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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY CHALMERS BROWN FOR JUDICIAL REVIEW

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Before: Carswell LCJ and McCollum LJ

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CARSWELL LCJ

[1] This is an appeal from a decision of Kerr J given on 20 May 2002, whereby he dismissed the appellant's application for judicial review of a decision by the Secretary of State for Northern Ireland refusing renewal of a firearm certificate and affirming the decision to the same effect of the Chief Constable of the Royal Ulster Constabulary. At the conclusion of the hearing we dismissed the appeal and stated that we would give our reasons in writing at a later date. This judgment now contains our reasons for dismissing the appeal.

[2] Between about 1971 and 2000 the appellant owned a shotgun and held a firearm certificate covering the gun and ammunition, which was regularly renewed. In paragraph 2 of his affidavit grounding the present application for judicial review the appellant stated:

> "… having a shotgun is part of my way of life. Both my father and my grandfather before me had shotguns and having a shotgun is part of my family history and heritage. It is something which I value and which, at least in part, defines who I am and the way that I think about myself as a country man. Shooting and hunting have been part of my life for the last 20 years."

[3] On 20 January 2000 the appellant applied for a renewal of the certificate, which was due to expire on 24 January. He paid the renewal fee on 12

February 2000. The certificate was not in fact renewed, and it appears that the next that the appellant heard of the matter was when police came to his house on 5 June 2000 and confiscated the shotgun. He later received on 6 September 2000 a notice of refusal dated 15 August 2000, in which the ground was stated to be:

> "I am satisfied within the meaning of Article 28(2)(i) [of the Firearms (Northern Ireland) Order 1981] that you are unfitted to be in possession of said firearm and ammunition."

He appealed to the Secretary of State by notice dated 23 October 2000 and after further correspondence with and consideration by the Secretary of State (to which we shall refer later in more detail) he was notified by a letter to his solicitors dated 14 September 2001 that his appeal had been refused.

[4] The statutory provisions governing the licensing of firearms are contained in the Firearms (Northern Ireland) Order 1981 (the 1981 Order). Article 3 makes it an offence to possess a firearm without holding a firearm certificate in force at the time. The grant of a firearm certificate by the Chief Constable is governed by Articles 27 and 28. A certificate normally remains in force for three years and is renewable. The grant or renewal of a certificate is deal with by Article 28(2), which provides:

> "(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."

Under Article 28(10) a person aggrieved by the refusal of the Chief Constable to grant or renew a certificate may appeal to the Secretary of State under Article 55, which provides, so far as material:

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

[5] Following the seizure of the appellant's shotgun his solicitors wrote on 6 July 2000 to the Firearms Licensing Branch of the RUC. In the course of that letter they stated:

> "Mr Brown advises us that he has held a shotgun legally since 1971 without incident. He advises us that he is a well-known character in Carrowdore village and he is held in very high esteem by local farmers who allow him to shoot on their land. We are aware of no incidents where the RUC have been involved with any complaint in relation to Mr Brown's gun or any other incidents involving the gun where Mr Brown could said to be an unsuitable person to have a shotgun certificate.
>
> Mr Brown has been advised orally by Constable King who removed the firearm that the removal of the gun is in relation to a charge of having an offensive weapon which was brought by the RUC against Mr Brown in the early part of this year. We are also aware that the RUC only seized Mr Brown's shotgun on the 5th June 2000.
>
> This will raise a number of issues.
>
> 1. The charge of being in possession of an offensive weapon did not involve the shotgun. We are instructed that the charges were withdrawn we would ask you to clarify this.

> 2. The incident occurred in late 1999 or early in this year. The case has come to court and has been withdrawn by police. Had Mr Brown's possession of a gun been such a risk to the public we would have assumed that the gun would have been removed from him upon arrest and or upon charges being brought to court not some months afterwards. It is quite clear that there have no incidents involving unsuitable use of the gun by Mr Brown in the interim period or before. In fact we have a receipt on file where he has paid his renewal for his licence only in February of this year. This was accepted from him without question and at no time did the suitability of him to have a shotgun arise despite the fact that the charges now being relied on by yourselves must have been pending.
>
> It is for these reasons that Mr Brown feels that he is suitable for having a firearm certificate and would therefore ask you to take these matters into consideration when processing his application."

In his notice of appeal to the Secretary of State the appellant set out his reasons for appealing as follows:

> "It appears that the Police have made a decision to refuse to renew my Firearms Certificate on the basis that I was charged with possessing an offensive weapon. The charge however was withdrawn and I was bound over to keep the peace and to be of good behaviour. I respectfully submit that this Court appearance does not justify the decision to refuse to renew my Firearm Certificate. I have had a Certificate since 1971 and there have never been any allegations of misuse in relation to same. I also refer to a letter send [sic] by my previous solicitors John Ross & Son to Superintendent Gilbride dated the 6th July 2000."

[6] The Firearms and Explosives Branch of the Northern Ireland Office wrote on 12 February 2001 to the appellant's solicitors concerning his appeal. In the letter they said:

> "The Chief Constable has advised us that, following an incident on 31 May 1999, Mr Brown was charged

with possession of an offensive weapon in a public place and disorderly behaviour. These charges were withdrawn at Newtownards Magistrates' Court on 10 April 2000, however Mr Brown was bound over to keep the peace in the sum of £100 for 12 months on each charge.

Local police also reported that in May 2000 Mr Brown is alleged to have assaulted an 82 year old man by trying to kick him in the genitals. The man's wife reported the incident but the injured party refused to make a formal complaint. Police observed an injury to the injured party's hand, which had been received during the alleged assault.

On 5 June 2000 police went to Mr Brown's home to seize his shotgun. They reported that he was not in but returned while police were in attendance. He entered his home through the unlocked back door and retrieved his shotgun from underneath his bed. When asked about where he kept the shotgun Mr Brown said that it was normally kept in a larder-type store in the kitchen. Police observed that the wooden door of this store was secured with a hasp and padlock and informed Mr Brown that his storage facility was below the standard required by the conditions of his firearm certificate. A copy of the front page of a firearm certificate, showing the minimum standard of secure storage required, is attached for your information.

In view of all of this information the Chief Constable refused to renew Mr Brown's firearm certificate on the grounds that he was unfit to be in possession of a firearm and ammunition.

There are two other points on which you might also wish to comment in your reply.

(i) The Chief Constable has advised us that Mr Brown made a complaint to police on 11 April 2000 alleging that in a series of events in June and July 1997 and in March 2000 he was threatened and intimidated by a Mr Jackie Rodgers. Police investigated his allegations but none of the witnesses he named

substantiated his version of any of the events he described.

(ii) In his application for the renewal of his firearm certificate (a copy of which is attached) Mr Brown failed to declare any convictions other than one in 1998 for having no insurance. He was in fact also convicted of failing to provide a specimen when in charge of a vehicle with excess alcohol in October 1998. He also has 5 other minor offences between 1964 and 1978."

The letter went on to state that the appellant was given an opportunity to comment in writing on the grounds given by the Chief Constable for his refusal. The solicitors replied in detail by letter of 12 March 2001, dealing *seriatim* with the matters raised in the NIO's letter of 12 February. In relation to some of these matters they took issue with the version of the facts set out by the police. They made the point that the convictions between 1964 and 1978 were old matters and that he did not declare the driving conviction because he had thought that the charge was withdrawn. Further comments followed in an exchange of letters in May 2001.

[7] By letter dated 14 September 2001 the NIO informed the appellant's solicitors that the Secretary of State had refused his appeal. The letter went on:

"In coming to his decision the Secretary of State took into account:

(1) Mr Brown's conviction in October 1998 for driving without insurance and failing to provide a specimen when in charge of a vehicle with excess alcohol;

(2) that as a result of being charged with possession of an offensive weapon in a public place and of disorderly behaviour, Mr Brown was bound over to keep the peace; and

(3) that Mr Brown failed to abide by the conditions of his FAC in relation to the secure storage of his shotgun.

In all these circumstances the Secretary of State considered that Mr Brown is unfit, in accordance with Article 28(2)(i) of the Firearms (Northern Ireland)

> Order 1981, to be in possession of a firearm and ammunition."

The decision was made on behalf of the Secretary of State by the Minister of State Mr Des Browne MP, and was based on a submission put to him dated 9 August 2001, which sets out in detail the facts material to the appeal.

[8] The appellant commenced the present proceedings for judicial review on 31 October 2001. In consequence of matters raised in his grounding affidavit the NIO referred the matter back to the Minister of State, with a correction to the details of the conviction for failing to provide a specimen of breath. The Minister gave the appeal further consideration in the light of this correction and on 22 January 2002 affirmed his decision to refuse it.

[9] At the hearing of the application before the judge on 20 May 2002 Mr Larkin QC on behalf of the appellant advanced a number of grounds, all of which were rejected by the judge in his decision. On appeal before us the grounds on which the appellant relied were refined into the following:

(a) The determination of such appeals by the Secretary of State was not compliant with the requirements of Article 6(1) of the European Convention on Human Rights.

(b) The procedure adopted by the Secretary of State did not contain sufficient procedural safeguards or fact-finding mechanisms to be compliant with Article 6.

(c) The decision of the Secretary of State violated the appellant's rights under Article 8 of the Convention and Article 1 of the First Protocol.

These issues overlap to a degree and can be considered together.

[10] In determining whether there has been a breach of Article 6 the anterior question is whether the appellant had a civil right within the meaning of that Article, upon which an adjudication took place. The respondent's case was that since the decision was a matter of discretion for the Secretary of State, no civil right was being determined. Reliance was placed upon the decisions of the European Court of Human Rights in *Masson and Van Zon v Netherlands* (1995) 22 EHRR 491 and *Machatova v Slovak Republic* (1997) 24 EHRR CD44, in which it was held that since the claimants did not have a right to the matters which they claimed, but they lay within the discretionary power of the authority to grant them, Article 6 was not engaged: cf *Re Creighton's Application* [2001] NIJB 210 at 216. Mr Larkin pointed to the remarks of Lord Clyde in *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] 2 All ER 929 at paragraph 150 and the decision of Forbes J in *R (Friends Provident Life Office) v Secretary of State for the Environment, Transport and the*

Regions [2002] 1 WLR 1450, but both of these cases can be distinguished, since each was dealing with the effect of an administrative planning decision on clearly defined property rights.

[11] Since this case was argued before us the House of Lords has given its decision in *Begum v London Borough of Tower Hamlets* [2003] UK HL 5. That case involved a challenge to the respondent council's decision that the accommodation offered to her was suitable for the appellant and that it was reasonable for her to accept it. One of the issues which arose was whether the appellant had a "civil right" within the meaning of Article 6(1). None of the members of the House of Lords decided this issue, but their extended discussion of it in their opinions shows its difficulty. The Strasbourg jurisprudence is still in the course of development, but it is tolerably clear from most of the opinions that their Lordships would have been slow to find that the appellant had a civil right. As Lord Walker summarised the position at paragraph 112, Article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion. If one applies this test, it is apparent that even allowing for some possible development of the Strasbourg jurisprudence, decisions on the grant of firearm certificates do not fall within the definition of civil rights for the purposes of Article 6(1). We accordingly consider that Article 6(1) was not directly engaged in the present case.

[12] Mr Larkin then submitted that if Article 6 was not directly engaged, it nevertheless was applicable, since the appellant's rights under Article 8 of the Convention and Article 1 of the First Protocol were engaged and they had to be determined in a manner which complied with the requirements of Article 6. Article 8 provides:

> "*Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

We agree with the judge's view that the right to hold a firearm certificate for possession of a shotgun is not an incident of the appellant's private life which

is protected by Article 8. It was held by the European Court of Human Rights in *Bolta v Italy* (1998) 26 EHRR 241 that the pursuit of a leisure activity does not ordinarily come within the framework of that Article of the Convention.

[13] Similarly, we do not consider that it constitutes a property right within Article 1 of the First Protocol, which provides:

> "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."

The prevention of the enjoyment of a sport or hobby is not the deprivation of a possession. In *RC v United Kingdom* (Application 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.

[14] If, contrary to our opinion, the appellant's Article 6 rights were engaged, the question arises whether the procedure for determining whether his firearm certificate should be renewed complied with or was in breach of the requirements of Article 6. Mr Larkin argued that there was no sufficient independent element in the determining process to satisfy the terms of the Article. Mr McCloskey for the respondents pointed, on the other hand, to the existence of the remedy of judicial review and submitted that this sufficed to import the necessary independence into the procedure.

[15] This issue has received a good deal of attention in recent years, both in the European jurisprudence and in domestic case-law. In the Court of Appeal in *Begum v London Borough of Tower Hamlets* [2002] 2 All ER 668 Laws LJ propounded a test based on whether the statutory scheme under consideration lay towards that end of the spectrum where judgment and discretion, rather than fact-finding, play the predominant part. In the House of Lords, however, Lord Hoffmann disagreed with the use of this test,

expressing the opinion at paragraph 58 that it was too uncertain. At paragraph 59 he stated:

> "In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making. Finally, I entirely endorse what Laws LJ said in *Beeson's* case, at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles."

Lord Bingham of Cornhill examined the Strasbourg authorities at paragraph 11 and concluded that –

> "in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of Article 6(1)."

Lord Millett approached the case in a similar fashion at paragraph 105:

> "In the present case the subject-matter of the decision was the distribution of welfare benefits in kind, and critically depended upon local conditions and the quality and extent of available housing stock. The content of the dispute related to the reasonableness of the claimant's behaviour in refusing an offer made to her which, if refused by her, would have to be offered to others on the homeless register. Any factual issue arising in the course of the dispute, even if critical to the

> outcome, would be incidental to the final decision. In my opinion the subject-matter of the decision and the content of the dispute demanded that the decision be made by an administrative officer with experience of local housing conditions, subject to a proper degree of judicial control; and that a right of appeal to the court on law only was sufficient for this purpose."

[16] Mr Larkin submitted that the homelessness type of case involved more judgment and discretion than the present issue and that the unresolved conflicts of fact in this case were a strong indication that a more independent fact-finding element was required than was possible on an application for judicial review. We are unable to accept this contention. In our judgment the fact-finding element in firearm licensing is generally a very minor portion of the determination, not to say incidental to it. The fact situation in most cases is uncomplicated and the issue is whether on those facts the determining authority should grant or renew a firearm certificate sought by the particular applicant. This in our opinion clearly places this type of case in the class in which a right of appeal by way of judicial review is sufficient to satisfy the requirements of Article 6.

[17] For the reasons which we have given we accordingly considered that the appellant had not made out any of the grounds of appeal upon which he relied and we dismissed the appeal.