicant's second judicial review concerns two decision of the Secretary of State of 2 June 2003, in the first place dismissing an appeal from a decision of the Chief Constable refusing to vary the applicant's Firearms Certificate to include a personal protection weapon and further, removing the applicant's entitlement to hold a Firearms Certificate.

The Firearms (Northern Ireland) Order 1981

[31] The statutory provisions governing the licensing of firearms in Northern Ireland are contained in the Firearms (Northern Ireland) Order 1981. A Firearms Certificates may be granted by the Chief Constable as provided by Article 28 -

> "(1) Subject to paragraphs (2) to (4), the Chief Constable may grant a firearm certificate to an applicant on payment of the fee payable under Article 33(1).
>
> (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,
>
> 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.
>
> (5) The Chief Constable may when granting a firearm certificate attach conditions to the firearm certificate.
>
> (10) A person aggrieved by the refusal of the Chief Constable to grant or renew a firearm certificate under this Order, or by any condition attached to such a certificate under paragraph (5) may appeal to the Secretary of State under Article 55."

[32] A Firearms Certificate may be varied by the Chief Constable under Article 29 –

> "(1) The Chief Constable may at any time by notice in writing attach or add conditions to a firearm certificate or vary the conditions specified in a firearm certificate except such of them as may be prescribed, and may by the notice require the holder to deliver up the firearm certificate to him within twenty-one days from the date of the notice for the purpose of attaching conditions to the firearm certificate or adding to or amending the conditions specified in the firearm certificate.
>
> (2) A firearm certificate may also, on the application of the holder, be varied by the Chief Constable.
>
> (3) A person aggrieved by a refusal of the Chief Constable to vary a firearm certificate or by any conditions attached, added or varied under this Article may appeal to the Secretary of State under Article 55."

[33] A Firearms Certificate may be revoked by the Chief Constable under Article 30 –

> "(1) A firearm certificate may be revoked by the Chief Constable if he is satisfied that-
>
> (a) the holder is prohibited by this Order from possessing a firearm, or is a person of intemperate habits or unsound mind, or is otherwise unfitted to be entrusted with firearms; or
>
> (b) the possession of a firearm by the holder is likely to endanger the public safety or the peace; or
>
> (c) the holder-
>
> (i) if he is a person to whom Article 28(3) applies, does not require the firearm or ammunition for sporting purposes only; or
>
> (ii) in any other case, no longer has a good reason for possessing the firearm; or
>
> (d) the holder has failed to comply with a notice under Article 47; or
>
> (e) the holder has failed when required to do so to furnish a photograph in accordance with regulations made under Article 58(1)(b); or
>
> (f) the holder, if he is a person to whom Article 28(3) applies, may not lawfully possess the firearm or ammunition under the law for the time being in force in the country in which he resides;

> or if the holder fails to comply with a notice under Article 29(1) requiring him to deliver up the firearm certificate.
>
> (2) A person aggrieved by the revocation of a firearm certificate on any of the grounds specified in paragraph (1)(a) to (f) may appeal to the Secretary of State under Article 55."

[34] An appeal lies to the Secretary of State against the decisions of the Chief Constable under Article 55 –

> "An appeal to the Secretary of State under Articles 28(10), 29(3), 30(2)…….shall be made in accordance with such rules as may be prescribed and, on such an appeal or application, the Secretary of State may make such order as he thinks fit having regard to the circumstances."

On an appeal to the Secretary of State from the Chief Constable the decision must be considered afresh. In *Re Tennyson's Application* [2001] NIJB 353.

The Personal Protection Weapon Policy.

[35] The Chief Constable operates a policy in relation to personal protection weapons. The policy contains a statement of overriding principles that recognise that under Article 2 of the European Convention on Human Rights the State has a primary duty to secure the right to life by putting in place effective criminal law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. The Chief Constable is stated to have a positive obligation to take all reasonable measures to obviate the risk to an individual's life and to prevent injury where he knows or ought to know that the individual is subject to a real and immediate threat. Under the policy this level of threat may be satisfied by a general threat or a specific threat. The general threat criterion applies to those who by virtue of their current profession or profession prior to retirement are in threat of their lives despite there being no specific intelligence against the individual. The specific threat criterion applies in other cases where there has been a recent life-threatening attack on the individual and the level of threat remains, or a personal threat has been made which can be substantiated by a specialised police security report. It is a further requirement of the personal protection weapon policy that the applicant be fitted to be entrusted with a firearm. The Chief Constable is entitled to operate a personal protection weapon policy provided the policy remains flexible. In *Re Herdman's Application* [2003] NIQB 46.

The Decision.

[36] The applicant held a Firearms Certificate for a shotgun for a number of years. As a result of the threatening and intimidatory conduct referred to above in relation to the other application for judicial review the applicant applied in 2002 for a variation of the Firearms Certificate to include a personal protection weapon. By letter dated 21 November 2002 from the Chief Inspector at the Firearms Licensing Branch of the Police Service of Northern Ireland, as the duly authorised officer acting on behalf of the Chief Constable, the applicant was notified that the Chief Inspector was minded to refuse the application for a personal protection weapon and to revoke the Firearms Certificate in respect of the shotgun. The reason was stated to be that "this view is taken because of your alleged associations with loyalist terrorist organisations." The letter invited the applicant to make comments or representations before a final decision was made.

[37] By a response dated 28 November 2002 made by the applicant's solicitor particulars were sought of the nature of the applicant's associations with the organisations, the identity of the organisations, the timing of the information and the nature of the information.

[38] In a reply dated 22 January 2003 the Chief Inspector gave notice of his decision that the application for a Firearms Certificate for a personal protection weapon was refused on the ground that the applicant was unfitted to be in possession of that firearm within the meaning of Article 28(2)(1) of the 1981 Order. In addition notice was given that the applicant was not a fit person to be entrusted with a firearm and a Notice of Revocation in respect of the Firearms Certificate was enclosed.

[39] The applicant appealed to the Secretary of State. By letter dated 12 May 2003 from the Firearms and Explosives Branch of the Northern Ireland Office the applicant was informed that the Chief Constable had revoked his Firearms Certificate as the applicant was unfit to be in possession of firearms and that:

> "He based his decision on a reliable intelligence report that you associated with loyalist terrorist organisations. He considered that your association with these organisations did not arise from your work with FAIR and could not be described as legitimate."

In relation to the application for grant of a personal protection weapon the applicant was informed that the Chief Constable had concluded that there was no information to indicate that there was a specific threat on the applicant's life which warranted him being permitted to have a personal protection weapon. The letter offered the applicant the opportunity to comment further in writing on the grounds given by

the Chief Constable for his decision before the Secretary of State reached a decision on the appeal.

[40] In a response dated 20 May 2003 the applicant disagreed that there was no specific threat to his life and referred to further evidence supporting such a threat as well as indicating that it was incumbent on the Northern Ireland Office to conduct their own enquiries into the matter. In relation to the alleged terrorist associations the applicant stated:

> "Contrary to the rather hollow claims of the Chief Constable I have no links whatsoever with any paramilitary movements."

[41] In a letter dated 2 June 2003 the Secretary of State refused the applicant's appeal stating:

> "(1) You did not need a PPW as Special Branch have advised that you are not the subject of a specific threat.
>
> (2)You are unfit to have firearms and ammunition as the police have intelligence from a reliable source to indicate that you have recently associated with loyalist terrorist organisations."

<u>The Grounds for Judicial Review.</u>

[42] The applicant's grounds for Judicial Review are:

(a) The Secretary of State acted in breach of his duty to act in a procedurally fair manner and did so in particular by -

(i) Failing to disclose to the applicant and permit him to make representations in relation to the police intelligence or the gist of the police intelligence which purported to show that the applicant had links to loyalist terrorist organisations.

(ii) Failing to permit the applicant to cross examine or otherwise effectively challenge the evidence of the police officers who contended that he had links to loyalist terrorist organisations.

(iii) Failing to disclose to the applicant to allow him the opportunity to comment on the police report and all other relevant materials which were before the Secretary of State in making his decision.

(iv) Falling to give effect to the applicant's procedural legitimate expectation that if material came into the police possession which would affect his continuing entitlement to hold a Firearms Certificate he would be afforded proper opportunity to be made aware of and comment on same before his Firearms Certificate was revoked.

(v) Improperly fettering his discretion in respect of what material might be made available to the applicant by concluding that he must observe the requirements of the police in respect of the provision to him of information of an intelligence or sensitive nature.

(b) The Secretary of State's finding that the applicant had associations with loyalist paramilitary organisations had no factual or evidential basis; and there was no or no sufficient material in front of the Secretary of State on which he could, properly directing himself, so find.

[43] The first ground of refusal of the applicant's appeal was that he was not subject to a specific threat. The applicant disputed that conclusion in correspondence and on affidavit and the applicant has produced additional information to support his position. The applicant may of course renew his application supported by new evidence at any time. The level of threat is primarily a matter for the police assessment. It is a matter in respect of which the Secretary of State is entitled to rely on the assessment of police. If there are grounds to request reconsideration of the police assessment the Secretary of State may do so. If there are grounds for setting aside the police assessment the Court may do so. There are no such grounds in the present case.

Procedural unfairness.

[44] The central issue in the Judicial Review concerns the applicant's alleged association with terrorist organisations. The nature of the information available to the Secretary of State and the processing of that information are set out in the affidavit sworn on behalf of the respondent by Eric Kingsmill of the Firearms and Explosives Branch of the Northern Ireland Office. The decision to refuse the applicant's appeal was made by the Security Minister on behalf of the Secretary of State. The Minister

was made aware of the general nature of the intelligence information provided by police in the same way that the applicant was made aware of it and in addition she was told that the applicant had denied that he had any links with a paramilitary organisation. The Minister was not provided with the intelligence report relied on by the police. The Minister had dealt with an earlier appeal by the applicant in respect of a personal protection weapon in April 2002, when she had received a copy of a police intelligence report, but when making her decision the Minister could not recall any detail of the earlier intelligence report over and above the general description of the intelligence briefed to her for the purposes of the latest decision. Accordingly the respondent received no more information on the issue of the applicant's alleged terrorist associations than that which was disclosed to the applicant.

[45] Further, officials on behalf of the Secretary of State had taken two steps in relation to the police intelligence before seeking representations from the applicant. In the first place they queried with the police whether the alleged associations of the applicant were legitimate and whether the intelligence was reliable. The police responded that the alleged associations did not arise out of the applicant's work with FAIR and could not be described as legitimate and also indicated that the information came from a reliable source. This information was communicated to the applicant in the letter of 12 May 2003.

[464] Secondly officials on behalf of the Secretary of State queried with police the extend of the disclosure concerning the alleged associations that might be made to the applicant and it was confirmed by the police that no further information could be disclosed. The Secretary of State observes the requirements of the police in relation to the provision of information of an intelligence or sensitive nature.

[47] The applicant has been found unfitted for a Firearms Certificate because of paramilitary links. The applicant is entitled to receive notice of the factors adverse to his application so that he might make representations that might affect the decision. Subject to public interest considerations he is entitled to the gist of the adverse information. Again, subject to public interest considerations, the gist of the information made available must be such information as is in the possession of the decision-maker to enable the applicant to address the substance of the adverse factors. If there is limited disclosure of such information to the decision maker, as in the present case where no details of the intelligence were furnished to the Minister, the further issue arises as to whether the decision maker had sufficient material on which to make the decision. For present purposes there are, therefore, two elements of the disclosure issue that require consideration. The first relates to the nature and extent of the information in the possession of the decision-maker. The second concerns the extent of disclosure that would be sufficient to allow the applicant to address the adverse factors.

[48] In the present case the decision-maker has disclosed to the applicant all the information in relation to alleged terrorist associations which was available to the decision-maker. That being the case the applicant's complaint is that it was

unreasonable of the Secretary of State to rely on the statement to the Chief Constable concerning the applicant's alleged terrorist associations without requiring further particulars of the allegation from the Chief Constable or requiring other enquiries to be undertaken on the issue. I am satisfied that the Secretary of State can rely on the intelligence information furnished in the present case as there are no indications that call into question reliance on that information. Officials sought confirmation that there was intelligence that the applicant's contacts were illegitimate and that the information was considered reliable and both matters were confirmed. There will be cases where circumstances require that further enquiries be undertaken, but no such circumstances are evident in the present case.

[49] Had further information been furnished to the Secretary of State in relation to the applicant's terrorist associations then in any event the Secretary of State has stated that the undertaking of confidence given to the Chief Constable would have been honoured. The applicant objects to information being withheld by the Secretary of State where it would otherwise be appropriate to make disclosure to an applicant. However, the obvious source of information for the Secretary of State in relation to decisions on Firearms Certificates must be from the Chief Constable and the overall statutory function would be clearly inhibited if intelligence information was not available from the Chief Constable. Disclosure of such information to an applicant must involve the Chief Constable, and issues about the balance between disclosure to an applicant and non-disclosure in the public interest must engage not merely the Secretary of State but also the Chief Constable. In the present case the issue is academic as no undisclosed information was made available to the Secretary of State.

[50] The issue of disclosure of intelligence information will arise when the firearms application is before the Chief Constable. An applicant can request the gist of such adverse factors in order to make representations prior to the Chief Constable's decision on the Firearms Certificate. The present applicant contends that a refusal of such information at that stage by the Chief Constable will not enable a challenge to be made by way of Judicial Review of the Chief Constable's decision as an applicant would have the alternative remedy of an appeal to the Secretary of State and the Court would not hear an application for Judicial Review of the decision of the Chief Constable. In such circumstances it is my judgment that an appeal against a refusal of a Firearms Certificate by the Chief Constable should proceed to the Secretary of State and that appeal should address the issue of disclosure as well as the substance of the decision to refuse the application. The Secretary of State may request and obtain additional information on the adverse factors and in conjunction with the Chief Constable will have to address the issue of disclosure to the applicant of information over and above that which might already have been disclosed to the applicant by the police. It is the position that the Secretary of State will not disclose information to the applicant without the consent of the police, and subject to argument in another case on the duty of the Secretary of State to make such disclosure without the consent of the police, I hold the approach of the Secretary of State to be reasonable in the circumstances. Accordingly, an adverse decision by the

Secretary of State on appeal would involve Judicial Review of the decisions of the Secretary of State and the Chief Constable and would include the issue of disclosure to the applicant.

[51] The further issue that then arises concerns the extent of disclosure that ought to be made in the particular case. That does not arise in the present case because the decision of the Chief Constable is not the subject of Judicial Review. In general it can be said that in the present case the general statement that the applicant has had associations with terrorist organisations is not sufficient to enable him to address the substance of that adverse factor. However, there may be public interest reasons why further particulars cannot be furnished to the applicant. It would be for the police to articulate those public interest considerations in the particular case.

[52] Even when there has been completion of such disclosure to an applicant as can properly be made in the public interest the applicant may dispute the contents of that disclosure relied on by the decision-maker. Some of the issues that can then arise were addressed by Kerr J in *Re McConway's Application* [2003] NIQB 59 where the Northern Ireland Prison Service relied on intelligence information furnished by the police. In those circumstances the Prison Service was entitled to rely on the information and the police established that the information had been dealt with in accordance with the regulatory system in place.

[53] The applicant's grounds of procedural unfairness rely on the five matters set out at paragraph [40] above at (i) to (v). When particulars of police intelligence are not disclosed to the Secretary of State then matters concerning representations, cross-examination, disclosure, procedural legitimate expectation and fettering of discretion require a challenge to the decision of the Chief Constable as considered above.

<u>Absence of a factual or evidential basis for the adverse finding.</u>

[54] The applicant's alternative basis for challenge is that the Minister did not have the material on which to conclude that by reason of paramilitary associations the applicant was unfitted to hold a firearms certificate. Again on an issue of this nature the Minister must be entitled to rely on intelligence available to police and on the police assessment of that intelligence. The Minister is also entitled to question the intelligence and the assessment and did so in the present case. As appears from the reference to a previous application by the applicant the Minister may on occasions receive additional particulars of the intelligence available to police. There may be cases where the circumstances indicate a basis in Judicial Review on which the Minister ought to make additional inquiries or ought not to rely on the available information or ought not to reach a particular conclusion in light of all the available information. In the circumstances of the present case there is no basis for overturning the Minister's decision in the light of the available information. Pending the applicant taking appropriate steps to undermine the police intelligence by way of challenge to the decision of the Chief Constable I am satisfied that the Minister

was entitled to conclude that the applicant was unfitted to hold a firearms certificate by reason of the police intelligence concerning paramilitary associations.

[55] For the reasons set out above I reject each of the applicant's grounds of challenge to the refusal of a personal protection weapon and the revocation of the firearms certificate.