[2023] JMSC Civ 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03155

BETWEEN	**WAYNE DEMERCADO**	**CLAIMANT**
AND	**THE FIREARM LICENSING AUTHORITY**	**1ST DEFENDANT**
AND	**THE REVIEW BOARD**	**2ND DEFENDANT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**3RD DEFENDANT**

IN OPEN COURT

Mr Pierre Rogers and Ms Monique McLeod instructed by Rogers & Associates for the Claimant

Ms Courtney Foster instructed by Courtney Foster & Associates for the 1st Defendant

Ms. Faith Hall instructed by the Director of State Proceedings for the 2nd and 3rd Defendants

Ms Alanna Wanliss representative of the First Defendant

Heard: November 23, 2022 & January 23, 2023

Judicial Review – Revocation of Firearm User's Licence - Failure to conduct hearing by Review Board and Minister – Should the Review Board provide detailed reasons to further an appeal – Role of Review Board – Role of Minister - Decision of Minister made without reasons - Whether delay is breach of natural justice – Statutory Interpretation – Firearms Act, 1967, Firearms(Appeals to Minister) Regulations

WINT-BLAIR, J

[1] The claimant was granted leave to apply for judicial review on September 27, 2021. By way of a fixed date claim form,[1] the claimant seeks the following relief:

1. "A Declaration that the 1st Respondent, in revoking the Applicant's Firearm User's Licence on the 20th February, 2019 is [sic] [in] breach of Section 36(1)(b) of the Firearms Act, resulting in the revocation being illegal, null and void and of no effect;

2. A Declaration that the action of the 1st Respondent, by revoking the Firearm User's Licence of the Applicant on the 20th February, 2019 is irrational, resulting in the revocation being null and void and of no effect;

3. A Declaration that the decision made by the 2nd and 3rd Respondent in refusing to determine the Applicant's appeal of the revocation of his Firearm User's Licence on the 20th February, 2019 within the prescribed period, is in breach of section 37A(2) (3) (4) of the Firearm Act, resulting in the same refusal being illegal, null and void and of no effect.

4. An order of certiorari quashing the decision of the 1st Respondent in revoking the Firearm User's Licence of the Applicant on the 20th February, 2019.

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[1] Filed on October 8, 2021

5. An order of certiorari quashing the decision of the 2nd Respondent in denying the Applicant's appeal against the decision of the 1st Respondent in recommending to the 3rd Respondent that the Applicant's Firearm User's Licence should not be reinstated.

6. An order of certiorari quashing the decision of the 3rd Respondent to accept the recommendation of the 2nd Respondent not to reinstate the Applicant's Firearm User's Licence.

7. An order of mandamus compelling the 1st Respondent to renew the Applicant's Firearm User's Licence.

8. Costs.

9. Such further and other relief as this Honourable Court shall deem fit."

Summary

a) **There is no constitutional or legal right to own a firearm or to be allowed to hold a firearm.**

b) The Firearm Licensing Authority is not obligated to grant a hearing to a licence holder before it revokes a Firearm User's Licence.

c) The Firearm Licensing Authority does not have to give detailed reasons to a licence holder when it revokes a Firearm User's Licence.

d) When a licence holder applies for a review of the Authority's decision, the Review Board is to do the following:

    i. Secure the Authority's reasons for its decision;

    ii. Grant the licence holder a hearing, which need not be oral, it may be on paper only. The Review Board must invite the

licence holder to provide representations and give the date of the hearing.

iii The Review Board is to provide its recommendations to the Minister of National Security.

iv. An aggrieved party who wishes a review of a decision to revoke the Firearm User's Licence has to do so lodge an appeal. The appeal is lodged at a point in time when one set of facts are in existence. With the effluxion of time, the aggrieved party may find that his circumstances have changed. There has to be an avenue for bringing these changes to the attention of the Review Board.

v. The Review Board is to "*hear, receive and examine evidence"* which suggests that it is to function in a quasi-judicial manner. The Fourth Schedule to the Act sets out the composition of the Review Board. It is this panel of experts that must "*receive*" evidence. The reception of evidence has to be by way of the submission of further documents by both sides as information is gathered. It connotes a continuing process.

vi. The evidence in a hearing before the Review Board is to be received from both sides. Evidence can either prove or disprove that which is being alleged. To construe the function of the Review Board when it "*examine*[s] *evidence*" as a consideration of only a snapshot of the factual circumstances at the time the appeal was lodged and nothing further, would lead to an absurdity.

vii. Evidence also means character evidence. An aggrieved party who has been said to be "*otherwise unfitted*" or not a fit

and proper person, has to be allowed to disprove the allegation. The Authority is not a court of law; it makes an assertion as to character of a licence holder. The aggrieved party has to be allowed to salvage his reputation and to present evidence as to why he should be considered fit and proper.

viii. It is incumbent on the Review Board to set a date and time for the hearing whether in person or on paper. This is in order that the date and time indicate a point at which all the material which it will "*examine*" should have been submitted. It is notice to the aggrieved party. While there is no provision in the statute for notice, this is a basic principle of fairness in the conduct of the. This will allow for a reasonable time within which an aggrieved party can lodge all of the material which disproves or rebuts the allegation/s made against him. This is particularly so as the Review Board may fail to act within the statutory period.

e) In the instant case which is one of revocation of a licence, the Review Board should have given the claimant the specific basis of the complaint for the revocation and not the general term not fit and proper which was used. This derogated from the claimant's ability to appeal the decision.

f) The statute is silent as to the procedure the Review Board is to adopt, therefore it is the master of its own procedure. This means a high degree of fairness is to be incorporated into its process. If it fails to act within the statutory period and the Minster acts in its stead, the relevant material would have been submitted by both sides and be available to the Minister for his decision.

g) Upon receiving the recommendation of the Review Board, the Minister of National Security is mandated by law, to hold a hearing.

h) An aggrieved licence holder has the right to be heard when the matter goes before the Minister.

i) The Minister of National Security must advise the licence holder of the date and time of the hearing.

j) The Minister of National Security is mandated by law, to provide the reasons for the decision he makes, so as to enable the licensee to answer the allegations made against him.

k) The Minister of National Security has to hear from the licence holder whether in writing or in person by legal representative or not for his decision to be fair.

The Evidence

[2] The claimant filed an affidavit in support of his fixed date claim which stood as his evidence in chief[2] in it he deposed that in 2015, he applied to the Firearm Licensing Authority ("the Authority") for a Firearm User's Licence ("the licence.") The application was approved. In that same year 2015, the claimant was charged for the offences of possession of ganja, dealing in ganja, attempting to export ganja and conspiracy to export ganja.

[3] The claimant deposed that he was successful in renewing the licence three times after the charges were laid. On or about March 2019, a revocation order from the

[2] Filed October 8, 2021

Authority was served on him,[3] with the reason that he was not considered a "fit and proper" person to retain a licence. The revocation order was marked WDM1.

[4] In accordance with the revocation order, the claimant surrendered his firearm, firearm licence booklet and ammunition to the Authority. He also lodged an application by letter to the Review Board for the review of the decision to revoke his licence. The letter submitted to the Authority is marked WDM2. The claimant said he cannot recall the date he lodged the appeal and he does not have a document to prove that the Authority received his letter, but he is sure that his appeal was lodged within time.

[5] On October 17, 2019, the claimant deposed that he was tried in the criminal court for the charges against him. The prosecution failed to establish a case and a submission of no case to answer was upheld. He was discharged. He exhibits as WMD3 a letter from the Clerk of Courts, Kingston and St. Andrew Parish Court, Criminal Division to this effect."[4] He said that he has had no other charges brought against him since the determination of those criminal proceedings.

[6] There was significant delay in responding to his appeal to the Review Board, the claimant said that he retained the services of Mr Pierre Rogers, attorney-at-law, who, wrote to the Authority for updates, those letters are marked WMD4[5] and WMD5.[6]

[7] On April 23, 2021, an email was sent by a senior secretary on behalf of the Authority to his attorney indicating that the Review Board had concluded its review of his appeal and had submitted its recommendations to the Minister of

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[3] Dated February 20, 2019

[4] Dated October 18, 2019

[5] May 26, 2020

[6] April 6, 2021

National Security ("the Minister") on February 8, 2020, who had considered the recommendation and denied the appeal. This email is marked WMD6. A letter dated March 22, 2021 was attached to the email outlining this position was marked WMD7. The claimant complains that the Minister did not communicate directly with him, as the first and only notice he was given of the appeal was by way of this email to his attorney.

[8] The claimant deposed further, that it took over eighteen months for the Review Board to consider his application for an appeal. This failure is in breach of the statutory period of ninety days in section 37A(2) of the Firearms Act. In addition, there was no hearing at which the claimant could have presented his case before a conclusion was reached in the matter. No hearing was ever convened and he was never invited by the Review Board to make representations in support of his application. The claimant deposed that both the Review Board and the Minister have failed to state reasons for the denial of his application which is in breach of natural justice.

[9] The claimant stated that there have been changes in his personal situation since the licence was revoked which justify his need for a licence. He now is employed as a Warehouse Supervisor and from time to time is responsible for collecting cash at his workplace which is situated in a volatile area. He also has to travel through similarly volatile communities to get to and from work. In addition, it is he who has to intervene when customers get boisterous with his members of staff.

[10] He said his character remains unblemished, he is a fit and proper person to hold a licence and in all the circumstances, the conduct of the defendants is procedurally improper and irrational.

[11] In a further affidavit,[7] the claimant deposed that a copy of the letter in respect of the disposition of his criminal case marked WMD3, was personally delivered to the Authority within two days of his receiving it in October 2019.

[12] In cross-examination by Ms Foster, the claimant admitted that he had failed to notify the court in any of his affidavits that he had given a statement to the Authority during the course of its investigation. He agreed that the statement he had given was a procedural step in the decision to revoke the licence granted to him. It was put to him that the opportunity to be heard was granted by the Authority, in that, he could have put his side of the case to the Authority in that statement before the order for revocation was made. The claimant did not agree. He said that at that time he was asked to give a statement to the Authority, his criminal case had not yet been concluded, and he did not know when it would have been tried. He agreed that he could not have expected the Authority to wait until his trial to revoke the licence. He agreed that the offences with which he was charged were serious qualifying his answer by saying, had he been found guilty. The claimant agreed that when his criminal case was determined in October 2019, it had been almost two years since his application for renewal was made in January 2018. He admitted that he had failed to state that he gave a statement to the Authority in any of his affidavits to this court.

[13] In cross examination by Ms. Hall, the claimant agreed that when he filed his appeal the criminal case was still pending. He further agreed that in his letter to the Review Board he would have indicated this. He agreed that the Minister was not approached after the expiration of the statutory review period, the Review Board having failed to act. He agreed that the follow up was with the first defendant. He explained in re-examination that this was where he knew that documents were to be served regarding his appeal.

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[7] Filed on September 29, 2022

[14] In response on behalf of the Authority, Mr Mervin McNab in his affidavit which stood as his evidence in chief,[8] said that he is currently the Overseeing Director of Investigation for the Authority. His duties include managing and directing the staff of the Investigations Department. Prior to this post, he was an Investigator between 2016 to 2019. As an Investigator he used to investigate complaints, prepare files for submission to the defendant; obtain background information on applicants for licences, existing and potential licence holders from various intelligence agencies. He also carried out duties as assigned to him by the Chief Executive Officer.

[15] He said that he was personally aware of the standard procedures for the consideration of an application for a licence as well as for the grant or renewal of a licence. The witness said that he personally perused the case file of the claimant. The claimant made an initial application for a licence on or about September 17, 2015 which was approved on or about February 8, 2016. At the time of the application, the claimant indicated that he was applying for the licence for the protection of life and property. The claimant collected his licence card on or about June 21, 2016.

[16] The witness continued by saying that the Authority received all relevant information regarding the claimant in order to determine whether or not the licence should be further granted or retained. If the Authority determined that the renewal process would not be successful, it is empowered under section 26B(1)(c) of the Firearms Act to revoke any firearm licence despite a previous grant.

[17] He said on or about January 30, 2018, the claimant made the second application for renewal since the initial grant of the licence. The claimant was fingerprinted and a background check conducted. This background check revealed a

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[8] Filed on November 25, 2021

"negative trace" against him. The Authority commenced an investigation. Intelligence was received that the claimant had been charged on or about March 9, 2016, for the aforementioned offences against the Dangerous Drugs Act by the Transnational Crime and Narcotics Division of the Jamaica Constabulary Force. In light of the investigation, the Authority seized the claimant's firearm.

[18] The witness continued by saying that at all material times, the claimant was aware of the Authority's investigation and had given a statement to the Authority on or about July 4, 2018, confirming the criminal charges, but denying any involvement in the offences.

[19] The investigator's file was completed and submitted to the Review Board. On or about February 20, 2019, that body determined that the claimant's licence should be revoked. The Authority complied with the requirements of the Firearms Act and notified the claimant of its decision. Although not required to provide a reason, the Authority advised the claimant that it no longer considered him to be a fit and proper person to possess a licence.

[20] At the time the licence was revoked, the criminal charges against the claimant had not yet been ventilated in the court. Notwithstanding the outcome of the criminal matter, an acquittal is not the only factor that the Authority will take into consideration when a licenced firearm holder is/has been charged with an offence.

[21] On or about April 16, 2019, the claimant applied for a review of the Authority's decision under section 37A of the Firearms Act. He exhibited letters written to the Authority regarding an update in his case; however, the matter was no longer within the purview of the Authority as the appeal process had already commenced. The appeal process is not done by the Authority, but by the Minister of National Security, through the Review Board. The Authority has no control regarding the date on which the appeal will be considered by the Review

Board or the Minister. The Firearms Act provides an avenue to an applicant where the Review Board fails to act within the stipulated time.

[22] The witness said that, at all material times, the claimant was given an opportunity to be heard. There were no procedural or legal breaches by the Authority regarding the manner in which it revoked the claimant's licence. The claimant was aware of the nature of the investigations against him by the Authority who gave him an opportunity to provide a statement and he did so. Neither the Firearms Act nor the Regulations mandates the Authority to conduct a hearing when it is determining whether or not a licence should be granted or renewed. However, representations can be made to the Minister in support of the appeal.

[23] In cross examination by Mr Rogers, the witness Mr McNab admitted that he had not worked on the investigation of the claimant. He knew only that a statement had been taken from the claimant, but knew of no other steps in the investigation. He agreed that documents for the attention of the Review Board are served on the Authority and that he knew the legal basis for the revocation of licences.

[24] He said that the Authority has the resources to conduct its own investigations but did not know whether the investigator had made independent enquiries of witnesses or whether the court file was checked. He admitted that the sole factual basis on which the first defendant acted against the claimant was the charges against him. He further admitted that he was aware that the criminal trial had been determined in the claimant's favour having regard to the contents of the file at his office. He had seen the letter from the Clerk of Courts on the file. He was not aware whether the information contained in that letter had been brought to the attention of the Review Board but agreed that fairness would require that it should have been.

[25] The witness admitted that in his affidavit at paragraph 16 he deposed that the claimant had exhibited letters written to the Authority regarding an update. He agreed that the Authority accepts service on behalf of, receives documents for

and submits them to the Review Board. In addition, he agreed that the Authority is bound by the rules of fairness to make available to the Review Board any relevant material which comes into its possession.

[26] Mr McNab agreed that he had looked at the claimant's file, he admitted to having seen the letter from the Clerk of Courts. He admitted that the Authority was aware that the claimant had been acquitted of the criminal charges. He agreed that the Firearms Act makes provision for the revocation of licences in the face of a conviction. He also agreed that the Authority acted before there was a conviction in the claimant's case. He agreed that the statute was specific as to the offences on which the Authority should act. He qualified his answer in re-examination by saying that there are other reasons in the statute for revocation besides a conviction.

[27] He admitted that the Authority acted only on the fact of the charges laid and that the claimant was never advised of this. He disagreed that the failure to so advise would have hindered the claimant's efforts on appeal to address the concerns of the Authority. He agreed that the only reason given for the revocation of the licence was that the claimant was unfit. He admitted that it was only the fact of the charges which the Authority had relied on to revoke the licence.

[28] Mr. McNab also said that the claimant had declined to give a statement to the Authority explaining in re-examination that the statement only said he was not guilty of the offences which in his view, was the claimant declining to "*tell his entire side of the story to the Authority"* in that statement.

[29] In re-examination the witness said that once the Authority receives any adverse complaint or information an investigation is conducted. The Review Board is given the applicant's file and upon submission, all other documents pertinent to an appeal. There is a team in the office of the Authority that deals with applications for an appeal.

[30] In response on behalf of the Minister, Rochelle Jaggon, Senior Legal Officer (Ag.), Ministry of Justice, in her affidavit which stood as her evidence in chief,[9] said the facts to which she deposed were taken from the files held at the offices of the Ministry of National Security. She deposed that the application for a licence was granted to the claimant in June 2016 by the Authority's Board. That licence was revoked on February 12, 2019 on the basis that the claimant was no longer considered a fit and proper person to possess a firearm. The revocation order was served on the claimant on February 20, 2019. On April 16, 2019, the claimant lodged an appeal with the Review Board which considered the material that was placed before the Authority this included "*comprehensive statements given by the claimant*."

[31] She said that there was no need for an oral hearing in a matter of this nature. The Review Board conducted its hearing by reviewing the written material over several days during December 2020 and January 2021. Having considered the matter, the Review Board submitted its recommendation to the Minister of National Security. The Minister made a decision to deny the claimant's request, indicating this in a letter dated March 5, 2021. The process of review was not invalidated by being done outside the ninety-day period, as that period only serves as a guide. There are no arguable grounds for judicial review with a realistic prospect of success.

[32] In cross examination, Ms Jaggon agreed that the Review Board is required by statute to receive, hear and examine evidence, and make recommendations to the Minister. She said that the statutory ninety day period is a guide. She agreed that two years cannot be considered reasonable. She admitted to having had sight of the claimant's file and that the Review Board would have had before it the same material as the Authority. She could not say whether the fact of the

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[9] Fled on February 3, 2022

acquittal was brought to the attention of the Review Board and she could not recall seeing the letter from the Clerk of Courts on the file held at her office. The witness agreed that it is important for the Review Board to state the reasons for its recommendations and that the statute requires it to submit a written report of its findings to the Minister together with its recommendation.

[33] She said that the Review Board dealt with the matter between December 2020 and January 2021. She agreed that one of the pre-requisites of a hearing is that the affected party be heard, she could not say whether the claimant was ever given a date for a hearing. She asserted that there was no right to an oral hearing in the statute, but agreed that one could have been extended to the claimant. She did not see any evidence on the claimant's file to suggest that he had been invited to submit a written defence. The witness could not recall the contents of the claimant's case file, she had only looked at her affidavit before testifying. She stated that the Review Board was not required to advise the claimant of the reasons advanced by the Authority or their actions in revoking the licence. She admitted that the Review Board by its delay in making its recommendation to the Minister acted contrary to the principles of natural justice. She did not know whether the Minister afforded the claimant an opportunity to be heard before making the decision.

Submissions of the Claimant

[34] The claimant challenges the legality of the actions of all three defendants. He submits that the actions of the Authority in revoking the licence without giving reasons is irrational. The Review Board failed to conduct a hearing within the statutory period; failed to advise the claimant of the details of the allegations against him and also failed to afford the claimant the opportunity to respond to the said allegations. The Review Board is also culpable for its inordinate delay in its consideration of the matter. These actions on the part of the Review Board fall into the category of procedural impropriety and irrationality. The Minister is similarly blameworthy on the issue of inordinate delay.

[35] The claimant was unaware of the review by the Review Board and when the recommendation was made to the Minister. The Minister gave no clear evidence as to when he made his decision. Last and most fatal, argued, Mr Rogers is the admitted failure of the Minister to demonstrate by his decision any indication that he considered all the relevant material and in particular, the fact that the criminal charges against the claimant had been dismissed without the claimant being called upon to answer to the charges.

[36] **Latoya Harriott v University of Technology Jamaica,** cited by Mr Rogers,[10] stands as authority for the proposition that in addition to the usual grounds of judicial review set out by Lord Diplock in **Council of Civil Services Unions v Minister of State for Civil Services**[11] ("CCSU") the heads of proportionality and unconstitutionality are now to be considered by the court.

[37] In **Robert Ivey v Firearm Licensing Authority**,[12] Mr Rogers submitted that the position of the Court of Appeal is:

> *"Although generally, at common law, there is no obligation placed on the decision maker to provide reasons for the decision, this principle has long been under siege in favour of the principle of fairness in the particular circumstance. Where decisions are made in the context of statutory provisions, the question of whether the decision maker is obliged to provide reasons for the decision will also depend on whether the circumstances are fair."*

[38] This submission was buttressed by the holding in **Raymond Clough v Superintendent Greyson & Anor,**[13] which was that the Firearms Act ("the Act")

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[10] [2022] JMCA Civ 2

[11] [1985] AC 374

[12] [2021] JMCA App 26

provided for its own appellate process and the statute by allowing a hearing by the Minister after revocation by another official, provided a procedure whereby the principles of natural justice would be satisfied. The court cited reasons for the decision and a hearing as examples. Mr Rogers submitted that based on **Raymond Clough**, the Minister ought to have conducted a hearing and given reasons for his decision particularly in light of the modern approach in administrative law matters for a decision maker to act fairly.

[39] Counsel further argued that the second and third defendants had an obligation to satisfy the statutory requirement to "*hear, receive and examine the evidence*."[14] A hearing would have allowed the claimant to place the evidence of his acquittal before the second defendant to have been considered by them. The claimant's position had changed significantly between the date of revocation and the date of the final decision by the third defendant. Having failed to consider this evidence, the decision of the second defendant was irrational and to be considered procedurally improper.

[40] Lastly, on the issue of delay, Mr Rogers argued that delay denied the claimant the presumption of justice. It is accepted that while delay does not invalidate the decision of an administrative body, inordinate delay does. Procedural propriety and fairness require that administrative functions be exercised within a reasonable time. Fifteen months is outside of what could be considered reasonable and this was a breach of natural justice in all the circumstances. Counsel relied on **Andrew Bobb v Firearm Licensing Authority**[15] for this

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[13] (1989) 26 JLR 292

[14] Section 37A (2) of the Firearms Act

[15] [2021] JMSC Civ 87

proposition. Counsel did not address the court on the case of **Aston Reddie v Firearm Licensing Authority**[16] though he was invited to do so.

Submissions of the First Defendant

[41] Ms Foster argued that the power of revocation is at the sole discretion of the Authority. The power to renew a licence is found in section 26B(1)(b) of the Act. The Authority received information regarding the criminal charges under the Dangerous Drugs Act and a statement to its investigators from the claimant in which he denied any involvement in the offences. The Authority did not act solely on the adverse information, it conducted its own investigation into whether the claimant was fit and proper and afforded him an opportunity to be heard during the investigation before making its decision. He was given the opportunity to provide a statement and he did so, this satisfies the right to a hearing, though neither the Act nor the Regulations mandate that a hearing be conducted upon an application for renewal.

[42] Ms Foster also cited **Raymond Clough** which she submitted defined the word "**otherwise**" in section 36(1)(a) to mean "in other respects." This gave the Authority a wide range of factors to be considered when determining fitness. There is no list of factors in the Act which the Authority is to consider in deciding whether a person is fit and proper. The claimant has not submitted that the Authority took irrelevant considerations into account at the time of the revocation. Counsel relied on **Re JR 20s (Firearms Certificate) Application for Judicial Review**[17] in which the applicant who was the holder of a firearms certificate for some years was judged not to be a fit and proper person by the licensing body. The factors taken into account in a trial court are different than those by a licensing body such as the Authority.

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[16] HCV 1681 OF 2010; November 24, 2011

[17] [2010] NIQB 11

[43] Ms Foster argued that in the case at bar, the claimant submitted the letter stating that his criminal case had been dismissed after the licence had been revoked, he and while he was aware of the investigation against him. The decision to revoke could not have taken into account that which did not exist at the time. The decision could not be said to be irrational as the facts are not in dispute. In addition, the claimant was given notice with the reason for the revocation.

[44] On the issue of irrationality she relied on **Kevin Bertram v Firearm Licensing Authority**[18] in which the Court of Appeal held that the fact that a first application was approved does not mean that a subsequent determination that the applicant had not established a need to be armed was irrational.

[45] Ms Foster submitted that the Authority could reasonably consider the charges at the time of the application in 2018 and determine that the claimant would pose a risk to the public if his licence was renewed. The duty on the Authority to ensure proper persons are granted licences is continuous. If this were not so then the previous grant of a licence would meant that the first defendant would be estopped from exercising the discretion afforded to it on applications for renewal. Renewal is not automatic, there is no right to possess a firearm, it is a privilege.

[46] Regarding the case of **Aston Reddie v Firearm Licensing Authority et al**,[19] Ms Foster submitted that in that case the firearm and booklet were seized after Mr Reddie had been arrested and charged for several offences. The case was eventually dismissed for want of prosecution. The licence was revoked less than a year after the charges were laid for reason of intemperate behaviour. There was no evidence that the Authority had spoken to witnesses in the criminal matter before revoking the licence. Both Mr Reddie and his wife had given

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[18] [2022] JMCA Civ App 22

[19] HCV 1681 of 2010 delivered on November 24, 2011 (unrep.)

exculpatory statements to the Authority. Nonetheless, Mr Reddie argued that he had not been given a hearing by the Authority prior to the revocation.

[47] Ms Foster argued that in the instant case, it is undisputed that the claimant had provided a statement to the Authority prior to the revocation. His firearm was not revoked until a year after he had applied to renew the licence. She contended that it was open to the instant claimant to have provided the names of the witnesses he wanted interviewed by the Authority, when he filed his appeal to the Review Board.

[48] She asked the court to reject the position of the claimant having said that at the time he provided his statement to the Authority he said that he was still before the criminal court, did not know when the criminal case would be concluded and did not expect the Authority to wait, yet has argued that the decision to revoke was in breach of natural justice. She submitted that there was no need for the Authority to await the outcome of the criminal case, the offences were serious in nature and it exercised its discretion. She relied on paragraph 74 of the decision in **Aston Reddie** which stated that a conviction or an acquittal in court are not conditions precedent for the Authority to act, particularly within the context of the provisions under the Act under which the Authority exercised its power. The Authority had an independent right to assess the situation and to determine whether the claimant could be entrusted with a firearm.

[49] She further argued that the revocation was not based on section 36(1)(b) of the Act and therefore there is no statutory requirement to await the outcome of the trial. It was sufficient for the Authority to act on a prima facie case, having received a negative trace against the claimant and his statement to the investigator. She relied on paragraph 75 of the **Aston Reddie** decision for this proposition.

[50] The instant claimant was given the opportunity to be heard when the Authority asked him to give a statement. There is no statutory requirement on the

Authority to grant a hearing to the claimant. The right to be heard arises at the review stage. The Authority operated within the law by revoking the licence based solely on the adverse report against the claimant. He had the opportunity as an aggrieved person to challenge that decision by section 37A of the Act. She relied on paragraph 39 of **Aston Reddie** in that the power to summon witnesses granted to the Authority does not impose a duty to conduct a hearing or act in a quasi-judicial manner.

[51] Lastly, the law does not mandate that the Authority provide reasons for revoking a licence. The instant claimant was given a reason which was one set out in the Act. The Authority did not act ultra vires in its revocation of the licence. There was no action on the part of the Authority preventing the claimant from lodging his appeal to the Review Board. The letter evidencing his acquittal did not exist at the time the decision to revoke was made. The Review Board was required to examine the information before the Authority at the time of the revocation. It is at the appeal stage, that the principles of natural justice must be satisfied, that is the right to be heard and the right to reasons for the decision made. It therefore it cannot be said that the Authority acted illegally or irrationally.

Submissions of the Second and Third Defendants

[52] Ms Hall submitted that under the head of irrationality the authority is the case of the[20] **CCSU**, the test is whether the decision was so outrageous that it could not be reasonably be arrived at, the Wednesbury test.

[53] Under the head of fairness/procedural impropriety, Ms Hall submitted that fairness depends on the particular circumstances of the case, and the court should employ a flexible approach. The second and third defendants submit that

[20] [1985] AC 374 at 408

they acted within the provisions of the Act and that there was no breach of the principles of natural justice

[54] Ms Hall argued that regarding the ninety-day statutory requirement, the statute uses the word "*shall*." In construing section 37A(2) of the Firearms Act, what was the intention of Parliament? If the Review Board did not conduct their review within the timeline that would not invalidate its decision, therefore that could not have been the intention of Parliament, the statutory period is therefore just a guide. The section also gives the Minister the discretion to intervene in the review process if Review Board has not completed its review. Parliament gave that discretion to the Minister without legislating a consequence for non-compliance in the statute. The absence of a provision regarding non-compliance supports the point that it is not a mandatory requirement, the court should interpret the section as directory and not mandatory.

[55] It is submitted that the word "*shall*" in section 37A of the Act is directory and not mandatory. The accepted principle in statutory interpretation is that the word "*shall*" should according to the context be either mandatory or directory in its effect. The approach the court must employ when determining the issue of non-compliance with a statutory provision is to ask whether it was the purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute as outlined in the case of **R v Soneji**,[21] in which the critical consideration was the consequence of non-compliance. In the instant case, the question is whether the intention of Parliament was that an application not reviewed within the ninety days would render any decision by the Review Board null and void.

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[21] [2005] UKHL 49

[56] In circumstances where the statutory provisions were not adhered to, there are alternate procedures available for review. By virtue of section 37 any person who is aggrieved by a decision of the Authority has a right of review to the Review Board. Further pursuant to section 37A(4), if the Review Board does not review the matter within the ninety days stipulated by the Act, the Minister may hear and determine the matter under review. Therefore, Parliament recognized that there may be situations where the Review Board is unable to comply with the statutory requirement and gave the Minister the discretion to hear the matter. It is submitted that it was always open to the claimant to bring his application for review to the Minister for his intervention. There is no evidence before the court that he engaged that process.

[57] Ms Hall contended that in relation to this claim, the enquiry of the court, should proceed in accordance with the dictum of Lord Diplock in **CCSU**.

[58] In relation to declarations, counsel cited Wade and Forsyth, Administrative Law, 10th Edition at page 480- 481 regarding declarations as a discretionary remedy. It was submitted that in deciding whether to grant the declarations, the court must ask whether or not the question is real in relation to every declaration sought by the claimant. Even if the court were to find that any issue in relation to the grant of a declaration is real, it still has a discretion as to whether or not to grant or refuse declaratory relief.

[59] Ms Hall argued that the role of the Review Board is one of review and recommendation. It is not the decision maker as it is the Minister who is given the authority under the Act to makes decisions. This process is explained by Brooks, P in **Robert Ivey v Firearms Licensing Authority**[22] It is therefore submitted that, it is the Minister who has the authority to make a decision on the claimant's

[22] [2021] JMCA App 26 at paragraphs 39 and 40

application for review and that in this case, the Review Board has not made a decision in relation to the claimant's appeal.

[60] Ms Hall contended that the claimant was not entitled to an oral hearing in these circumstances. There is no provision in the Act or Regulations which requires an oral hearing in a matter of this nature. It cannot be said that such a failure rendered the process unfair or irregular. It is submitted that the Review Board, before making its recommendation to the Minister, took the time to consider the material which was before the Authority. That material included the statement given by the claimant. In deciding whether they acted unfairly, the court should look at what was before the second and the third defendants, as the timeline is critical

[61] The evidence is that the Review Board conducted its hearing by reviewing the written material over several days during December 2020 and January 2021. The claimant was given the opportunity to make written representations in his application for review and so there was no breach of the principles of natural justice. On the issue of a breach of natural justice the court should note that the facts are not in dispute, they are as follows:

> **1**.When the claimant made his application to the Review Board, his criminal matter was not yet decided, exhibit WMD2, shows that the claimant acknowledged the pending criminal matter.
>
> **2**.The claimant was aware of the allegations against him, he stated this in his application for review.
>
> **3.** The claimant put forward a response to those allegations saying that he was innocent of the criminal charges.
>
> **4.** There is no evidence that the letter from Clerk of Courts came to the attention of the Review Board or the Minister. The claimant's, evidence is

that he brought that letter to the first defendant, there is no agreement that it came to the attention of the Board or Minister.

5. The matter under review was the revocation of the licence and this was done prior to the determination of the criminal matter.

The court notes that Ms Hall also declined to make submissions on the case of **Aston Reddie** though invited so to do by the court.

Issues

[62] The following issues arise on the material presented to the court:

1. Whether the decision taken by the defendants to revoke the Firearm User's Licence was ultra vires as being in breach of the Firearms Act, 1967

2. Whether the proceedings before the defendants were conducted in breach of the principles of natural justice.

3. Whether the decision to revoke the claimant's Firearm User's Licence was reasonable in all the circumstances.

4. Whether the Minister had a duty to hold a hearing and to advise the claimant of the date thereof

5. Whether the Minister had a duty to provide the reasons for his decision.

The Law

[63] This court will first look to the statute under which the defendants derived their authority. Any exercise of the power granted to a public body must be based in law. Section 26B of the Firearms Act sets out the functions of the Authority and Section 36 provides for the exercise of those functions. The relevant portions of the Act are set out below:

"36.- (1) Subject to section 37 the Authority may revoke any licence, certificate or permit if –

(a) the Authority is satisfied that the holder thereof is of) intemperate habits or of unsound mind, or is otherwise unfitted to be entrusted with such a firearm or ammunition as may be mentioned in the licence, certificate or permit; or

(b) the holder thereof has been convicted in Jamaica or in any other country for an offence involving -

(i) the illegal importation or exportation of firearms or ammunition;
(ii) the illegal possession or use of a firearm or ammunition;

(iii) the use of violence for which a sentence of imprisonment of three months or more was imposed;

(c) the holder thereof has been convicted of an offence against the Dangerous Drugs Act or any other offence for which a sentence of two years or more was imposed;

(d) the holder thereof has been convicted of an offence involving –

(i) the unlawful discharge of a firearm in a public place;

(ii) failure to adequately secure a firearm or ammunition at his place of abode or work or on his person;

(iii) the unlawful use of a firearm to threaten violence against another person; or

(iv) negligence, resulting in the loss of a firearm or ammunition;

(e) the holder thereof fails to comply with a notice under section 35.

(2) Where the Authority revokes any licence, certificate or permit under this section or under section 18 or 46, the Authority shall give notice in writing to the holder thereof –

(a) specifying that the Authority has revoked such licence, certificate or permit;

(b) requiring such person to deliver up such licence, certificate or permit to the Authority on or before the day (not being less than three days after delivery of such notice) specified in such notice.

37.-(1) Subject to this section and section 37A, any aggrieved party may within the prescribed time and in the prescribed manner apply to the Review Board for the review of a decision of the Authority-

(a) refusing to grant any application for a licence, certificate or permit; or

(b) amending or refusing to amend any licence, certificate or permit; or

(c) revoking or refusing to revoke any licence, certificate or permit; or

(d) refusing to grant any exemption pursuant to subsection (3) of section 35A or any certificate pursuant to subsection (4) of section 35A.

(1A) Where any aggrieved party applies for the review of a decision of the Authority pursuant to paragraph (d) of subsection (1), the firearm or ammunition in relation to which the review is sought may be retained by the holder of a licence, certificate or permit in respect thereof until such time as the review has been determined.

(1B) Every person who pursuant to subsection (1) applies for the review of a decision of the Authority shall at the time of making the application pay the prescribed fee.

(2) …

(3) In this section the expression "aggrieved party" means the applicant for or the holder of any licence, certificate, exemption or permit in respect of the refusal to grant or the amendment or the revocation of which an application for review is made and the owner of the firearm or ammunition to which such application, licence, certificate or permit relates.

(4) …

37A.-(1) For the purpose of a review under section 37, there is hereby established a Review Board consisting of persons appointed by the Minister in accordance with the Fourth Schedule

(2) The Review Board appointed under subsection (1) Schedule shall within ninety days of receiving an application for review-

> *(a) hear, receive and examine the evidence in the matter under review; and*
>
> *(b) submit to the Minister, for his determination, a written report of its findings and recommendations.*

(3) The Minister upon receipt and consideration of the reports of the Review Board shall give to the Authority such directions as the Minister may think fit.

(4) Where the Review Board fails to comply with subsection (2), the Minister may hear and determine the matter under review."

[64] The applicable Regulations governing section 37 of the Firearms Act are found in The Firearms (Appeals to the Minister) Regulations, 1967 which provide in section 2 that the applicant means the person appealing from a decision of an appropriate authority. The Regulation continues:

> *"3.- (1) Every appeal under section 37 of the Act shall be commenced by notice in writing addressed to the Minister and filed within twenty-one days of the date on which the decision from which the applicant is appealing is communicated to him, or within such longer period as the Minister may in any particular case allow.*
>
> *(2) The applicant shall state in his notice his grounds of appeal and shall forward a copy of such notice to the appropriate authority.*
>
> *4. Within fourteen days of the receipt of a notice of appeal, the appropriate authority shall forward to the Minister a statement in writing setting out the reasons for the decision from which the applicant is appealing together with a copy of every other document relating thereto.*
>
> *5.- (1) The Minister may, in his discretion, permit any applicant to appear before him to put forward arguments in support of his appeal.*
>
> *(2) Any applicant permitted to appear before the Minister as aforesaid may do so in person or may be represented by counsel or solicitor if he so desires.*
>
> *(3) Where the Minister permits an applicant to appear before him he shall invite the appropriate authority to be represented at the hearing if the appropriate authority so desires.*

> *6. So soon as may be practicable after the filing of all documents or the conclusion of the hearing of the appeal, as the case may be, the Minister shall communicate his decision in writing to the applicant and to the appropriate authority and give to the appropriate authority such directions as may be necessary*."

Judicial Review

[65] The grounds of judicial review are set out here:

> *The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:*
>
> > *By illegality as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

> *By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...*
>
> *I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.*
>
> *The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."*

[66] In **Chief Constable of The North Wales Police v Evans**[23] at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

> *"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that*

[23] [1982] 1 WLR 1155

purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."

[67] In addition, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology**) [24] These additional grounds were not argued in this claim.

[68] The approach of the court in determining this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not to decide whether the decision is correct or not. It is not for this court to substitute its own views on the merits of the decision made or to make a decision.

Discussion

[69] The case of **Robert Ivey v Firearm Licensing Authority** is instructive. There the Court of Appeal outlined the statutory framework governing the Authority, the Review Board and Minister of National Security. It also set out that a person aggrieved by a decision of the Authority may apply to the Review Board for a review of that decision. The Review Board having considered the application for review is required to submit its findings and recommendation to the Minister. It is the Minister who, upon receipt and consideration of the report directs the Authority on the steps it should take.[25]

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[24] [2022] JMCA Civ 2 at para [47]

[25] [2021] JMCA App 26, per Brooks, P at paragraph 6

[70] The facts are dissimilar to those of the case at bar., however the law is applicable to the instant claim. In **Robert Ivey**, the claimant did not apply for a review by the Review Board. He instead applied to the court for leave to apply for judicial review which was refused. On appeal against that order, Brooks, P examined the case of **Raymond Clough v Superintendent Greyson and Another**[26] affirming the dictum of Carey, JA (as he then was) that the law requires the official to act fairly. Emphasising that:

> *"But it is a misconception that at the first tier, there is necessarily and inevitably any requirement for a hearing so that the citizen might disabuse the first tier official of any wrong impression. Lord Denning in R v Gaming Board for Great Britain, Ex parte Benaim and Anor. [1970] 2 All E.R. 528 at 533 pointed out that there are no inflexible rules as to the applicability of the rules of natural justice. He said this:*
>
> > *'I think that the board are bound to observe the rules of natural justice. The question is: what are the rules?*
> >
> > *It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter…'*
>
> *The subject matter in this case is the licence to hold or possess a firearm. There is no constitutional or legal right to own a firearm or to be allowed to hold a firearm. the entitlement or to [sic] the refusal of or the revocation of a grant of a licence is in the hands of the police. The Firearms Act is concerned with the control of, the use and misuse of firearms in this country. The incidence of violence involving guns is such that the greatest care has to be taken to ensure that such weapons do not fall into the*

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[26] (1989) 26 JLR 292

wrong hands. The welfare and security of the entire country is at stake. The national security must be a matter of the greatest concern. Criminal activity is unarguably a matter which affects national security."

[71] There was therefore no obligation at the stage of the Authority or first tier stage, to afford a hearing or to give reasons for a decision under the previous iteration of the Firearms Act. The Court of Appeal went on hold that Carey, JA had found under the Act as it then was, that it was the Minister who was obliged to allow a hearing, not necessarily in person and to provide reasons for his decision. Further, that the statute made it plain that an aggrieved party has the right to be heard when the matter goes before the Minister. *"It is at the hearing before the Minister that attacks on the basis of illegality, irrationality and procedural impropriety can properly be pursued."*

[72] In **Robert Ivey**, Brooks, P having reviewed the case of **Raymond Clough** and affirmed the position of the court regarding the duties of the instant defendants under the statute. The learned President decided that the duty of the Authority is to act fairly, however, it can take into account any information it thinks fit. He noted that that the case of **Raymond Clough** was decided before the establishment of the Authority, however the legislative structure governing decision-making and appeals is similar to that of the present Act as indicated below:

[35] The issue of whether the Authority is obliged to afford Mr Ivey, or any licence holder, a hearing, before revoking a firearm licence, has to be addressed in the context of the statutory framework. Under the Act:

a. the Authority makes the first tier decision in exercise of its functions under section 26B of the Act;

b. the Authority informs the licence holder of its decision to revoke (section 36(2) of the Act);

c. the licence holder is permitted to apply to the Review Board for a review of the Authority's decision (section 37(1) of the Act);

d. the Review Board conducts a review within 90 days of the application and makes a report to the Minister (section 37A(2) of the Act);

e. the Minister considers the report and gives directions to the Authority, as he thinks fit (section 37A(3) of the Act); and

f. if the Review Board fails to conduct a review or provide a report within the stipulated time "the Minister may hear and determine the matter under review" (section 37A(4) of the Act).

[73] Brooks, P decided that under the current Act the functions of the Review Board are akin to an appeal although the Act now uses the word "*review*." The Court of Appeal did not depart from its decision in **Raymond Clough**. It affirmed the two-tiered structure of review and said that it is the Minister who makes the decision at the second tier, under both the previous and present version of the Act. The difference is that it is the Review Board that receives applications for review rather than the Minister.

[74] Having said that, Brooks P, went on to hold that:

[41] In applying the reasoning in Raymond Clough v Superintendent Greyson and Another to the present statutory framework, the similarity to that which applied in the previous dispensation of the Act, dictates a finding that although the Authority is obliged to act fairly and in accordance with an ostensibly legitimate basis, it is not obliged to grant a hearing to a licence holder before revoking a licence. The Authority is also not obliged to give reasons for its decision to the licence holder. If, however, the licence holder requires a review, the Review Board must:

a. secure the Authority's reasons for its decision;

b. grant the licence holder a hearing, which need not be orally conducted; and

c. provide its recommendations to the Minister.

[42] In Aston Reddie v The Firearm Licensing Authority, McDonald-Bishop J (as she then was) considered the statutory framework under the present dispensation. She concluded that the similarities in the framework were such that the decision in Raymond Clough v Superintendent Greyson and Another was applicable in the current statutory framework.

[75] The case of **Aston Reddie v Firearm Licensing Authority** is similarly instructive. In that case, the claimant was charged with criminal offences concerned with allegations of assaulting his wife. His licensed firearm and firearm booklet were seized by the investigating officer and submitted to the Authority. Subsequently the charges were dismissed for want of prosecution and a no order made.

[76] The Authority issued a written notice to the claimant revoking his Firearm User's Licence for his "intemperate behaviour." The claimant through his attorney-at-law objected to the revocation and filed a notice of appeal with the Chairman of the Review Board. The grounds were that he had not been afforded an opportunity to be heard and that the decision of the Authority was unfair and unreasonable, being made without him being heard and without any evidential basis for so doing.

[77] Mr Reddie heard nothing further until he received a letter from the Permanent Secretary of the Ministry of National Security which stated that the Minister acting on the advice of the Review Board had dismissed his application for review and upheld the revocation of the licence by the Authority. He applied for judicial review.

[78] His evidence in court was undisputed; he disagreed that he was of intemperate disposition; denied assaulting his wife or anyone else with the firearm and that investigating officer was blatantly wrong in his statement to the Authority. Mr Reddie asserted that he had given a statement to the Authority when his home was visited by an officer of the Authority as did his wife. He had handed over his firearm and ammunition upon request. He had never used his firearm in an unlawful manner. His application for renewal was always granted, he had never threatened to use his firearm contrary to the terms and conditions of the licence, and had no criminal convictions whatsoever.

[79] He appealed to the Review Board stating his grounds, it heard no evidence from either himself of anyone on his behalf. This was the same when his case was reviewed by the Minister.

[80] The defendant's case was based on evidence from Chairman of the Authority and the Minister. In sum, the Superintendent of Police in charge of the parish of Hanover conducted an investigation into criminal charges brought against the claimant. He handed over copies of documents from part of the police file. The Authority conducted its own investigation. The licence was revoked after consideration of the aforementioned material. A notice of revocation was given to the claimant. The Authority was satisfied that the claimant was of intemperate habits based on the information from the police file and its own investigation. McDonald-Bishop, J (as she then was) decided in relation to the Authority that:

> *"The Authority need not receive evidence of a conviction to determine whether a Firearm User's Licence should be revoked. Neither does the Authority only revoke a licence issued to a restricted person."*

[81] The Minister received the recommendation of the Review Board, reviewed the information which had been provided to the Authority by the police, as well as the investigation conducted by the Authority and its decision to revoke the licence. He upheld the decision.

[82] The claimant complained that the decision was made without there having been granted to him an opportunity to be heard. The court decided the following issues:

i. Whether the decision taken by the Authority, the Review Board and the Minister to revoke the Firearm User's Licence in the circumstances was ultra vires.

ii. Whether the proceedings were conducted in breach of the principles of natural justice.

iii. Whether the decision to revoke the claimant's licence was unreasonable in all the circumstances.

[83] The learned judge held that it was in the discretion of the Authority what steps it would take and the procedure it would adopt in performing its functions. If a hearing was found to be necessary, then section 26B(2)(c) of the Act made provision for that. However, the section did not obligate the Authority to afford the opportunity for a hearing before revocation. She adopted the decision in **Raymond Clough** and said that the hearing and reception of evidence is at the review stage and that it is at that stage that the right to a hearing is to be granted.

[84] McDonald-Bishop, J found that the Review Board had failed to grant a hearing which rendered its decision ultra vires and its actions procedurally improper. In so doing, its recommendation was tainted by the illegality and procedural impropriety in its decision-making process. The Minister also failed to recognize that the law had not been complied with and also failed to determine the matter himself. He acted on the tainted recommendation and upheld the decision.

[85] The court ultimately found that the Review Board had considered the appeal, submitted its findings to the Minister and in doing so was acting in accordance with the Act. The Minister acted on the recommendation. The claimant was not aware of each of these stages until the Minister made his decision which was

made without a hearing. A hearing is expressly provided for in the Act. The Minister must hear, receive and examine evidence upon an application for review as provided for in section 37 of the Act. The Minister having failed so correctly understand the law regulating his decision-making power acted unlawfully. He having also failed to observe the express procedure set out in the Act acted inconsistently and his actions amounted to procedural impropriety. The Minister's decision having been made without jurisdiction was held to be ultra vires and declared null and void.

[86] The learned judge also decided that there was no unfairness to the claimant in that she was satisfied that the claimant had failed to make out a case that the Authority did not use its statutory powers in a bona fide manner and reasonably in the context of the statutory authority conferred upon it. She found that there was no breach of natural justice on the part of the Authority in its actions.

[87] There is a discrepancy between the evidence of Mervin McNab and the claimant in respect of the renewal of the licence. The claimant said he had renewed his licence successfully three times after the charges were laid. While Mr McNab said that the claimant had applied for renewal for the second time since the initial grant of the licence on or about January 30, 2018. Given that the legislation provides for the annual renewal of licences the evidence of Mr McNab is accepted over that of the claimant. This point is moot, as was argued by Ms. Foster, as **Aston Reddie** states that the Authority need not grant a renewal because it had granted an initial licence.

[88] I have considered and cited these cases at length because the instant claimant's case is really against the Review Board and the Minister. He has not successfully argued that the Authority failed to apply the statute in the instant case based on the foregoing. I will now examine the steps taken by the Review Board.

The role of the Review Board.

[89] The Review Board has a duty to hear, receive and examine the evidence before making its recommendation to the Minister. Based on **Aston Reddie** at this tier, the claimant has a right to a hearing. This is one of the statutory duties of the Review Board.

[90] In **Aston Reddie**, the claimant had indicated in his grounds of appeal that he was not given a hearing by the Authority. This was interpreted to mean that he sought a hearing and it was denied to him by the Review Board. In the case at bar, the claimant asked in his application for review, that the *"board thoroughly review my case."* I construe this request to mean that the instant claimant was to have been given a hearing as a matter of law as the Act expressly uses the word "*hear*" in relation to the Review Board. This word "*hear*" invokes the audi alteram partem rule. Having heard from the Authority in relation to the instant claimant, it was incumbent on the Review Board to hear from him.

[91] The Court of Appeal in **Robert Ivey** set out the law related to the duties of the Review Board at paragraphs 39 – 41:

> [*39] Although the application for review is made to the Review Board, it is the Minister who makes the decision. He, thereafter, gives directions to the Authority. It is worthy of note that, unlike the earlier formulation of the Act, where the term "appeal" was used, the present provisions of the Act use the term "review" in describing the exercise which the Review Board is mandated to undertake. Nonetheless, the details of the Review Board's functions are more akin to an appeal, in the sense that the Review Board is required to conduct a hearing. Section 37A(2)(a) of the Act requires the Review Board to "hear, receive and examine the evidence in the matter under review". The previous iteration of section 37(1) of the Act spoke to an "appeal to the Minister against any decision of an appropriate authority". The Firearms (Appeals to the Minister) Regulations 1967 ('the 1967 regulations'), then, as now, require the Minister to consider the*

material that is placed before him, grant a hearing if he is so minded, and give directions to the appropriate authority, which is now the Authority.

[40] Despite the amendments to the Act, the two-tier structure described by Carey JA remains materially intact. It is the Minister who makes the decision at the second tier, under both iterations of the Act. The difference is that under the present dispensation, it is the Review Board that actually receives the application instead of the Minister. There is no material difference that would alter the stance of the court in relation to the obligations, or lack thereof, which are placed on the Authority, as opposed to those, which Carey JA opined, had been placed on the "appropriate authority" under the previous dispensation.

[41] In applying the reasoning in Raymond Clough v Superintendent Greyson and Another to the present statutory framework, the similarity to that which applied in the previous dispensation of the Act, dictates a finding that although the Authority is obliged to act fairly and in accordance with an ostensibly legitimate basis, it is not obliged to grant a hearing to a licence holder before revoking a licence. The Authority is also not obliged to give reasons for its decision to the licence holder. If, however, the licence holder requires a review, the Review Board must:

a. secure the Authority's reasons for its decision;

b. ***grant the licence holder a hearing, which need not be orally conducted; and***

c. provide its recommendations to the Minister,"

[92] It is open on the facts and the law to find that the Review Board failed to perform its statutory duty to afford a hearing to the instant claimant. Their actions constitute procedural impropriety and are irrational.

Should the Authority or the Review Board have provided detailed reasons in order for the claimant to adequately pursue his application for review as a matter of fairness

[93] The law is as set out by the Court of Appeal in the case of **Kevin Bertram v the Firearm Licensing Authority**[27], cited by Ms. Foster. **Kevin Bertram** concerned an application for judicial review of the decision by the Authority to refuse an application for a Firearm User's Licence. Laing, JA(Ag.) writing for the court, made it clear that the cases of **Raymond Clough** and **Robert Ivey** set out the applicable principles regarding the requirement for reasons at the stage of the Authority. He said that the statutory framework does not require the Authority to provide detailed reasons to an applicant whose application for a licence is refused. He noted that the amendment to the Act introducing the Review Board did not change "*the spirit of the pre-existing, two-tiered statutory regime, which remains intact*."

[94] The applicant had received a reason which was that he did not satisfy the Authority of the need to be armed. The learned judge of appeal said that the assertion of a right to detailed reasons was found to be without merit. He found that there was no illegality in the refusal of the application by the Authority, as it having been duly considered and a reason for the refusal given. There was also no irrationality and no basis for judicial review arising from the first stage of the application process. There was also no statutory requirement for the Review Board to provide an applicant with more detailed reasons for its decision, therefore the provision of detailed reasons is discretionary.

[95] The learned judge of appeal in **Kevin Bertram** said that in looking at whether the statutory position would constitute procedural impropriety, he had to examine the

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[27] [2022] JMCA App 22

principle of fairness. The court held that there were special circumstances where fairness will necessitate that detailed reasons be given.

> *[54] There are special circumstances where fairness will necessitate that detailed reasons be given. This may be the case where, for example, a person's firearm user's licence has been revoked. Support for this position may be found in the case of Danhai Williams v The Attorney General and others (1990) 27 JLR 512, at page 520, where Gordon JA said:*
>
> > *"The law gives the aggrieved party the right to appeal against the decision revoking his licence. It also gives him a right to a hearing for the first time and it would seem in these circumstances that there should be conformity with the rules of natural justice, he must be told what he has to meet. If the right to appeal is real and not illusory then the grounds of appeal should relate to a specific basis of complaint for revocation of the licence. Section 36(1)(a) contains bases of complaint viz:*
> >
> > *(i) intemperate habits*
> >
> > *(ii) unsound mind*
> >
> > *(iii) otherwise unfitted . . .*
> >
> > *This latter complaint is wide enough to include involvement in criminal activity (which is itself extremely wide). The right to appeal involves the right to the legitimate expectation that the rules of natural justice will apply. These rules subscribe to a right to fairness. How can one submit meaningful grounds of appeal if he is unaware of the basis for the revocation? In my view the appellant should have been informed of the basis of complaint."*
>
> *[55] However, while acknowledging the need for more than skeletal reasons in appropriate cases, it would not be prudent for this court to*

make sweeping generalisations as to when reasons (or detailed reasons) should be provided to an applicant to facilitate a review. This is because the possible scenarios in which such considerations may arise are numerous.

[56] As with most cases, the issue of whether there is an obligation of disclosure in the interest of fairness will depend on the particular facts. In the instant case, the applicant's application disclosed that he was a businessman. He was married and needed a firearm to safeguard his family, self and property. It is not challenged that the relevant investigations were conducted in accordance with the FLA's standard procedures. His application was refused on the ground that he did not establish a need to be armed. In my view, that reason, although terse or economical, provides a sufficient "gist" of the decision and was sufficient to permit the applicant to pursue his application for a review."

[96] I understand the learned judge of appeal to be saying that fairness is to be determined on a case by case basis on the facts presented. What constitutes fairness has been prescribed by Lord Mustill in **R v Secretary of State for the Home Secretary, ex parte Doody**. His speech was cited with approval by Lord Brown in **Bari Naraynsingh v The Commissioner of Police**, a judgment of the Privy Council from Trinidad and Tobago which was delivered on the 20th April 2004. In that case, Lord Brown said at paragraph 16:

"As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Secretary, ex parte Doody[28]:

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[28] [1994] 1 AC 531, 560

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derived that: (1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type… (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (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 cannot make worthwhile the mere representations 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."'

[97] **Doody** was not cited to the Court of Appeal in the case of **Kevin Bertram**, however, it is too well known to have been far from his Lordship's mind when he drafted his decision.

[98] In the instant case, the claimant would not have known why he was considered unfit. He had been vindicated by judicial process, the rule of law having been engaged. He was given less than the gist of the case he had to answer and he was not given detailed reasons.

[99] Ms Jaggon for the Minister, gave evidence that the Review Board had the material relied on by the Authority. This is evidence which makes it plain that the Review Board did not conduct a hearing. Had it done so, there ought to have been more material in its possession than that submitted by the Authority. There ought to have been evidence it had received and examined. Evidence which the claimant desired to present but was not afforded the opportunity so to do.

[100] In answering this question, there is no distinction in principle between **Kevin Bertram** and the instant case, the law does not require the Authority to provide detailed reasons for its decision to revoke a licence. There is of course a distinction between the failure to give reasons and the failure to give adequate reasons. The submission in the case at bar was based on a failure of the Authority to give adequate reasons. However, that submission is found to be without merit as it is not in accord with the law as stated.

[101] In this case I am of the view that the instant claimant falls within that category referred to by His Lordship in **Kevin Bertram** and should have been given detailed reasons by the Review Board out of fairness as the revocation concerned the matter of his character, there was no hearing, no opportunity to present representations and the process adopted was one-sided. I adopt the words of Carey, JA…*If the right to appeal is real and not illusory then the grounds of appeal should relate to a specific basis of complaint for revocation of the licence.* This conforms to the decision in **Danhai Williams** and I will further adopt the words of Carey, JA to the instant claim on this point.

> *"Further if the aggrieved person is to be able to appeal the decision, he should be in a position to know the basis of the revocation seeing that the reasons for revocation are categorized in specific and general terms. Is it being said that he is insane - or is "otherwise unfitted". This phrase covers, I would suggest, a multiplicity of ill-assorted sins. I would hold that it would be wholly unreasonable to assert that an aggrieved person against whom serious allegations could be made as affecting his*

reputation or good name, is fairly treated if he is expected to appeal a decision founded upon charges, the nature of which has never been vouchsafed to him."

[102] I have come to this conclusion for the following reasons:

1. An aggrieved party who wishes a review of a decision to revoke the licence has to do so within twenty-one days. He lodges his appeal at a point in time when one set of facts are in existence.

2. With the effluxion of time, the aggrieved party may find that his circumstances have changed. There has to be an avenue for bringing these changes to the attention of the Review Board.

3. The words **hear, receive and examine evidence"** were used by Parliament. What was the intention of the drafters when these words were used? The word "**evidence**" suggests that the Review Board is to function in a quasi-judicial manner. The fourth schedule to the Act prescribes the august panel which constitutes the Review Board. The panel could be said to be experts in their respective fields and are collectively in possession of a wealth of experience in the criminal arena. This is the body that must "**receive"** evidence. The reception of evidence has to be by way of the submission of further documents by both sides as information is gathered. It connotes a continuing process.

4. The evidence in any hearing comes from both sides. Evidence can either prove or disprove that which is being alleged. To construe the function of the Review Board when it "**examine[s] evidence**" as to consider only a snapshot of the factual circumstances at the time the appeal was lodged and nothing further, would lead to an absurdity.

5. Evidence also means character evidence. An aggrieved party who has been said to be "**otherwise unfitted**" or not fit and proper, has to be allowed to disprove the allegation. The Authority is not a court of law; it makes an assertion as to a blemish on his character. The aggrieved party has to be allowed to assert his good character and to present evidence as to why he should be considered fit and proper.

6. This is why there has to be a hearing. It is incumbent on the Review Board to set a date and time for the hearing whether in person or on paper. This is in order that the date and time indicate a point at which all the material which it will "**examine**" should have been submitted. It is notice to the aggrieved party. While there is no provision in the statute for notice, it is a basic principle of fairness in the conduct of a hearing. This will allow for a reasonable time within which an aggrieved party can lodge all of the material which disproves or rebuts the allegation/s made against him.

7. The Minister receives a recommendation which ought to have been examined by the panel of experts on all relevant material pertinent to the appeal before it. This panel based on its experience may ask for further and better particulars if it needed to do so. The reception of evidence is not limited to only evidence presented to it by both sides. In my view, nothing in section 37A(2)(a) prevents the Review Board from itself requesting evidence from either side.

8. In the instant case which is one of revocation of a licence, the Review Board should have given the claimant the specific basis of complaint for revocation of the licence and not the general

term used. This derogated from the claimant's ability to appeal the decision.

9. The statute is silent as to the procedure the Review Board is to adopt, therefore it is the master of its own process. This means a high degree of fairness is to be incorporated into that process. If it fails to act within the statutory period and the Minster acts in its stead, the relevant material would have been submitted by both sides.

[103] There is no evidence that the investigation by the Authority uncovered any of the claimant's undisputed change in circumstances. Given that there is no constitutional or legal right to hold a licence, it is the claimant who bears the burden of establishing on review, the sufficiency of his character. There could be no hearing of, or examination of, absent evidence. In my view, it can be said that the recommendation was irrational in that the statutory body failed to take relevant considerations into account, and in so doing, the Review Board in failing to grant an opportunity for a hearing denied itself any information as to a change in circumstances which may have been relevant to the Minister.

[104] For these reasons, the Review Board in the instant case, failed to perform its statutory duty and to uphold minimum standards of fairness to the instant claimant.

The role of the Minister

[105] The cases of **Raymond Clough** and **Robert Ivey** are both binding on this court and the case of **Aston Reddie** has been affirmed by the Court of Appeal. Carey, JA in **Raymond Clough** made it clear that the legislative framework by allowing an appeal to the Minister satisfied the principles of natural justice: *as the statute by allowing a hearing by the Minister after revocation by another official, provide a procedure whereby the principles of natural justice, for example, reasons for the decision and a hearing could be satisfied*."

[106] McDonald-Bishop, J in **Aston Reddie**, while recognizing that the statute at the time of the decision did not provide for the Review Board cited the case of **Danhai Williams v The Attorney General et al**[29] for the role of the Minister in the appeal process as set out by Carey, JA:

> "*The Minister is clearly called upon to adjudicate, to hear both sides and to give a decision. He is in a position akin to a judge holding an inter-partes hearing after the grant of an ex-parte injunction. Although the aggrieved party had no right to be present, it seems to me he should know the date on which the hearing of the application is to take place. It will enable him to decide whether he should retain counsel to appear. He may wish to apply for further time to submit further representations."*

Wright, JA in the same case said:

> *"The appeal to the Minister invokes the intervention of a tribunal at a higher level than the appropriate authority. Accordingly, to sanction treatment by him similar to that of the appropriate authority, in which the appellant takes no part, labels the right of appeal illusory. It would be an exercise in futility to enable a person to appeal and then to deny him meaningful participation in the resultant proceedings.*"

[107] It was held by the Court of Appeal in **Danhai Williams** that the Minister's failure to inform the appellant as to the date his appeal would be heard and to allow him to participate in the process meant that the Minister did not act judicially or fairly and his decision was therefore in breach of natural justice.

[108] In **Aston Reddie** the Minister had breached the rules of natural justice when he failed to hold a hearing and this action was irrational. It was held that both the Review Board and the Minister had acted irrationally when they failed to act on a

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[29] (1990) 27 JLR

correct view of the applicable law. In her analysis on this issue, McDonald-Bishop, J pointed out that the claimant in that case had a right to have the decision of the Authority reviewed.

[109] The instant claimant has the right to a hearing by the Minister who is by law to hold a hearing at the review stage. This hearing satisfies the principles of natural justice in that it gives an aggrieved party access to fairness and justice where the statutory procedure has failed to produce it.

[110] The jurisdiction of the first defendant to revoke a licence is grounded in the authority conferred upon it by sections 26B(1)(c) and 36 of the Act. The Review Board derives its authority from section 37 to recommend upon review whether or not a decision to revoke a licence should stand. The authority vested in the Minister is granted by section 37A of the Act and the Regulations made pursuant to section 37. The Minister upon review has the discretion to affirm the decision to revoke a licence.

[111] Section 36(1)(a) gives the Authority the power to revoke any licence, certificate or permit if-

> (*a*) *the Authority is satisfied that the holder thereof is of intemperate habits or of unsound mind, **or is otherwise unfitted** to be entrusted with such a firearm or ammunition as may be mentioned in the licence, certificate or permit, or…* (emphasis mine.)

[112] The Authority has a duty to act fairly and the decision of **Raymond Clough** stands for the proposition that it should have a prima facie case before it and to act in good faith. In that case, **t**he words "**otherwise unfitted**" or "**fit and proper**" have been judicially defined:

> *"In the present case, we are called upon to construe a phrase "otherwise unfitted" in the Firearms Act. In my view, "otherwise" has the ordinary dictionary meaning of "in other respects". The list of disabilities form no*

particular class; a drunkard and a mad man have altogether dissimilar characteristics. The intention of the statute is an important aid to construction. The plain intention of the statute is stringently to control the possession of firearms. The fact that a specialized Court has been created to adjudicate in gun related offences is more than ample proof of that intention. As undoubtedly it is the police who are charged with enforcing the law, it would be absurd to suggest that a licence holder could commit gun related offences or any other serious criminal offence for that matter and be immune from having a licence previously issued to him, revoked by the "appropriate authority". The conclusion is, in my judgment, irresistible, that "otherwise unfitted" includes a person who is involved in criminal activity. Such a person, Mr. Grant contended, fell entirely outside the class or genus which the section prescribed. I am quite unable to accede to that proposition."

[113] Mr Rogers argued that the claimant has not been convicted of a criminal offence and that there is no evidence that the fact of acquittal was considered by any of the defendants. It was set out in **Aston Reddie** that the Authority need not receive evidence of a conviction to determine whether a licence should be revoked; nor does the it revoke only licences issued to restricted persons. In other words, the fact of an acquittal is but one a factor be to be considered. The learned judge said:

"A conviction or acquittal are not conditions precedent for the Authority to act under the Act particularly when viewed within the context of the provision under which the Authority sought to exercise its power. The Authority had the independent right to assess the situation and to come to a determination as to whether the claimant could be entrusted with a firearm. It is not bound at all by the results of the court proceedings

particularly in light of the fact that there had been no hearing on the merits."[30]

[114] In the instant case, the claimant was tried in the criminal court, there was a hearing on the merits but the holding remains applicable. It is a prima facie case which is required in order for the Authority to satisfy the exercise of its power to revoke the licence. Nevertheless, his acquittal is an important factor in the presentation of his case to the Review Board and to the Minister.

[115] Mr McNab was aware that the claimant had submitted the letter from the Clerk of Courts regarding his criminal case as he testified to this. Ms. Jaggon could not recall seeing this letter on the file in her office. This failure to recall does not equate to the absence of the letter on the file and I find that the letter was on the file submitted to the Minister.

[116] The decision-maker is the Minister. On appeal, his role is as set out in **Danhai Williams.** His powers under the statute have been set out above. The appropriate authority which is now the Review Board, is required within ninety days of receipt of the application for review to furnish the Minister with reasons for its decision from which there is an appeal with all supporting documents. There is no automatic right of appearance before the Minister, however, in his discretion he may permit representation in person or by legal representative.

[117] As was pointed out in **Aston Reddie** and **Robert Ivey**, there is nothing in the Regulations which sets out a requirement for the Minister to fix a date for the hearing and to give notice of the hearing to the aggrieved party. How then would the claimant have known whether or not the fact of his acquittal had been brought to the attention of the Minister? This was a most unsuitable state of affairs.

Was there a hearing by the Minister

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[30] Paragraph 74

[118] Based on the submissions of Ms Foster and Ms Hall, the claimant put forward his version of events, in his statement to the Authority. The evidence from Ms Jaggon on behalf of the Review Board was that it considered all the material that was before the Authority. It is trite law that a hearing does not have to be an oral.

[119] I find myself unable to agree with the submission that the statement provided to the Authority constitutes the opportunity to make representations. There was no authority provided by either counsel for this proposition. A statement given as a part of an investigation is quite a different thing from representations in favour of the claimant's position on an application for review.

[120] The Minister is engaged in a process akin to an appeal. The initial application could be considered the notice of appeal. This is a skeleton which may or may not be supported by any additional material. In the instant case the claimant set out the reasons he desired a review of his case. He then retained the services of an attorney. These steps taken by the claimant are to my mind indicative of an intention to make substantive representations on the hearing of the appeal before the decision maker. It is one thing to file submissions it is another to argue them.

[121] The evidence regarding the actions taken by the Minister commenced with the application to the Review Board for review of the decision to revoke the licence. The Minister upheld the recommendation of the Review Board without notifying the claimant of the consideration of the appeal, or the hearing date.

[122] The Minister's role has remained unchanged despite the amendments to the Act. The evidence is that the claimant in the case at bar had an attorney-at-law who wrote to the Authority regarding updates in the appeal. It therefore could not be said that the Minister had no knowledge that the claimant was being represented at the hearing as counsel's letters ought to have been on the file.

[123] The entry of Mr Rogers into the review on behalf of the claimant suggests to this court that there would be substantive representations on behalf of the claimant at the hearing conducted by the Minister whether in writing or in person. The

claimant was not made aware of each of any of the stages until the Minister made his decision which was made without a hearing.

[124] Both the Review Board and the Minister simply ignored the presence of counsel in the matter. This was a clear denial of the opportunity to be heard. This is coupled with the failure to provide a date on which the review would be considered and the reasons for the Minister's decision. All together, the actions of the Minister are ultra vires. His actions are also in breach of the principles of natural justice as they constitute a failure to act judicially and fairly. Further, his failure to hold a hearing is considered irrational.

[125] A decision can be unreasonable on the grounds of: (1) improper purpose or what is known as Wednesbury unreasonableness (a) taking considering irrelevant matters or failing to take relevant considerations into account or (b) a decision so unreasonable that no reasonable decision maker could ever have come to it.

[126] It was submitted by the claimant that the decision of the Minister in affirming the recommendation without giving reasons is irrational. The claimant in the case at bar argues that the failure to provide him with reasons was based on an erroneous view of the applicable law. The claimant argued that the Minister failed to take the acquittal into account and this rendered his decision irrational. The evidence is that the Minister gave no reasons for his decision. There is no evidence what he took into account. Nevertheless, the cases show that the acquittal is but one factor in the review and could not have been determinative of the appeal. These actions by the Minister are procedurally improper and irrational.

Record keeping and chronology

[127] In terms of the evidence, it is noted that there is a discrepancy in the dates between the witnesses in their affidavits. Mr McNab gives the date of the application as on or about September 17, 2015 and the date the claimant collected the licence as June 21, 2016 while Ms Jaggon gives the application

date as November with no day or year and the issue date as June 2016 with no day.

[128] I recall here that while Mr McNab recalled seeing the letter from the Clerk of Courts on the claimant's file, and Ms Jaggon could not recall whether the letter was on the claimant's file and whether it had been submitted to the Minister.

[129] Another discrepancy between Mr Mc Nab and Ms Jaggon was in the content of the statement given by the claimant to the Authority. Neither side produced this document to the court. Mr McNab said it did not contain the claimant's side of the story, it merely said he was not guilty of the offences. In his view, the claimant declined to give a statement.

[130] It is this statement in the singular which is being described in the affidavit of Ms Jaggon as *"comprehensive statements given by the Applicant."* There was no attempt to correct this evidence while she was in the witness box. Ms Jaggon did not help herself by failing to recall and to neither confirm nor deny, the answers to most of the questions she was asked in cross examination. This was particularly troubling given that she was present to speak to the actions of the decision maker, who is the Minister. The evidence of Mr McNab is more credible and I resolve these discrepancies in the evidence in his favour.

[131] This court considers the contents of the file a matter of record-keeping. In so serious a matter as the proper review of Firearm User's Licences granted by the Authority. This court is compelled to the view that there was a failure to create and maintain an accurate record in this claimant's case. The court registers its alarm at the handling of this matter between the various tiers involved.

[132] In **Raymond Clough**, on the 13th April 1987, pursuant to section 37(1)(c) of the Firearms Act, the appellant, lodged an appeal with the Minister of National Security. On the 4th May 1987, the appellant received from the Minister, a letter acknowledging the receipt of the appeal and also advising that the "appropriate authority" had been asked to furnish a report on the matter.

[133] In the instant case, there is no correspondence to indicate receipt of the appeal or receipt of any supporting documents until the email to counsel. The introduction of the Review Board into the legislation does not obviate the need for an acknowledgement to the licence holder that it has received documents from him as a basic principle of fairness on the part of a public body.

[134] In all the circumstances as outlined, I find that the process was one which did not allow for the principles of fairness and the presumption held by this court that the wide power granted by Parliament would be exercised in a fair and proper manner did not obtain in the claimant's case.

Delay

[135] The claimant submitted that the Review Board was responsible for inordinate delay in its consideration of the matter. This action falls into the category of procedural impropriety and irrationality.

[136] It is to this court that the claimant complains that the Review Board breached the statutory time limit for review pursuant to section 37A(2) of the Act. Delay is contemplated by the legislation and the applicant for review is given a remedy in such a situation. In section 37(4), where the Review Board fails to comply with subsection 37A(2), the Minister may himself hear and determine the matter under review. In the case of **Aston Reddie**, the learned judge said that:

> *"… There is no provision for a direct application to the Minister. It is when the Review Board fails to comply with the Act, that the Minister may himself hear and determine the matter under review. So the Minister, it seems on a strict interpretation, can only come in where the Board fails to act in conformity with the law. The Act does not say the aggrieved party can go directly or, in the first instance, to the Minister. The crux of the matter though, is that for the aggrieved party to go to the Minister and ask*

for his intervention, it would have to first be brought home to him that the Board is in breach of the law. If he is not aware of that, then there is no "trigger" event invoking his right to go to the Minister."

[137] The importance of minimising delay should not be underestimated. Whether the subsequent decision is favourable to the applicant or not, the applicant will have been subjected to unnecessary frustration and stress; and small grievances will have grown into large ones.[31]

[138] The legislative purpose in amending the Act introduced a means by which an aggrieved party could have the decision of the Authority reviewed by a body distinguished by their character and expertise. This removed any spectre of political interference in the process and brought about an intermediate step at the second tier. The Act states the purpose and composition of the Review Board as follows:

37A.-(1) For the purpose of a review under section 37, there is hereby established a Review Board consisting of persons appointed by the Minister in accordance with the Fourth Schedule."

(2) The Review Board appointed under subsection (1) ***shall within*** *ninety days of receiving an application for review-*

(a) hear, receive and examine the evidence in the matter under review; and

(b) submit to the Minister, for his determination, a written report of its findings and recommendations.

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[31] H.W.R. Wade & C.F. Forsyth, 11th ed., p.79

(3) The Minister upon receipt and consideration of the reports of the Review Board shall give to the Authority such directions as the Minister may think fit.

(4) Where the Review Board fails to comply with subsection (2), the Minister may hear and determine the matter under review.

[139] The word "*shall*" as set out in the section on an ordinary interpretation means that the Board is required to or has a duty to carry out its statutory mandate. The drafters did not include a negative word such as "not" or "no" before the word "*shall*" for that would signal that the word "*shall*" ought to be interpreted to mean may**,** as what is being negated would be permissive rather than required.

[140] The court has to look at the word "*shall*" in the context of the subsection and the section as a whole. Section 37 provides a remedy for a person affected by the failure of the Review Board to perform its functions in a timely manner. The Minister may then review the matter himself. The section when read as a whole suggests that the construction of the word "*shall*" means "*should*," it is directory and not mandatory, as any failure to act is not met with a sanction. I accept the submission that the timeline of ninety days is a guide.

[141] There is no procedure for the Minister to intervene laid down in the Act or the Regulations. On a literal reading of section 37 it suggests that it is the licence holder who must initiate the process at the end of the ninety days by appealing to the Minister to review the matter. As the Minister cannot be approached directly, it would seem to me that the procedure is through the Review Board.

[142] On the issue of delay as a ground of procedural fairness, no cases were cited to the court. In my own research in the Supreme Court of Canada case of **Knight v Indian Head School Division No. 19**[32], a case decided by the Supreme Court

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[32] [1990] 1 SCR 653 at para 46

of Canada before the seminal case of **Baker v**, **Canada (Minister of Citizenship and Immigration)**,[33] L'Heureux-Dubé J.'s said:

> *It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith, the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.*

[143] In the case of **Blencoe v British Columbia (Human Rights Commission)**,[34] the Supreme Court of Canada in another well-known decision considered whether lengthy delay amounted to a denial of natural justice or abuse of process. The minority said that the case should be resolved on administrative law principles as no Charter rights[35] had been breached. The minority set out three factors in assessing the reasonableness of administrative delay which this court will adopt:

> *Administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to administrative law principles. Unreasonable delays must be identified within the specific circumstances of every case because not all delay is the same and not all administrative bodies are the same. In order to differentiate reasonable and unreasonable delay, courts must remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. In assessing the*

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[33] [1999] 2 SCR 817

[34] [2000] SCR 307 at para 160

[35] Canadian Charter of Rights and Freedoms

reasonableness of an administrative delay, three main factors should be balanced: (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay. A consideration of these factors imposes a contextual analysis.

[144] The minority found that administrative delay in **Blencoe** constituted an abuse of process. Further, the court should also consider the balance between competing interests, the type of hearing is also a relevant consideration.

[145] In assessing whether there is inordinate administrative delay sufficient to be called unreasonable and to breach procedural fairness, warranting the grant of a remedy, this court considered the following factors:

(1) The time taken compared to the time requirement in the statute:

(a) Were there any legal or complex issues of fact to be considered,

(b) Was there a need to gather additional information,

(c) Were there public interest concerns.

[146] *(2) The causes of delay beyond the time requirement*

(d) Did the applicant contribute to delay;

(e) Did the applicant waive parts of the delay;

(f) Did the public body under review use its resources efficiently.

[147] *(3) The impact of the delay*

(g) What prejudice was occasioned;

(h) Were there efforts at minimizing the impact by either side

[148] On factor (1), the uncontroverted evidence is that the statutory ninety-day period was exceeded. There was no evidence before this court that the application of Mr. DeMercado contained any factual or legal complexities, nor was there any evidence of a need for further information or any public interest concerns.

[149] On factor (2), there is some evidence as to the cause of the delay. It came from the claimant in cross examination when he admitted that he made his application for renewal in January 2018 and the criminal case was determined in October of 2019. The evidence did not point to any contributory actions on the part of the claimant, nor did he waive any part of the delay. Though Mr Rogers made heavy weather of an eighteen-month period of delay, it was admitted by his client that the Authority need not have waited for the disposition of the criminal matter to revoke the licence. His application for review was filed on or about April 16, 2019. The claimant did not obtain the letter from the Clerk of Courts until October 18, 2019 and in his further affidavit he said he delivered that letter in person two days later.

[150] The letter of acquittal having been lodged, the evidence of Ms Jaggon was that the Review Board conducted its hearing by reviewing the written material over several days during December 2020 and January 2021. It submitted its recommendation on February 8, 2021. The period during which the Review Board handled the matter was between April 16, 2019 and February 8, 2021, this exceeds its ninety-day period of review by approximately eleven months.

[151] There was some evidence as to the use of public resources on the part of the Authority in the evidence of Mr McNab. He said, that the Authority has the resources to conduct its own investigations. He could not say whether the investigator had made independent enquiries of witnesses or whether the court file was checked. He admitted that the sole factual basis on which the first defendant acted against the claimant were the charges against him. He further admitted that he was aware that the criminal trial had been determined in the claimant’s favour having regard to the contents of the file at his office. He had

seen the letter from the Clerk of Courts on the file. He was not aware whether the information contained in that letter had been brought to the attention of the Review Board but agreed that fairness required that it should have been. He could give no evidence about the process before the Review Board.

[152] On factor (3), the claimant said in his affidavit he lodged his application for the appeal of the decision to revoke the licence on a date he could not recall, and that after obtaining no response to his application for review, he retained an attorney. His attorney did not receive a response until April 23, 2021 indicating that the Review Board had concluded its review and had submitted its recommendation to the Minister of February 8, 2021. The licence was revoked on March 19 2019. The inference drawn from these uncontroverted facts is that the application was lodged after March 19, 2019 and within the time prescribed for review by a party aggrieved.

[153] The claimant in his affidavit deposed to changes in his circumstances since the revocation of the licence. He said that he now occupies the position of warehouse supervisor with a company situated in a volatile community. His responsibilities include dealing with cash, customers who cause disputes on the premises, commuting through volatile communities to and from work and the position is one he acquired since the licence was revoked. He raises the question of his livelihood and personal safety in these averments. These are important considerations in my view. The difficulty is the decision maker did not have this information. The claimant did not provide the date he commenced this new employment, however he has said that these changes took place between the approval of the application for a licence on February 8, 2016 and the date of revocation on February 12, 2019.

[154] The prejudice suffered is apparent in the averred changes in the claimant's circumstances since the revocation, the failure to advise his counsel of the hearing date, the discrepant evidence on matters of record, added to the twelve-eleven-month delay complained of. There is no evidence before this court of any

reason for the delay of eleven months from any of the second or third defendants.

[155] Whether there were efforts at minimizing the impact by either side is a question answered in the negative. The claimant's counsel wrote to the Authority requesting an update. This is the point at which the Authority responded indicating that the Review Board had already conducted its hearing and submitted its file to the Minister who had in turn made his decision. As a consequence, the representations of counsel were not received by the Minister. The claimant was not invited to make representations, although in my view, thus the change in circumstances which redound to his prejudice were not placed before the Review Board. There were no efforts at minimising the impact by the defendants at any stage. Delay in this case is a factor which has contributed to the breach of procedural fairness in the instant case and I so find.

[156] In conclusion, the findings made by the court have been summarized in paragraph two. This fixed date claim is determined as follows:

[157] **Orders**:

1. It is declared that the failure of the Review Board to hold a hearing is in breach of the Firearms Act. This resulted in its recommendation to the Minister of National Security being illegal, null, void and of no effect.

2. It is declared that the decision arrived at by the Minister of National Security to revoke the Firearm User's Licence issued to the claimant is in breach of the Firearms Act, and ultra vires.

3. It is declared that the proceedings before the Review Board and the Minister of National Security to uphold the decision of the Firearm Licensing Authority to revoke the Firearm User's Licence issued to the claimant were in breach of the principles of natural justice.

4. It is declared that the decision of the Minister of National Security to affirm the recommendation to revoke the Firearm User's Licence issued to the claimant is irrational.

5. The court grants an order of certiorari quashing the decision of the Minister of National Security to revoke the Firearm User's Licence issued to the claimant.

6. The court orders that the Minister of National Security remit the application for review to the Review Board for a hearing in accordance with section 37A(2) of the Firearms Act which includes affording an opportunity to the claimant or his legal representative to present representations.

7. The court orders the Review Board to give detailed reasons to the claimant for the allegations made against him in order to facilitate his representations on review as well as a date for the hearing.

8. The Review Board shall submit its recommendation to the Minister within ninety days of the receipt of the matter remitted for hearing pursuant to section 37A(4) of the Firearms Act.

9. No order as to costs.

10. Liberty to apply.