[2023] JMSC Civ 247

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV01897

BETWEEN	**FABIAN MADDEN**	**APPLICANT**
AND	**THE FIREARM LICENSING AUTHORITY**	**1st RESPONDENT**
AND	**THE REVIEW BOARD**	**2nd RESPONDENT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**3rd RESPONDENT**

IN CHAMBERS

Mr. Hugh Wildman instructed by Hugh Wildman & Co. for the Applicant absent from the trial

Mr. Neco Pagon for the 1st Respondent

Mr. Robert Clarke holding for Ms Kristina Whyte instructed by the Director of State Proceedings for the 2nd and 3rd Respondents

Heard: October 17 & December 20, 2023

Judicial Review – Firearm Licensing Authority– Extension of Time to Apply for Judicial Review – Failure to appeal through statutory review process at second and third tier

WINT- BLAIR J

[1] I must indicate from the outset that this hearing was conducted in the absence of counsel for the applicant. Mr Wildman was contacted by telephone at the commencement of the trial. He indicated on the record that he was in the Parish Court for St James holden at Montego Bay. He said he was engaged in a very old criminal matter and that the office of the Director of Public Prosecutions had indicated to him that arrangements would be made to have this matter adjourned. That is all that need be indicated as these proceedings continued, in the absence of counsel to hold the brief of the attorney on record for the applicant (as is the law), that needless application for an adjournment having failed.

[2] This matter concerned an amended application for leave to apply for judicial review and an application to extend time for leave to apply for judicial review[1].

[3] The Notice of Application for Leave to Apply for Judicial Review states:

> *"The Applicant, FABIAN MADDEN[sic], seeks the following Declarations and Orders by way a Notice of Application for Leave to Apply for Judicial Review against the Respondents:*
>
> *a. The 1st Respondent is a statutory body established in 2005 under section 26A (1) of the Firearms Act; and*
>
> *b. The 2nd Respondent was established pursuant to section 37A (1) of the Firearms Act; and*
>
> *c. The 3 Respondent exercises powers pursuant to section 37A (3) of the Firearms Act.*
>
> *FOR THE FOLLOWING RELIEF:*
>
> *That Leave be granted to the Applicant to apply for Judicial Review by way of:*

[1] Filed July 15, 2022

i. *A Declaration that the purported revocation of the Applicant's firearm licence on the 25th day of June 2020 by the 1st Respondent, on the basis that the Applicant is "no longer fit and proper to be entrusted with a firearm", is unlawful, null and void and of no effect.*

ii. *A Declaration that the purported revocation of the Applicant's firearm licence on the 25th day of June 2020 by the 1st Respondent, on the basis that the Applicant is "no longer fit and proper to be entrusted with a firearm", is irrational, rendering the said revocation null and void and of no effect.*

iii. *A Declaration that the decision of the 2nd Respondent in refusing to determine the Applicant's appeal of the 1st Respondent's decision to revoke the Applicant's firearm licence on the 25th day of June 2020, within the statutorily prescribed period, is in breach of section 37 A (2) of the Firearms Act, rendering the said refusal unlawful, null and void and of no effect.*

iv. *An Order of certiorari quashing the decision of the 2nd Respondent in refusing to determine the Applicant's appeal within the period of 90 days as stipulated under section 37 of the Firearms Act.*

v. *A Declaration that the 3rd Respondent acted unlawfully in refusing to carry out its statutory function by hearing and determine the Applicant's appeal, pursuant to section 37 A (4) of the Firearms Act.*

vi. *An Order of certiorari quashing the decision of the Minister, in failing to comply with the provision of 37 A (4) of the Firearms Act.*

The Detailed Grounds on which the Application is made are as follows:

I. *The Applicant is a businessman, Director of Madden's Funeral Supplies Limited. He owns 2 firearms, a Glock Pistol 9MM and a .38 Smith & Wesson Revolver. He has never been arrested or charged.*

II. *The Applicant was called into the Firearm Licensing Authority to pick up a package and bring in his firearms. No reason was given for doing so.*

III. *Subsequently, both licences were revoked on the 25th day of June 2020, by the 1st Respondent.*

IV. *The Applicant appealed to the Review Board through his then lawyer, Kevin Williams, of Grant, Stewart, Phillips & Company, Attorneys-at-Law. That appeal was to the 2nd Respondent which is the Review Board.*

V. *Since the Applicant's appeal in 2020, the Applicant has not heard anything from the Review Board and has not been called in by the*

Review Board. In addition, the Applicant has not heard anything from the Minister of National Security, who is the 3rd Respondent.

VI. *Section 32 A (2) of the Firearms Act mandates that the Review Board exercising its power of review, of the decision of the 1st Respondent, to revoke a firearm licence, must be done within a period of 90 days.*

VII. *Similarly, section 37 A (4) of the Firearms Act mandates that the Minister of National Security should exercise the power under the act, to determine whether a firearm licence holder should have his firearm returned where the Review Board fails to render its decision within the period of 90 days.*

VIII. *The Applicant has been waiting on both the 1st and 2nd Respondents to indicate to him the outcome of the review or appeal process by the 1st and 2nd Respondents to no avail.*

IX. *In the circumstances, the Applicant is constrained to seek the intervention of the Supreme Court by way of Judicial Review, to determine whether the revocation of the Applicant's licences by the 1st Respondent amounts to a breach of his rights.*

X. *There is no alternative remedy available to the Applicant other than the remedy of Judicial Review.*

XI. *The Applicant further states that the act of the Respondents in revoking his firearm licences, and not indicating the reason for the revocation amounts to a breach of the Applicant's right under the Firearms Act.*

XII. *The Applicant is a law abiding citizen, who has the responsibility of protecting his business, which is situated in a volatile part of the parish, and in the absence of the firearms, he is exposed to criminal elements.*

[4] The Notice of Application for Extension of Time to Apply for Judicial Review states:

The Applicant, FABIAN MADDEN, Businessman, Director of Madden's Funeral Supplies Limited, in the parish of Kingston, seeks the following orders:

1. *The Applicant be permitted an extension of time to file an Application for the Leave to Apply for Judicial Review.*
2. *Cost of this application to be cost in the claim.*
3. *Such further and other relief as this Honourable Court deems just in the circumstances.*

The Grounds on which the Applicant is seeking the orders are as follows:

a. *This Application is made pursuant to Rule 26.1 (2) (c) of the Civil Procedure Rules, 2002 (hereinafter referred to as the "CPR").*

b. *By virtue of Rule 26.1 (2) (c) of the CPR, the Court is vested with the power to extend the time for compliance with any rule, practice direction or order, even if the application for an extension of time is made after the time for compliance has passed.*

c. *Further, Rule 56.6 (2) of the CPR vests the Court with the power to extend time, if good reason is shown for the delay in making the Application for Leave to Apply for Judicial Review.*

d. *The Applicant's firearms licences were revoked on the 25th day of June 2020 by the Respondent, on the basis that the Applicant was "no longer fit and proper to be entrusted with a firearm."*

e. *Having applied to the Review Board, established under section 37A (1) for a review of the decision of the Respondent, the Applicant has been waiting almost two years for a decision to be returned by the Review Board.*

f. *As a result of the length of time the Review Board took in determining the Applicant's appeal, it was unavoidable that the Application for Leave to Apply for Judicial Review would be made outside the 3 months time frame stipulated by the Rules, for applications of this nature.*

g. *The Applicant contends that he has a good reason for failing to file an Application for Leave to Apply for Judicial Review within the stipulated time.*

h. *The application of the overriding objective in the CPR favours the grant of the orders sought herein."*

[5] The applicant filed affidavits[2] in support of each application, stating that he owns two firearms. He has never been arrested or charged. He was called into the Firearm Licensing Authority (the Authority") to pick up a package and to bring in his firearms. He was given no reasons. The Firearm Users Licences ("the

[2] June 16, 2022

licences") for both firearms were revoked on June 25, 2020, by the Authority.[3] He deposed to filing an appeal of the decision to revoke the licences to the Review Board through his then attorneys Grant, Stewart, Phillips and Company.[4] He attached a document entitled "Application for review of Authority[sic] Decision" dated July 13, 2020 and in his affidavit, referred to the letter dated June 30, 2020 as the grounds of appeal.

[6] The applicant deposed that neither the Review Board nor the Minister of National Security responded. There having been no response, the applicant deposes that he had no alternative remedy other than judicial review. The actions of the third and fourth respondents have breached his rights under the Firearms Act ("the Act"). He is a law-abiding citizen who has a business in a volatile area of the city. He is exposed to criminal elements in the absence of his firearms and he has the responsibility of protecting his business. In relation to the application for an extension of time, the applicant relies on the same evidence.

[7] On the part of the first respondent, Ms Letine Allen, Director of Compliance and Enforcement filed an affidavit.[5] She deposed that the information therein was within her personal knowledge and information.

[8] She deposed that the applicant was granted one licence on December 1, 2004 and a second on September 29, 2005. On September 26, 2019, the respondent received a complaint against the applicant in that it was alleged that he was participating in illegal activities, namely, the purchase and use of crack cocaine.

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[3] The order has been exhibited as FM1

[4] The appeal is dated June 30, 2020 and stamped as received on July 2, 2023 it is marked FM2

[5] Filed July 20, 2022

That the applicant displayed intemperate habits and was verbally abusive to his employees.

[9] The Authority advised the applicant of the allegations and invited his response. On or about December 10, 2019, the applicant provided a statement in response to the allegations admitting that he had previously used cocaine but denied that he still used it and further denied being abusive to his staff. There is no record on the applicant's file to support that the respondent was aware of the applicant's history with illicit drugs at the time he was granted the licences.

[10] The investigator of the first respondent interviewed the applicant's sister, members of his applicant's staff as well as the community. The investigator also contacted the police. At the conclusion of the investigation, the file was submitted to the Board for its determination. The licences were revoked on June 10, 2020, on the basis that the applicant was no longer fit and proper to retain a firearm user's licence.

[11] The applicant went to the Authority to receive his package which contained the written notice that his licences had been revoked and he would further be requested to hand over his firearms to the Authority. Ms Allen deposed that this approach is maintained so that licence holders are not advised before they collect the package out of a genuine concern that they may not submit their weapons to the Authority upon revocation. It is also the standard operating procedure that the licence holders may be asked to submit their weapons during the course of an investigation if the respondent considers it expedient and necessary to do so in the exercise of its functions under the Firearms Act.

[12] The first respondent complied with all the procedural requirements of the Act whereas the applicant has not completed the statutory appeal process. He applied for a review of the decision of the Authority on July 13, 2020, to the Review Board. The Act provides that where the Review Board fails to act within ninety days, the Minister may hear and determine the matter under review.

[13] The applicant has not made an application for review to the Minister of National Security ("the Minister.") This process remains open to him. The applicant has not given a reason for time to be extended to him.

[14] On the part of the Review Board, Mr Seymour Panton filed an affidavit.[6] On or about June 2020, the Authority decided to revoke the licences. The reason given was that the applicant was no longer fit and proper to retain a firearm user's licence.

[15] By letter dated November 4, 2020, the affiant deposed that he confirmed receipt of the applicant's review documents submitted on July 13, 2020 and informed the applicant's attorney by letter that the application for review was being processed.[7]

[16] Notably, the letter of November 4, 2020 stated that the decision had been taken to discontinue oral hearings for the remainder of 2020 and the applicant was invited to submit supporting documents or arguments in writing to the second respondent for a decision to be made.

[17] The second respondent did not receive any submissions from the applicant or his attorneys and took no further steps following the abovementioned invitation.

[18] On behalf of the third respondent, Ms Rochelle Jaggon deposed that neither the third respondent nor the ministry was involved in the decision of the first respondent to revoke the licences. She deposed that at the time of the applicant's application for a review of the decision of the first respondent, the third respondent was unaware of the said application and was not placed in a position to exercise

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[6] January 17, 2023

[7] Letter dated November 4, 2020 marked SP2

his discretion to hear and determine the matter pursuant to section 37A of the Firearms Act.

The Law

[19] The threshold test for leave to apply for judicial review is set out in **Satnarine Sharma v Carla Brown Antoine, Wellington Virgil and another**[8]. It is submitted that the court must be satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. In addition, Rule 56.6 (1) of the Civil Procedure Rules 2002 ("the CPR"), mandates that the applicant act promptly and within three months of the decision when making an application for leave for judicial review.

[20] The applicant is challenging the seizure and detention of his firearm by the respondent. The seizure and detention of his firearm occurred on August 21, 2018 and thus he has failed to act promptly in making his application for leave to apply for judicial review. It is submitted that in light of his undue delay and any lack of good reason for this delay, there is a discretionary bar of delay applicable to the applicant's case and thus, time should not be extended in which the applicant may apply for leave for judicial review. Therefore, the applicant's application for leave to apply for judicial review should be refused.

Extension of time

[21] The application for leave was filed on June 15, 2022, ten days shy of two years after the date of seizure, it was not promptly made. Where an application for leave to apply for judicial review has not been promptly made, the court is nevertheless permitted to extend the time within which to make the application if there is an

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[8] [2006] UKPC 57

application before the court to extend time and if there is good reason for doing so pursuant to CPR 56.6(2) which provides:

> *"However the court may extend the time if good reason for doing so is shown."*

[22] In the case of **Regina v Secretary of State for the Home Department ex parte Anufrijeva,**[9] the House of Lords said time runs when the decision is communicated or received. At paragraph 26 of the judgment Lord Steyn said:

> *"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system…"*

[23] The learned authors of De Smith's Judicial Review state the following:

> *"With respect to timing and delay, the "grounds for the application" arise when the public authority does an act with legal effect, rather than something which is preliminary to such an act. The subjective experience and state of knowledge of the claimant are not relevant in determining a start date, though those facts may be relevant to whether time should be extended. The primary requirement is always one of promptness, and permission may be refused on the ground of delay even if the claim form is filed within three months.* ***A breach of a public law duty is a continuing one and does not necessarily make it irrelevant to take into account the date at which the breach began in considering any question of delay****. There is no general legislative formula to guide the court on issues of delay. Factors taken into account include: whether the claimant had prior warning of the decision complained of; and whether there has been a period of time between the taking of the decision impugned and its communication to the claimant. Good reasons for delay may include time taken to obtain legal aid; the importance of the point of law at stake; or that the claimant is awaiting the outcome of consultation. The mere fact that permission is granted does not mean that an extension of time*

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[9] [2003] UKHL 36

for making the application is given; an express application for extension of time must be made."[10]

[24] An applicant must therefore plead the substantive act or decision by which he is aggrieved, and this must be evident by his pleadings. This means that the applicant must know and state what was the impugned act or decision, in order to know when time begins to run. This is what grounds the application.

[25] Support for this approach is to be found in the well-known observations of Lord Diplock in **O'Reilly v Mackman**[11] to the effect that the public interest in good administration, requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary, in fairness to those affected by the decision.

[26] It is noteworthy that as from the applicant himself, there is no evidence in the affidavits before the court as to the reason for his delay between the date of seizure in 2020 and the date of the filing of this application in 2022. I note that the applicant said that he has been waiting on the outcome of the review or appeal process by the first and second respondents but to no avail. This does not answer the question as to why he waited beyond ninety days and took no further steps in this matter. There was no other correspondence from counsel or the applicant himself enquiring into the matter. He simply sat on his hands. The absence or presence of counsel at the hearing of the instant application could not have cured this deficiency in the evidence. There is therefore no evidence upon which to make a finding that there was a good reason for the delay which would merit an extension of time, under CPR 56.6 (2.)

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[10] DeSmith, Judicial Review, 6th edn, page 842-843

[11] [1983] 2 AC 237, 280-281

[27] This finding is sufficient to establish that there is in fact a discretionary bar to this application. As a result, having failed the test for promptness, this application for leave to apply for judicial review cannot but fail as delay is a bar to the grant of leave to apply for judicial review. However, in the event of error, I will go on to consider the other factors.

Alternate remedy

[28] The statute provides for an appeal to the Review Board constituted by Section 37A of the Firearms Act. By Section 37 of the Act, an aggrieved party as defined by Section 37(3) means:

> *"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."*

[29] The holder of a licence may within the prescribed time and in the prescribed manner, having paid the prescribed fee, 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 sub-section (4) of section 35A."*[12]

[30] Any person who is 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

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[12] Section 37(1)

to the Minister. It is the Minister who, upon receipt and consideration of the report of the Review Board, directs the Authority on the steps that it should take in the matter.

[31] It is for the applicant to show exceptional circumstances, which would allow him to bypass the appellate procedure set out in the statue and to apply instead for judicial review.

[32] The case of **R v Chief Constable of the Merseyside Police, ex parte Calveley and others**[13] stands for the proposition that the mere fact that judicial review may provide a speedier, more effective or more convenient route for challenging a decision, does not by itself justify departure from the established principle. There has to be evidence of circumstances which led to a decision or action likely to be overturned as a matter of law. This will constitute exceptional circumstances.

[33] In the instant application, there is no evidence of exceptional circumstances. The court requires evidence upon which to make a determination and there simply isn't any. The applicant was invited to make written submissions to the second respondent and did not. That was the end of the matter.

[34] The statutory review process is the more appropriate method of determining the real issue to be decided, which is whether the applicant is unfit to hold a Firearm Users Licence. That was the decision, which was made by the Authority when it revoked the licences issued to the applicant.

[35] The process of judicial review cannot decide that issue. It can only decide whether the applicant was treated fairly by the respondent. The court does not have the

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[13] [1986] 1 All ER 257, at pages 265, 266 and 267

information or the proficiency possessed by the Review Board in relation to matters under its remit.

[36] Secondly, the public interest requires that holders of firearm licences be fit to do so. The entities that are established by the Act are the ones duly constituted by law to decide on issues regarding fitness.

[37] Thirdly, the statutory review process is more likely to be swifter than the process for judicial review. The statutory process establishes a 90-day period for a decision to be made. It is true, that there have been examples of a departure from that standard but not only is that insufficient to create exceptional circumstances, but the Act also provides a direct route to the Minister if the Review Board fails to execute its duties within the prescribed time.

[38] Fourthly, from the affidavit evidence the statutory appeal process has not been completed and there are numerous cases which speak to this being the alternate remedy.

[39] I need not move on to the next ground having come to these conclusions, h however, in the event that there is uncertainty, I will go on to look at arguability.

Whether the application disclosed any arguable ground for judicial review with a realistic prospect of success

[40] The burden of proof rests with the applicant, to satisfy the court on a balance of probabilities that leave should be granted. The parties are obligated to put the court in a position to decide on the issues raised in the case before it. This is consistent with each party's responsibility, to assist the court in advancing the overriding objective of dealing justly with cases[14]. Given the nature and gravity of

[14] CPR Rule 1.1

the evidence, the applicant has failed in his duty to advance a challenge to the impugned decision to seize the firearm based on the evidence that is before this court.

[41] The Review Board has a duty to act fairly and the decision of **Raymond Clough v Superintendent Greyson & Anor**[15], stands for the proposition that it should have a *prima facie* case before it and to act in good faith. In that case, the words "*otherwise unfitted*" or "*fit and proper*" have been judicially defined by the Court of Appeal:

> *"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 forms 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."*

[42] I am mindful that at the leave stage, this court is only concerned with whether the threshold is met. It is here that I go to the arguability of the applicant's case as set out in **Sharma v Brown-Antoine**[16]**:**

> *"…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find*

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[15] (1989) 26 JLR 292

[16] [2006] UKPC 57

the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities. It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen; Matalulu v The Director of Public Prosecutions [2003] 4 LRC 712 at 733."

[43] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. in explaining the concept of 'arguable ground with a realistic prospect of success', stated a paragraph 11 that:

> *"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[44] To assess arguability, it is the strength or quality of the evidence adduced by the applicant that is required to be placed before the court for a determination on a balance of probabilities. The burden is on the applicant to adduce evidence that demonstrates that there is an arguable case with a realistic prospect of success. The applicant has not adduced any evidence as to what steps he took after the ninety-day period had elapsed, and the evidence is that there were no submissions he made to the Review Board at its invitation. In fact, the applicant failed to address in his own affidavits the response from the Review Board dated November 4, 2020, rather, the court was told that he filed his appeal with the Review Board and there was no response. He indicates that he has certain reasons for needing his firearm and denies the allegations. This is not the proper forum and the other side has not been able to respond to his affidavits as a result of the approach taken by the applicant. The threshold test of arguability has not been met for the many reasons stated herein.

[45] Based on the foregoing, the court makes the orders below:

[46] Orders:

(1) The orders sought in the notice of application for leave to apply for judicial review are refused.

(2) The orders sought in the notice of application to extend time for leave to apply for judicial review are refused.

(3) No order as to costs.

(4) Leave to appeal refused.