

**THE HIGH COURT****JUDICIAL REVIEW****Record No.2006/301JR****BETWEEN****THOMAS O'LEARY****APPLICANT****AND  
SUPERINTENDENT MICHAEL MAHER****RESPONDENT****Judgment delivered by Ms. Justice Clark on 24th April 2008**

The issues in this application for Judicial Review are relatively simple. They arise out of the refusal of the Superintendent respondent to grant a firearms certificate to the applicant. Leave was granted to seek judicial review 15th. March 2006 by Peart J. to seek:

- I. An Order of Certiorari by way of an application for judicial review quashing the Decision of the Respondent communicated orally on the 28th of November, 2005, to refuse to issue a firearms certificate in respect of a .308 hunting rifle (Steyr Mannlicher SC 103 6883);
- II. A Declaration by way of an application for judicial review that the decision of the Respondent to withhold a firearm certificate from the Applicant in respect of the said hunting rifle is ultra vires and without lawful basis;
- III. An Order of Mandamus by way of an application for judicial review directing the Respondent to furnish reasons in writing for his decision to refuse to grant the firearms certificate;
- IV. A Declaration by way of an application for judicial review that the Applicant is entitled to a statement in writing of the reasons for refusal to grant a firearms certificate pursuant to section 3 of the Firearms Act, 1925.

**Factual background**

1. Generally speaking, it is not lawful to own, use or carry a firearm unless authorised by a firearm certificate. The process for obtaining such certificate is contained in the Firearms Acts, 1925 and 1964. In essence, an applicant has to prove that he has good reason for requiring the firearm; that he is capable of using the firearm without danger to the public and that he is of good character. The person designated under the Firearms Act 1925 to issue such certificate is the local Superintendent of the district in which an applicant resides.
2. The applicant Thomas O'Leary who was born in 1958 lives in the Killarney area where he engages in the hunting of large game and is a member of a gun club. It is not in issue that he is keen shot of considerable experience and has for many years held firearms certificates and a Wildlife licence to shoot deer with his .243 bolt action Ruger rifle and a bolt action .220 Remington rifle.
3. In early 2005 he purchased a legally imported Steyr Mannlicher .308 calibre hunting rifle through a registered firearms dealer for the sum €2,300 which included his existing .243 rifle in part exchange. To obtain possession of this rifle, the applicant had to first obtain a firearms certificate.
4. Although the gun in question is generally described as a .308 rifle, strictly speaking, it is the ammunition for the rifle made by Winchester which carries the .308 name. Rifles calibrated to take .308 cartridges are particularly suited for the shooting of large game such as deer as the cartridge is known for its accuracy and capacity to achieve a humane and clean kill.
5. The particular .308 rifle which the applicant sought to license is a bolt action gun holding a maximum of 3 cartridges. The applicant claims that the gun is a sporting rifle; it is neither automatic nor semi-automatic loading and thus it is not an assault weapon.
6. The applicant applied in June 2005 to the Respondent who was the local Superintendent for a firearms certificate for the 308 Steyr Mannlicher in substitution for the certificate for his .243 rifle because he required the gun for deer hunting. The Respondent learned from a conversation with Sergeant Walsh in mid-July, 2005 at the local garda station that his application was being refused because of safety reasons. In fact, the Superintendent had written to the sergeant in the following terms "the existing .243 rifle is more than sufficient for the purpose for which required i.e. shooting deer. I am of the opinion that licensing the .308 now proposed would contribute an additional and unnecessary risk to the public in this area. This letter was not furnished to the Applicant.
7. The applicant wrote seeking an explanation for the refusal. A further meeting with the respondent took place at which the applicant felt that the respondent had a closed mind on the subject viewing the .308 as a military rifle. No attempt was made by the Respondent at any time to view the hunting rifle.
8. A further meeting with the respondent took place when the applicant produced literature from a gun and ammunition catalogue showing that .308 was a hunting rifle but the Superintendent continued in the belief that this was a military calibre weapon. He agreed however to take the opinion and advice of the garda ballistics section and to review his decision.
9. The respondent obtained a garda ballistics report where he had sought:

- (i) An opinion relating to the substitution of a .308 calibre firearm for a .243 weapon and
- (ii) The difference between the 30-06 calibre and .308 cartridges.

The report issued from D/G Thomas Carey on the 23rd August 2005. The report was not furnished to the applicant but was produced to the court. It was inadvertently furnished in an incomplete form but this mistake was not realised until after the hearing had taken place when the full version was obtained. The report described:-

Statutory Instrument 239 of 1977 indicates that the ammunition for intended deer hunting should be fitted with a bullet of no less than 55 grains in weight. It should also, according to S.I. 239, be no less than .22 in calibre and the cartridge must develop at least 1,700 foot pounds of energy.

These parameters are devised as the minimum requirements to effect a clean and humane kill.

However, current trends have moved towards the .270 calibre using bullets between 93-150 grains. This type of ammunition is quite sufficient for the clean and humane killing of deer in this country.

(1) .243 calibre versus .308 calibre.

.308 calibre (aka 7.62 x 51mm NATO).

This cartridge was originally a U.S. military cartridge and was marketed at about 1952 as a sporting cartridge under the name of .308 Winchester.

This round was known for its accuracy and suitable for large game from deer up to elk and moose.

Generally fitted with bullets in the range of 110 grains up to 200 grains, it develops up to 2743 foot pounds of energy at 3,200 feet per second (muzzle velocity).

243 calibre.

The .243 calibre cartridge was developed around 1955 and used as the cartridge case of the above .308 Winchester round. The mouth of the cartridge case is reduced to accommodate the slightly smaller .243 (6mm) calibre bullet.

Bullet weights range from 55 to 100 grains giving 1,600 to 2,100 foot pounds of energy at 2,900 to 4,058 fps.

This round is quite suited to deer hunting and is indeed a very popular choice of ammunition/firearm for deer hunting in this country.

Opinion.

In my opinion the .243 calibre round is the most suitable for all deer hunting requirements in this country.

While the .308 calibre will also achieve this aim, I believe that the calibre increase is unnecessary in this scenario. It should also be borne in mind that the .308 calibre is still in military service as the 7.62 x 51 mm NATO round. Full metal jacket armour piercing and incendiary rounds are all readily available in this calibre.

(2) 30-06 versus .308 calibre.

30-06 (.30 calibre of 1906) AKA 7.62 x 63mm.

The 30-06 cartridge was introduced in 1906 by the US military for use in their 1903 Springfield rifle. It was fitted with various military bullets and was eventually adopted for large game hunting using bullets in the range of 150 to 165 grains. These weights typically developed 2,873 foot pounds at 2,800 fps. This cartridge is very popular in the U.S. as a large game cartridge.

However, it is not very common in Europe. In comparison the .308 calibre cartridge is similarly used as a large game hunting cartridge in the U.S. However, while the two have similar characteristics the 30-06 has a higher muzzle energy.

Both rounds would, in my opinion, be excessive for the purpose of deer hunting in Ireland."

10. At a further meeting on the 23rd September, 2005 to discuss the particular hunting rifle, the respondent indicated that he was refusing the application but did not furnish the report obtained from the ballistics section and informed the applicant that his main reason for refusing was that the .308 was still in military service with NATO and that full metal jacket armour piercing and incendiary rounds were available in this calibre. His safety concerns were that as the area in which the applicant shot deer was popular with hill walkers, the higher calibre would present additional dangers to that group of persons.

11. The applicant persisted in trying to make the respondent change his mind on the .308 rifle and furnished the respondent with further literature about the .308 from a gun and ammunition catalogue showing "In power the 308 Winchester is superior to the 300 Savage and almost equal to the 30-06. It delivers about 100fps less muzzle velocity than the larger 30-06 with any given bullet weight.....most authorities consider the .308 suitable for most North American big game, although it's on the light side for moose or big brown bear. The applicant also wrote to the respondent telling him that all military rounds must, under Geneva Conventions, be full metal jacket intended to penetrate and keep going whereas ammunition used in hunting involves an expanding projectile which stops when it hits its target. He pointed out that a licence has been granted to a named sportsman in the same County for a 30-06 calibre which was a gun specially designed for the military and also referred to the licensing throughout Kerry of the 6.5 x 55 which was also a military rifle.

12. In late November, the applicant was verbally informed by the secretary to the Respondent that his application was being refused for safety reasons but that if he wished to apply for a different calibre gun being a 30.06 that his application would be successful. The applicant had already purchased and imported his preferred 308 calibre hunting rifle and did not want a 30.06. He prefers the characteristics and accuracy of the .308 which he believes to be more suitable to his requirements and furthermore had previously furnished the respondent with information to the effect that the .308 delivers about 100fps less muzzle velocity than the larger 30-06

with any given bullet weight. When he furnished this information, he was unaware that any suggestion in relation to a more favourable view towards the 30-06 would be made. He was also unaware that the respondent had sought an opinion from the ballistics section regarding the difference between the .308 and the 30-06.

13. The applicant and the respondent met again on the 22nd December, 2005 and the Respondent informed the Applicant that his original decision still stood. The application was refused on the basis that the respondent was not satisfied that the applicant's reason for requiring this particular firearm was a good one as he had a perfectly adequate .243 rifle and that as the .308 calibre used faster and heavier ammunition it posed an additional danger to public safety and in particular to hill walkers in the area where the applicant was likely to be shooting deer.

14. The applicant commenced proceedings to quash this decision on the basis that the reason for the refusal of the certificate derived from a blanket general policy to refuse a certificate for this particular calibre gun which the respondent viewed as a military rifle and which the applicant believed was *ultra vires* his powers under the Firearms Act, 1925.

### **Statutory provisions**

15. The legislative basis for powers of the Garda Síochána to grant and renew firearm certificates is contained in the Firearms Act, 1925 as amended. The long title to the 1925 Act describes it as: -

"An Act to place restrictions on the possession of firearms and other weapons and ammunition, and for that and other purposes, to amend the law relating to firearms and other weapons and ammunition."

The relevant statutory provisions are section 2(1), 3, 4, 5 and 8 of the Firearms Act, 1925 ("the 1925 Act").

Section 2(1) of the 1925 Act provides:-

"Subject to the exceptions from this section hereinafter mentioned, it shall not be lawful for any person after the commencement of this Act to have in his possession, use, or carry any firearm or ammunition save insofar as such possession, use or carriage is authorised by a firearms certificate granted under this Act and for the time being in force.

Section 3(1) of the 1925 Act provides:-

"(1) The Superintendent of the Garda Síochána of any district may, subject to the limitations and restrictions imposed by this Act, upon the application of any person residing in such district and upon the payment by such person of the fee (if any) for the time being required by law, grant to such person a firearm certificate.

(2) The Minister may, at his discretion but subject to the limitations and restrictions imposed by this Act, upon the application of any person not ordinarily resident in Saorstát Éireann and upon payment by such person of the fee (if any) for the time being required by law, grant to such person a firearm certificate.

(3) Every firearm certificate shall continue in force until the 31st day of July next after the grant thereof, but a firearm certificate granted may be expressed to commence on the next following 1st day of August and shall in that case be in force on and from such 1st day of August until the next following 31st day of July.

(4) Every firearm certificate shall be in the prescribed form and shall operate and be expressed to authorise the person to whom the same is granted—

( a ) to have in his possession, use, and carry the particular firearm described in the certificate, and

( b ) to purchase and use in such firearm during the currency of such certificate such quantity of ammunition for such firearm as shall be specified in the certificate, and

( c ) to have in his possession at any one time and carry so much only of the ammunition so purchased as shall be specified in the certificate.

(5) Where the firearm described in a firearm certificate is a shot-gun the certificate may be expressed and in such case shall operate to authorise such firearm to be used for killing animals or bird's other than game on land occupied by the person to whom such certificate is granted.

(6) Every firearm in respect of which a firearm certificate is granted shall be marked in the prescribed manner with a number or other prescribed mark of identification and such number or mark shall be entered in the firearm certificate."

S.4 provides:-

"Before granting a firearms certificate to any person under this Act, the Superintendent of the Garda Síochána or the Minister (as the case may require) shall be satisfied that such person -

(a) Has a good reason for requiring the firearm in respect of which the certificate is applied for,

(b) Can be permitted to have in his possession, use, and carry a firearm or ammunition without danger to the public safety or to the peace, and

(c) Is not a person declared by this Act to be disqualified to hold a firearms certificate"

S. 5 of the Act deals with revocation of firearms and provides as follows:-

"The Superintendent of the Garda Síochána of the district in which the holder of a firearm certificate resides may at any time revoke such certificate if he is satisfied that the holder of such certificate-

- (a) has no good reason for requiring the firearm to which the certificate relates, or
- (b) is a person who cannot, without danger to the public safety or to the peace, be permitted to have a firearm in his possession, or
- (c) is a person who is declared by this Act to be disqualified to hold a firearm certificate, or
- (d) where the firearm certificate limits the purposes for which the firearm to which it relates may be used, is using such firearm for purposes not authorised by the certificate."

S.8 of the Act deals with the categories of person who are disqualified by the provisions of the act from holding a certificate and provides:-

8(1) "The following persons are hereby declared to be disqualified to hold a firearm certificate, that is to say:-

- (a) any person under the age of fifteen years, and
- (b) any person of intemperate habits, and
- (c) any person of unsound mind, and
- (d) any person who has been sentenced by any court in all Saorstát Éireann for any crime to penal servitude for any term which has not expired or has expired within five years previously, and
- (e) any person who has been sentenced by any court in Saorstát Éireann for any crime to imprisonment for any term of not less than three months which has not expired or has expired within five years previously, and
- (f) any person who is subject to the supervision of the police, and
- (g) any person who is bound by a recognizance to keep the peace or be of good behaviour, a condition of which is that such person shall not have in his possession, or use, or carry any firearm or ammunition.

(2): -Any person who is by virtue of this section disqualified to hold a firearm certificate shall also be disqualified to hold a permit under this Act in relation to any firearm or ammunition".

16. The shooting of deer requires a gun of a minimum calibre and certain firearms are excluded from use for the killing of deer. *The Wildlife Act 1996*, section 33 restricts the use of certain firearms and ammunition to kill or injure wildlife:-

- (1) "It shall be an offence for a person to kill or injure
  - (a) with a repeating or automatic shotgun (other than a repeating or automatic shotgun which is adapted or modified so as to render it incapable of carrying more than three shotgun cartridges) with an airgun, air rifle, gas rifle, pistol or revolver."

17. *The Wildlife Act, 1976 (Firearms and Ammunition) Regulations 1977* stipulate in paragraph 2(a):-

- (a) "The firearms and ammunition of the type and calibre specified in the Schedule to these Regulations may be used to hunt deer species.
- (b) Firearms and ammunition of any type and calibre other than the type and calibre specified in the Schedule to these Regulations shall not be used to hunt deer species.

#### SCHEDULE

##### Firearms

Centre-fire rifles of not less than .22 calibre with a muzzle energy of not less than 1,700 foot pounds

##### Ammunition

Any bullet for use in such rifles, weighing not less than 55 grains."

18. It can be seen that the Firearms Act does not prohibit any specific category of firearm but the Wildlife Act and its regulations prohibit the use of automatic or semi automatic firearms for the shooting of game and specify the minimum calibre rifle to be used for the hunting of game and the minimum weight of the ammunition. Both parties agreed that the current trend in the shooting of heavy game such as deer has moved towards heavy calibre guns using heavier ammunition than the minimum specified in the Act.

#### **Applicant's arguments**

19. Mr. Gerard Hogan SC for the applicant Mr. Thomas O'Leary accepted that .308 calibre rifles can fire heavy full metal jacket rounds capable of armour piercing and the firing of incendiary rounds and that .308 rifles are in regular use by the national and Swiss armies. It is accepted that the .308 is particularly favoured as a military sniping rifle and was formerly the assault rifle issued to NATO forces. The applicant argues, and it is not controverted, that ammunition used in military weapons is not available for purchase by the public in Ireland and is of a totally different type to that used for the hunting of game. Game shooting ammunition is prohibited by international conventions for use in combat as these are expanding projectiles which do not exit the target.

20. Counsel for the applicant argues that it is wrong to confuse an assault or military rifle with a hunting rifle. An assault rifle is either a semi- automatic or fully automatic rifle and uses different ammunition whereas any examination of his particular .308 calibre sporting rifle will show that it is not an assault or military rifle but a sporting rifle with no capacity to fire more than 3 single action shots.

However the respondent rejected the application because the firearm in question was a .308 calibre which the respondent considered to be a military weapon. In applying this fixed policy to the .308, he failed to apply the relevant statutory criteria which are confined to a legitimate reason for wanting the gun, personal fitness to own a firearm and a capacity to use it safely.

21. The applicant had already informed the respondent in correspondence that this was a purpose built hunting rifle which did not fire military rounds which are in any event not permitted under the Wildlife Act and simply not available to the hunting fraternity. He argued that the Superintendent had a fixed idea that the .308 calibre was a military calibre and was determined not to license the use of the gun no matter what arguments the applicant presented.

22. There is no category of firearm which is excluded from certification under any legislation (apart from prohibited weapons which discharge noxious gas or liquid) and in particular no firearm which is stated to be excluded from consideration on the basis of bore, calibre, velocity or any other characteristic. The respondent was therefore not permitted to treat the .308 as being of a calibre excluded under the Firearms Acts.

23. As the Superintendent is obliged to consider each application on its merits bearing in mind the character of the applicant and his reasons for wishing to have such a firearm in the context of public safety and order, he has no power to refuse a certificate on an a priori basis. In this case, the Superintendent was in effect saying, this gun is too large a bore and too heavy a calibre for shooting deer when you have a perfectly good gun already. Mr. Hogan urged that this was akin to the Superintendent taking on the role of an expert in taste on models of guns for hunting which was little different from a car owner being told by a licensing authority that he had a perfectly good saloon car and did not therefore need the sports model or that as he had a serviceable black model car there was no good reason for wanting a coloured version.

24. He argued that in so acting, the respondent viewed himself as an independent statutory body with particular expertise and authority to refuse permission on the basis of taste and style and thus acted *ultra vires* his powers. Further he fettered his own discretion by applying a blanket disapproval of this particular calibre of sporting rifle. This was an attempt to legislate on which particular firearm should or should not be approved which he was not entitled to do.

25. As a person designated by statute to exercise a function he was obliged to act judicially and independently and within the bounds of constitutional justice and within any relevant statutory limitations. Where a discretionary power is vested in a particular individual, it is that individual who must bring his own discretion to bear on a case and not act under the dictation or influence of another body. In support of this argument the applicant relies on *Murphy v. Dublin Corporation* 1972 IR 215 and *The State (McLoughlin) v. Minister for Social Welfare* 1958 IR 1

26. *Dunne & Ors v. Donohue & Ors* 2002 2 IR 533 is a more recent Supreme Court decision which dealt specifically with the independent powers of a local Superintendent in the exercise of his discretion. In particular, it addresses his power to attach a condition as had been required by the Garda Commissioner. The Supreme Court held that: - "For a superintendent to add, in effect, a fourth condition, by requiring every applicant to provide a gun safe which would be available for inspection by the gardaí, would be to place the applicants in the same position as if, in the case of that particular district, the Oireachtas had so prescribed by primary or secondary legislation. Neither the Commissioner nor the district officers have been empowered by the legislature to impose such preconditions".

27. Counsel for the applicant argues that following submissions made on the character of the gun as a popular sporting gun in common use in Europe and the United States and frequently used by sporting tourists visiting the State for deer shooting, the Superintendent agreed to submit those submissions to the garda ballistics department for the purposes of advice. He argues that this advice did not address the points made by him in relation to the 30-06 but instead reiterated the military characteristics of .308 army calibre ammunition without considering the reality that ammunition used by sportsmen was not of a military character or that other applicants in other areas of Kerry had been issued with certificates for the same calibre rifle. As previously referred at para. 9, it was established after the hearing that portion of the report had been inadvertently omitted and this argument had therefore to be modified. The report stated that both the 30-06 and the .308 were heavy calibre shots which in the opinion of the ballistics expert were unnecessary for shooting deer in the Irish "scenario". The report in fact agreed with the applicant's contention that the 30-06 delivered a slightly higher velocity. The fact that despite this advice the respondent was prepared to grant a certificate to the applicant for the use of the 30-06 was further proof of the respondent's general policy to exclude the .308 from consideration.

28. The applicant had furnished the respondent with literature from a gun and ammunition catalogue showing that the 30.06 that had previously been favoured as a military assault weapon fired faster rounds than the .308. Any safety concerns which he had in relation to the .308 in circumstances where he was prepared to license use of the 30-06 were illogical and bizarre and a further indication that it was the particular .308 calibre rather than any other reason which was the real reason for the refusal. On the safety issue, the applicant pointed out that it is not the calibre of a gun which creates a danger to the public but rather the misdirection of the fire. An experienced shot does not increase the danger of misdirected fire when he uses a higher calibre of gun. In other words, the danger comes from the person and not the gun.

29. While the written submissions were critical of the failure to provide reasons for refusing the certificate and that they had to be inferred from conversations with the respondent, the reality at the hearing was that while the respondent's reasons were not extensively reasoned, they had always remained the same and were clear. Both parties appeared to resile from their respective and differing positions on their written submissions at the hearing and the failure to give reasons was not seriously in issue.

### **Respondent's arguments**

30. The Respondent through his counsel Mr. Conor Dignam B.L. disputes that the basis for his decision to refuse was because the firearm is a 'military' firearm or that his decision was to prohibit a class of firearm. The reasons for his decisions are that he was not satisfied that the Applicant had a good reason for requiring the particular firearm in question or that the Applicant could be permitted to use, carry or possess that firearm without danger to the public safety. He nevertheless maintained his position that the .308 was a military weapon.

31. In reaching that conclusion the respondent had regard to a number of issues:-

- the area in which the Applicant hunts deer is an area which attracts very many other recreational users;
- the nature and calibre of this gun is such that the danger which is presented by all firearms is increased;
- The Applicant currently has a firearm which is suitable for deer hunting and presents less of a danger to the public.

While he did have regard to the fact that the gun in question is a military calibre commonly used by military forces and currently used by the Irish Defence Forces as their sniper calibre, it was not that fact alone which formed the basis of his conclusion but rather the additional dangers presented by this calibre of firearm.

32. He disagreed with the factual position portrayed by the Applicant in relation to his reasons for refusing. The Applicant was informed of the refusal to grant a certificate by Sergeant Walsh on the 11th July, 2005. Irrespective of what was said by Sergeant Walsh as to his reasons for refusal the direction given by the Respondent to Sergeant Walsh was that "The existing .243 Rifle held by the applicant is more than sufficient for the purpose for which required, i.e. shooting deer. I am of the opinion that licensing the .308 now proposed would contribute an additional and unnecessary risk to the public in this area. Accordingly the applicant should be informed that the reason of public safety and the sufficiency of his present weapon for the purpose is declined."

33. He did not operate a closed mind on the particular gun and always kept the door open for further discussion as evidenced by the number of meetings held. At their final meeting on the 22nd December, 2005 the Respondent again advised Mr. O'Leary that the original decision to refuse on grounds of public safety stood, that he was of the belief that the .243 calibre was suitable for Deer Hunting and that .308 calibre represented an unacceptable risk to the public. He has been consistent since the 11th July, 2005 in his reasons and argued that the applicant is wrong in his characterisation of the basis of the refusal as, notwithstanding the applicant's belief, the reasons for not granting the certificate are the very reasons set out in the Firearms Act, 1925, that is, that he was not satisfied that the Applicant had a good reason for requiring the particular firearm in question or that the Applicant could be permitted to use, carry or possess that firearm without danger to the public safety. In order for a Superintendent to grant a firearms certificate he must be satisfied of those very matters.

34. He questioned the entitlement of the respondent to challenge the decision to refuse as the reasons given were ones which were open to the Respondent to make and upon which he was entitled to base his refusal. It is only if reasons are unreasonable or irrational that the court should interfere with same. The court was reminded that the appropriate test of unreasonableness is contained in the well known dictum of. Henchy J in *The State (Keegan) -v- Stardust Victims Compensation Tribunal* [1986] IR 642 where at 658 he stated that:

"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision maker should be held to have acted *ultra vires*, for the necessary implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision".

Finlay CJ said in *O'Keeffe -v- An Bord Pleanála* that:

"the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J in [the Stardust case] the circumstances under which the Court can and should intervene, but also in brief terms and not necessarily comprehensively to consider the circumstances under which the Court cannot intervene.

The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it ...

I am satisfied that in order for an Applicant for judicial review to satisfy a Court that the decision making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the Applicant should establish to the satisfaction of the Court that the decision making authority had before it no relevant material which would support its decision".

35. He argued that the two reasons for the Respondent's refusal cannot properly be separated from one another as the conclusion that the applicant did not have a good reason for requiring this particular firearm was connected with the increased danger to the public safety., He argued that as there was ample material upon which the Respondent could form the view that the Applicant did not need and, therefore, had no good reason for requiring this particular gun, then each of the said reasons was reasonable and rational. The applicant had shot 52 deer with his .243 in the hunting season prior to his application which was a clear indication that the .243 which he was seeking to replace was suitable for deer hunting. It was therefore open to the Respondent to conclude that he had no good reason for requiring to replace the .243, and specifically to replace it with the .308. The mere fact that the Applicant wants a different or a more effective gun does not mean that the Respondent must conclude that the Applicant has a good reason for requiring same.

36. There is also ample material upon which the Respondent could reasonably and rationally conclude that the Applicant could not use, carry or possess this firearm without danger to the public safety. The Respondent had the benefit of the advice of a ballistics expert. The .308 gun has greater power than his .243 and it was open to the Respondent to conclude that as such, it presented an additional danger to the public safety.

37. He argued that while he may have been wrong about the offer of treating an application for the 30-06 favourably, it does not affect the lawfulness of the basis decision to refuse the application..

## Decision

38. The position as I see it is quite clear. The ownership and use of firearms is prohibited unless the owner of the firearm is licensed by the local superintendent. Clearly the 1925 Firearms Act envisaged that the senior local garda officer was the appropriate person to investigate the circumstances of the applicant before issuing a certificate allowing that applicant to own, carry and use a firearm. The discretion lies in the Superintendent who, one can assume has access to local knowledge and is thus best placed to know whether the applicant has a good reason for requiring the firearm, is competent and capable of using the firearm without danger to the public safety or peace, is over sixteen, is of temperate habits, is of sound mind and has no criminal convictions.

39. I am satisfied a local superintendent to whom an application relating to the use of a new firearm is made is perfectly entitled to seek the advice of a ballistics expert in assisting him to make a decision in respect of public safety issues. In this case, the superintendent did seek advice and seems to have adopted the ballistics expert's view that the popular .243 was more than adequate for deer hunting in Ireland. The .308 and the 30-06 were described as popular game rifles in the U.S. but were not necessary in Irish conditions. No reasoning was provided by D/G Carey for why this was so. It was not suggested that deer in Ireland are smaller or that

the countryside where deer shooting occurs in Ireland is more populous. Additional objections to the .308 appeared to stem from the capacity of this calibre to fire military rounds and its current use in military service which seemed not to apply currently to the 30-06.

40. The advice received from D/G Carey was to the effect that both cartridges started their lives as US military cartridges but have become popular as large game rounds. He tacitly accepts that the .308 was marketed in 1952 as a sporting cartridge under the Winchester name and that the 30-06 which was a former military cartridge was eventually adopted(sic) for large game hunting.

41. Having sought advice, the Superintendent eventually had to make a determination himself using his own acquired knowledge and discretion and I have no criticism whatever of the respondent in his action here. He does not seem to have accepted all the views expressed by the ballistics expert as in spite of the opinion expressed by D/G Carey in relation to the heavy calibre of both the 30-06 and the .308, he was prepared to grant a certificate to the applicant to use the 30-06.

42. I do have a concern that at no stage was the issue of the applicant's capacity to safely use this gun addressed. Instead, the issue which exercised the respondent's mind at all times was the military character of ammunition which this particular calibre gun could fire. I believe that this was the wrong approach. The Firearm Acts 1925 indicates that it is the applicant who must be certified as fit by the Superintendent to possess or use a firearm. It is not the firearm itself which is licensed to the owner but rather the owner who is authorised to possess, use and carry the particular firearm. In those circumstances, it must surely be within the remit of the superintendent as the person designated to authorise an applicant to own and use a firearm, to examine both the fitness of the person and the appropriateness of the particular firearm to arrive at a fair determination. The important issue is the applicant's character, the reason why he requires the particular firearm and whether that particular applicant can be permitted to possess, use and carry a firearm or ammunition without danger to the public safety or the peace. It seems to me that to refuse a certificate on the grounds of public safety necessarily requires the superintendent to demonstrate some evidence that the applicant Mr. O'Leary himself is in some way more likely to create a danger to the public and especially hill walkers by his handling and use of the .308 rifle.

43. If he did have concerns relating to public safety about the military ammunition which he believed that this .308 calibre could fire, he had the power to attach conditions as to the type and quantity of ammunition for use with the firearm and had the power to revoke a license if he was satisfied that those conditions were not met or if there was a change in the applicant's circumstances or that he might threaten public safety or peace or that the firearm was being used for an unauthorised purpose. I believe that the first practical step which could have been taken to dispel or confirm his belief that this was a military weapon was to arrange to examine the gun in question. This was never done.

44. The respondent provided 3 reasons for his refusal to reconsider his decision made in July 2005 to refuse the certificate.

(i) The existing .243 Rifle held by the applicant is more than sufficient for the purpose for which required, i.e. shooting deer.

(ii) He was of the opinion that licensing the .308 now proposed would contribute an additional and unnecessary risk to the public in this area.

(iii) As the applicant has an adequate gun in his existing .243 he has no need for a more powerful gun.

There was no suggestion at any stage of the protracted discussions that the applicant lacks the skill to handle the more powerful rifle. There is no suggestion that the applicant's history of a very considerable deer kill score in the previous season presented a risk to hill walkers in the Killarney area with his previously held rifles. There is no suggestion that his personal circumstances have in any way been altered so as to render him a person disqualified from owning a firearm. He has satisfied the respondent that his guns are safely stored and that he has sophisticated alarm and surveillance systems to protect the guns from theft.

45. In this case the applicant simply seeks authorisation to exchange his current sporting rifle for a more powerful rifle for deer hunting. His previous rifle was perfectly adequate for the job but he wants a better gun which he says will be more accurate and more likely to give an immediate kill as opposed to causing a wounded animal. The superintendent says this is not a good enough reason for owning a higher calibre firearm. Guns are dangerous to the public and a more powerful gun presents a higher risk to the public as the projectile is delivered at a faster speed.

46. I cannot accept that he has the right to refuse the application on the basis of the calibre of the gun rather than on a consideration of the capacity of the applicant to use that particular gun safely. It would, in my view have been quite in order for the respondent to refuse the application if, for instance, while accepting that Mr. O'Leary belonged to a gun club and engaged in deer hunting, his accident record was such that he feared a more powerful firearm would increase the danger to the public. He could quite legitimately say that "I do not believe that you have the ability to handle such a gun." Instead the superintendent approached the question differently. He looked at the gun rather than the applicant and ignored the applicant's record as a good shot and competent sportsman and concentrated on the gun itself.

47. However, the application to quash the superintendent's decision goes further than the argument that the respondent was acting *ultra vires* the Firearms Acts in refusing the application because of the particular gun but also attacks his decision as being irrational and illogical.

48. An examination of the uncontradicted evidence of the nature of the alternative Springfield 30-06 is that there is little difference between the 30-06 and the Winchester 308 in the power to deliver a round at speed. However the applicant prefers the .308 and does not believe that the superintendent has the power to choose the type of gun he should use provided he is satisfied that he has a good reason to use the gun, is of good character and does not present a danger to the public. If he had never held a rifle suitable for large game would the respondent have been entitled to choose a gun for him? Would the respondent have been entitled to direct the applicant to a gun of his choice rather than to a gun chosen by the applicant as suitable for his purposes? I believe not.

49. While I have great respect for the accumulated wisdom vested in a senior member of the Garda Síochána in relation to local conditions and the safe use of firearms, I have difficulty with accepting the reasoning applied in the refusal in this case. Leaving aside for the moment the superintendent's stated reasons and concentrating on the public safety issues: the certificate of authorisation was refused for the .308 because it was a more powerful heavier calibre rifle than his existing .243 yet it was indicated to the applicant that another heavy calibre firearm the 30-06 which delivers a slightly faster projectile would be viewed positively. If there is to be logic and consistency in the safety argument, then it is difficult to see how one rifle is deemed too dangerous to the public and in particular to hill walkers to be licensed while the other which is favoured by the respondent delivers its rounds at 100 feet per second faster. It is not difficult to deduce that the objection is the .308 calibre itself as it is the current calibre of the National Forces rather than because it is a more powerful gun. In that case the safety argument then becomes illogical.

50. The respondent has a wide discretion as the person designated by Statute to determine whether an applicant is a suitable person to whom an authorisation to possess and use a firearm is granted and, in respect of that premise, the scope for challenging the validity of his decisions is therefore strictly limited. However, I believe that this case is one of those relatively rare cases of judicial review where as in *Brendan Matthews v. Irish Coursing Club* 1993 1 IR the decision sought to be impugned is so illogical and so unreasonable as to come within Henchy J's definition in *State (Keegan) v. Stardust* as being fundamentally at variance with reason and common sense.

51. I will therefore quash the decision of the respondent refusing to certify the applicant as a person suitable to own a Steyr Mannlicher SC 103 6883 by order of certiorari and remit the matter to the respondent to re-examine the application in accordance with the findings of the court.