Neutral Citation Number [2008] IEHC 195

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 626 JR

BETWEEN

RONAN McCARRON

APPLICANT

AND
SUPERINTENDENT PEADAR KEARNEY

RESPONDENT

Judgment of Mr. Justice Charleton delivered on the 4th day of July, 2008

1. For the last four years the applicant has been pursuing shooting as a sport. He is trained in pistol shooting, in rifle shooting and in shotgun shooting. In late 2005, he purchased a .40 calibre Gloc model 22, pistol and then applied for a firearm certificate under the Firearms Act 1925, as amended, to the respondent, who is the superintendent of An Garda Síochána in the Garda district where he resides. In consequence of his application, he was visited at home by a crime prevention officer who made requirements in relation to securing the weapon, in a firearms cabinet, should a license to possess the gun be granted by the respondent. On 24th February, 2006, the applicant visited the respondent at Letterkenny Garda Station. He says he was then informed that the respondent was refusing his application for a firearm certificate because the pistol was a combat weapon and that he would only consider an application for an Olympic- standard handgun of .22 calibre. The applicant says that there is no statutory basis on which he could have been refused a firearm certificate in respect of the weapon in question. He argues in this judicial review application that once he has decided in good faith to buy a weapon that it must be licensed by the respondent provided he is not a person who is ineligible under the Act to hold a firearm and provided he has been trained to safely use it.

The Refusal

2. The applicant felt aggrieved by the refusal of the respondent to grant him a firearm certificate in respect of his .40 calibre Gloc pistol. Through his solicitors, he wrote to the respondent asking for his reasons in writing. In consequence the respondent superintendent replied on 22nd March, 2006, in the following terms:-

> "I refer to yours of 8th March, 2006, in the above matter. I met with Mr. McCarron on 24th February, 2006, and outlined to him that I was not satisfied that he had a good reason for acquiring a .40 Gloc pistol in respect of which the certificate was applied for, s. 4(a) of the Firearms Act, 1925, as amended refers. My reason for this is that I do not believe that the firearm for which the application refers is a suitable weapon for target practice."

3. It is unfortunate that a number of allegations were directed against the respondent superintendent by the applicant. It was said, on affidavit, that the respondent refused, in general and as a kind of policy, to grant certificates for this type of firearm; that he had "a mental block against granting certificates above a certain calibre"; and that he was "prejudiced by an unfounded view that such calibre firearms are combat weapons". A temperate and dignified answer to these allegations was provided by the respondent at para. 4 of his affidavit. I accept this evidence. This reads in part:-

> "I say… that Mr. McCarron was also informed that an application for a firearm certificate for a .22 or a .177 target pistol would be considered. I explained the reasons for this approach… when I met with Mr. McCarron on 24th February, 2006…I explained to Mr. McCarron that I was refusing the application under s. 4(a) of the Firearms Act 1925, on the grounds that I was not satisfied that he had a good reason for requiring the particular firearm because I did not believe that it was a suitable weapon for target practice. I did advise Mr. McCarron that, in my view, the firearm in respect of which he had sought a certificate was a combat weapon and that, as such, while it could of course be used for target shooting in that an individual could shoot it at a target, it was not suitable for same when weighed against the dangers of such a firearm. I further informed Mr. McCarron that in reaching my decision I considered that this type of weapon was one declared to be particularly dangerous by the Firearms (dangerous weapons) Order, 1972. However, I did not say that I "would not license a handgun of higher calibre than an Olympic standard handgun – in other words a .22 calibre handgun". I consider applications for firearm certificates on their merits and if I receive an application for a handgun with a greater calibre and there is good reason for acquiring same I would (provided I am satisfied of all the matters contained in the Firearms Act), grant a certificate for same. However, I believe that the calibres used in Olympic type shooting competitions are non military/police calibres and present less of a risk to society and participants than the type of handgun for which the applicant seeks a certificate. In short, Mr. McCarron stated that he required this particular gun for target shooting; I am not satisfied that same is suitable for target shooting given the dangers inherent in such a gun, although I concede that it can be used for same and I am therefore not satisfied that Mr. McCarron has a good reason for acquiring this particular handgun. I should also say that even if this type of handgun is the only one that is suitable for the particular type of shooting in which Mr. McCarron wishes to engage, I am not satisfied that such a use is a good reason for acquiring this particular gun."

Legislative Background

4. The essential law regulating the use and possession of firearms is contained in five Acts of the Oireachtas: The Firearms Acts 1925, 1964 and 1971, the Firearms and Offensive Weapons Act 1990, and the Firearms (Proofing) Act 1968. The commencement of this action pre-dated the passing of the Criminal Justice Act 2006. In this last Act however, in Part 5, amendments are made to the Firearms Act 1925. Anyone attempting to deal with the law regulating firearms and ammunition has to have regard to six Acts of the Oireachtas together with a number of Statutory Instruments. There is no constitutional provision providing for any right to keep lethal firearms such as that in the Second Amendment to the Constitution of the United States of America guaranteeing that "the right of the people to keep and bear arms, shall not be infringed."

5. I have been told by counsel, who have wide experience in this area, that from 1972, coinciding with one of the most vicious periods of Irish history, up to 2004 no rifles above .22 calibre were licensed and no handguns, meaning revolvers or pistols, were licensed, save perhaps in the most exceptional circumstances. Shotguns were regularly licensed. In 1995, the general policy in relation to rifles was relaxed in respect of rifles up to .27 calibre where a superintendent was satisfied that the purpose of possessing such a gun was to hunt deer. In 2007, the policy against the licensing of pistols having been recently relaxed, for whatever apparent reason, some 1,600 pistols of various kinds were licensed for private use during that year. It is argued that any trends as to violent crime with guns can never be considered by a superintendent in his or her discretion as to whether to grant a firearm certificate.

6. Such factors as the general proliferation of guns, the kind of guns that are more especially dangerous, the murder and suicide rate

may be important factors in any sensible view as to the licensing of firearms, but it is argued that a superintendent can never consider these. A superintendent of An Garda Síochána is in a good position to be aware of such trends, perhaps more so than a judge, particularly in the Superior Courts where there is less of a connection with local problems. The applicant says that he is aggrieved by the refusal to allow him to have this high calibre pistol because so many of his shooting friends already have them. It may be that this development of the proliferation of pistols, and larger calibre rifles, has not been noticed and that no general policy of permission for the private use and possession of handguns and high calibre rifles is being pursued. A reasonable person is entitled to feel alarmed, however. In contrast, in the neighbouring kingdom, the policy that is being pursued is determinedly the opposite. Possibly this can be explained by what happened in Dunblane in Scotland on 13th March, 1996. On that occasion a man in his forties walked into a primary school armed with four revolvers and 743 cartridges. The guns were two 9mm pistols and two .357 calibre Magnum revolvers. These he discharged 109 times, killing 15 children and a teacher. The recommendations of the Honourable Lord Cullen, in Chap. 12 of his report on this crime, reflected a determination to move in a different direction to the apparent policy in this country over the last four years. Handguns were subsequently banned in Britain. It is argued that express legislative provision is required before any discretionary factors may be taken into account in granting or refusing a firearm certificate. Legislation, however, should never be construed by isolating provisions one from the other or from its underlying purpose.

7. I am obliged to apply the law as it stood at the time of the refusal of the applicant of a licensing certificate for his large calibre handgun.

8. No one is entitled to possess a firearm unless they are licensed to do so by the superintendent of An Garda Síochána of the district in which they reside. The possession of every firearm is illegal unless it is authorised by law. The possession of a firearm is not a right, but is a privilege granted in contra-distinction of the prohibition imposed by the Firearms Act 1925, as amended. Under s. 5 of the Act, a firearm certificate may be revoked by the district superintendent where he or she is satisfied that the holder of the certificate has no good reason for requiring the firearm to which the certificate relates, or is a person who cannot be permitted to have a firearm in his possession without danger to public safety or to the public peace, or is a person who is disentitled to hold a firearm certificate, or is using a firearm in ways restricted by the existing license. Disentitled persons under the Act are people under the age of sixteen, those of intemperate habits, people of unsound mind, those who have been imprisoned for not less than three months, those subject to the supervision of the Gardaí, and those bound by a recognisance not to carry a firearm. It is important to read these provisions together with s. 4 of the Act and in the context of the entirety of the legislation.

9. Section 4 of the 1925 Act, sets out the conditions which a superintendent of the Garda Síochána must apply in deciding to grant or refuse an applicant a firearm certificate:-

> "Before granting a firearm 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, and
>
> (b) can be permitted to have it in his possession, use, and carry a firearm or ammunition without danger to the public safety or the peace, and
>
> (c) is not a person declared by this Act to be disentitled to hold a firearm certificate."

Construction of the Section

10. Before anyone can be granted, or can continue to hold, a firearm certificate that person must fulfil each and every qualification set out in s. 4 and 5 of the Firearms Act 1925. There is no question but that the applicant is not a person disentitled by law from holding a firearm certificate. His evidence is, in addition, that he has been trained in the use of this particular firearm. The applicant therefore argues that s. 4(b) of the Act could never have had any relevance to his application. I should make a brief comment on his submission in that regard. Section 4(b) refers to a number of activities in respect of firearms which have to be satisfied. Clearly, under s. 5 of the Act a superintendent has a wide discretion where he is satisfied that there is a threat, in respect of the holding of a particular firearm by a particular person, to public safety. I note that the three conjunctive reasons whereby a person may be licensed to have a firearm, in s. 4 of the Act, are reproduced in s. 5. Where any one of these three conjunctive reasons is missing or where, in addition, there has been a misuse of a condition attached to a certificate, the superintendent must act to immediately revoke any existing certificate. Considerations of public safety are thus uppermost in the legislative policy behind the enactment. The conjunctive reasons set out in ss. 4 and 5 refer in paras. (b) and (c) to "a firearm" and to "a firearm certificate". Negligence in the keeping of a weapon or ammunition, carrying a weapon or ammunition around in unsecure circumstances, failing to exercise sufficient care in the discharge of a weapon and failing to use the weapon for an appropriate purpose are all factors which are sufficient for refusing the grant of a firearm certificate in the first place, or for revoking such a firearm certificate where it has been granted.

11. It should be borne in mind that the definition of a firearm under the 1925 Act, as amended, centres on its capacity to kill people. Under the original definition, which has been changed many times and which is now replaced by s. 26 of the Criminal Justice Act 2006, a firearm was defined as "a lethal firearm or any other lethal weapon of any description from which any shot, bullet, or other missile can be discharged". That definition is continued in the 2006 Act, with the addition of other specific types of weapon which experience has shown to be lethal, including powerful airguns, crossbows, stun guns and firearms from which a necessary component part has been removed. The lethal effect of firearms arises from the nature of the projectile, its velocity on discharge, its mass and its capacity to kill, or to be dangerous, over a distance. Under s. 4(a) of the Act, a person may feel they have a good reason for possessing a firearm and they may feel that because they have some basic training and are apparently of sound mind at the time of applying for a firearm certificate that somehow an entitlement to be licensed for any kind of lethal weapon arises. The Act, however, requires them to have "a good reason for requiring the firearm in respect of which the certificate is applied for". The firearm in question is required by the legislation to be considered by the district superintendent since that, if the application is successful, will be the weapon that the superintendent is also required to be satisfied can be left in the possession, use and conveyance of the licensed person.

12. The reason for possessing and using the particular weapon has to be more than a simple desire to use it or to have sport with it in some way, it has to be a "good reason for requiring the firearm in respect of which the certificate is applied for". A small calibre pistol may be lethal only if fired at point blank, or close, range. If a weapon is that small, however, it can be easily concealed and the superintendent is legitimately entitled to ask himself or herself as to why an applicant might have "good reason for requiring the firearm in respect of which the certificate is applied for". On the other hand, a Magnum pistol is, for instance, a large calibre weapon, as is the Gloc .4 calibre pistol in this judicial review application, and it is capable of firing particularly lethal kinds of ammunition at high velocity. Again, the superintendent must ask himself or herself the question as to why an applicant for a firearm certificate might have "good reason for requiring [that] firearm". A high velocity weapon is, of its nature, much more dangerous than a low velocity weapon. A bullet from such a weapon may travel for well in excess of a kilometre with lethal effect. A high calibre or high velocity

weapon has the capacity to deliver a shock to the body which can cause it to have lethal effect even if the bullet does not strike a vital organ. High calibre and high velocity weapons can have lethal effect well outside the range of the unaided vision of human beings. This is partly why telescopic sights are also controlled by firearms provisions of the Criminal Justice Act 2006. In all these circumstances, the superintendent will ask the question "What good reason does this person have for requiring this particular firearm?"

Discretion

13. It is submitted on behalf of the applicant that once a person who seeks the grant of a firearm certificate applies in good faith to a superintendent, then provided nothing disentitles him from holding a firearm and once he has shown that he has been trained in its use, he must be granted a firearm certificate in respect of that weapon. It is submitted that a superintendent has no discretion in the granting of a firearm certificate, no matter the nature of the lethal weapon for which the licence is being sought. This would mean that where a person in good faith joins with others to form an association to use assault rifles of high velocity and high calibre in practical training of a quasi-military style, there can be no refusal by a district superintendent of the grant of a firearm certificate under s. 4(a) of the Act. Such a policy, should any superintendent pursue it, would be illegal as it is outside the clear purpose of the legislative scheme.

14. I hold that under the legislation there is a duty on an applicant for a firearm certificate to satisfy a superintendent that he or she has a good reason for requiring the firearm in respect of which the certificate is applied for. The specific wording under the Act makes it clear that considerations of public safety, the good order of the community and the proliferation of weapons within a particular district, and within the community generally, are all matters which the superintendent of An Garda Síochána can and should take into account. In exercising his or her function under the Criminal Justice Act 2006 in respect of restricted weapons, the Commissioner of An Garda Síochána is in no different poison. In general, the more dangerous the weapon, the greater the burden born by a person applying for a firearm certificate to show that he or she has good reason for seeking to possess and use that particular weapon. Under the Act, considerations of calibre, ammunition type that may be used, lethal effect or danger over what distance, velocity of the ammunition, and the size and shape of the gun and the use to which the weapon may be put are clearly factors of high importance. It was submitted by counsel for the respondent that to replace the requirement in s. 4(a) of the Act, with one which simply requires an applicant to apply in good faith, is to remove the legislative purpose whereby an applicant must satisfy a superintendent in the district in which he resides that he has a good reason for requiring the particular firearm in respect of which he has sought a certificate, and to replace it with a system whereby there is self-certification for the purpose of licensing lethal weapons. That submission is correct.

15. The purpose of licensing is to have control over firearms. It would not be right for this Court to construe the Act in such a way that the controls put in place by the legislature are abdicated in favour of a test of choice as if a firearm is not a lethal weapon and is something other than a most dangerous article. That is what the legislation is there to control. It is not within the legislative scheme to issue a firearm certificates to any individual simply having a genuine desire to hold a particular weapon for sport, no matter what its calibre, the velocity of its projectile or its especial killing potential. Nor do I regard it as right in law, as has been submitted on behalf of the applicant, that a person must first establish a poor safety record in using firearms before a refusal can be made under s. 4. I also reject the proposition that a superintendent is only entitled to refuse a certificate for a gun if an owner has already been shown to be negligent in securing or conveying it. It might be thought that securing a firearm in a cabinet is a sufficient safety precaution. However, for firearms to be used they must be brought from their gun cabinet to a place where they may be used for target practice or for killing game animals or vermin. Securing a gun in a residence is a helpful, but minimal, safety precaution as experience shows that threats, and worse, are sufficient to unlock any safe.

Reasonableness

16. It is to be expected that officials engaged in administrative and quasi-judicial business on behalf of the State are reasonable. A decision which is unreasonable cannot be within the jurisdiction that is conferred on such an official by legislation. The High Court, on judicial review, is not entitled to substitute its own view as to whether a decision should, or should not, have been made. In reviewing such a decision, I remind myself that a judgment should never be framed so as to suggest what the right course may be on a particular application or so as to so fetter the authority vested in an official that, in practical effect, the matter can only be decided one way upon the matter being reverted after judicial review. The burden on an applicant who wishes to have a firearm certificate under the Firearms Act 1925, as amended, is that of satisfying a superintendent of the conjunctive requirements set out in the Act. Where a refusal is made by a superintendent to grant a firearm certificate in respect of a particular weapon then the applicant must show that the decision is fundamentally at variance with reason and common sense; *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642.

17. There can be circumstances where the necessity to protect human rights, arising in particular circumstances where an applicant for judicial review will be put in especial peril in the event of applying the ordinary reasonableness test, requires this Court to exercise a heightened level of scrutiny over administrative and quasi-judicial decisions; *N. v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C 107. The only circumstance in which the requirement for a heightened level of scrutiny now applies is in reviews of the correctness of decisions by statutory bodies, and the relevant Minister, in relation to those seeking international protection from persecution or a state of war in their country of origin, which protection must continue until that situation again becomes reasonably safe. In contrast, it may be that there are other circumstances where the particular means of knowledge of a quasi-judicial tribunal in a particular area, such as horse racing or veterinary practise, may require the court on review to exercise a certain deference towards decisions on the facts that are expressly concerned with that area of expertise.

18. I am satisfied that, in this case, the ordinary test for judicial review applies; of only upsetting an administrative decision where it is unreasonable in the sense of flying in the face of fundamental reason and common sense. There is nothing to suggest that the decision of the respondent should fall by those criteria. I am satisfied that there are good reasons and strong authority for that test. To interfere on any lesser test would cause this Court to trespass on an executive function and so infringe the separation of powers doctrine. It is not for this Court to award firearms licenses. This Court is not authorised to so closely scrutinise and criticise decisions in a manner that makes any subsequent decision, in effect, that of the court and not that of the body authorised by law. The law for the guidance of police officers should be clear in principle and in effect. Judicial review is a means of resolving an injustice due to lack of jurisdiction or to unreasonable decision-making. Judicial review, in relation to the availability of lethal weapons, can have the effect of replacing important considerations of the safety of the community and the proper exercise of discretion of those tasked with enforcing the law with legal rules that may lack a sufficient appreciation of the consequence of overturning carefully thought-through decisions. In such circumstances, a major question on judicial review in these cases must be the availability of an alternative remedy. I will return to this.

Vires

19. I have not been satisfied that the decision by the respondent to refuse the applicant a firearm certificate in respect of a high calibre handgun was made in consequence of an a priori decision. Nor am I satisfied that it was made as a result of a general direction

from headquarters, as in *Dunne v. Donohoe* [2002] 2 I.R. 533. It is, I understand from discussion with counsel, in consequence of Garda Headquarters not being legally entitled to issue a general direction that handguns and large calibre rifles have not been made subject of an instruction to divisional and district superintendents. It seems to me, however, that there may be an unfortunate misunderstanding of the judgment of the Supreme Court by the relevant Garda authorities. An individual superintendent, particularly in the light of that decision, retains authority over his own discretion. That must be respected unless there is evidence of improper conduct. I am not satisfied that the respondent in any way fettered his discretion as to the issue of firearm certificates. Rather, it seems to me, that he exercised a sensible policy through an individual decision which is within the terms of legislation concerned with the public good. It is a reasonable, lawful and sensible practice for those who have to decide on applications to exercise privileges at law to have regard to a set of guiding principles.

20. Garda Headquarters is entitled to issue such a set of guiding principles. A government minister, for instance, is entitled to make a set of guiding principles available to such of his or her officials as are exercising a delegated authority of a discretionary kind in his or her name. In considering such principles, an administrative or quasi-judicial official should not fetter their discretion; rather, the discretion must be left over and properly exercised, thus allowing the individual case to be judged in the light of those principles. In *Mishoa v. The Minister for Justice, Equality and Law Reform,* [1996] 1 I.R. 189, Kelly J. at p. 205, held as follows:-

> "In my view there is nothing in law which forbids the Minister upon whom the discretionary power under section 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rule does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or set of fixed rules must not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."

21. In *Lennon v District Judge Clifford* [1992] 1 I.R. 382 at 386, O'Hanlon J. stated that the:-

> "High Court is not available as a court of appeal from decisions of other tribunals except where it is given such a function by statute, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record."

22. See also *Stokes v District Judge O'Donnell and Others* [1999] 3 I.R.218. An error of law by a tribunal can vitiate its jurisdiction. Where an administrative official or quasi-judicial tribunal having a jurisdiction, which is limited by statute, mistakes the applicable law as to the facts, it may have asked itself a question which, in law, it was not entitled to enquire into. Where that happens, there can be an exceeding of jurisdiction and the purported determination of the quasi-judicial tribunal or administrative official ceases to be a determination within the meaning of the empowering legislation; *O'Reilly v. Mackman,* [1983] 2 A.C. 237 at 278 per Lord Diplock. I do not accept that in this case the respondent misconstrued his powers under s. 4(a) of the Firearm Act, 1925, as amended. Rather, the decision was one that he was entitled to make. In so far as my decision in this regard, differs from that of Peart J. in *Goodison v. Sheehan*, (Unreported 2nd May, 2008 High Court) and of Clark J. in *O'Leary v. Mahar*, (High Court, Unreported, 25th April, 2008), I find myself unable to follow those decisions.

2006 Act

23. Finally, I note that under the Criminal Justice Act, 2006 many amendments have been introduced to the 1925, Act. In respect of the grant of a firearm certificate for firearms and ammunition which is restricted, the function, in that regard, is reserved to the Commissioner of An Garda Síochána. The firearms which have so far been restricted are set out in S.I. No. 21 of 2008, the Firearms (Restricted Firearms and Ammunition) Order, 2008. I note that under s. 43 of that Act, a new s. 15(a) is inserted into the Firearms Act 1925, whereby a person aggrieved inter alia, by a refusal to grant a firearm certificate may appeal from the Commissioner of An Garda Síochána or the district Superintendent, as the case may be, to the District Court. This may be thought to be a peculiarly suitable remedy for those aggrieved in consequence of not being allowed to have the lethal weapon of their choice since that appeal lies in respect of the refusal of a firearm certificate from a local superintendent to the district judge of that area, where both will know, or can readily inform themselves, of both local and national conditions relevant to lethal weapons. They are not only entitled, but obliged, to take such matters into account.

24. In *Sefan v. The Minister for Justice, Equality and Law Reform*, [2001] 4 I.R. 203 at 217, Denham J. stated:-

> "*Certiorari* may be granted where the decision maker acted in breach of their procedures. Once it is determined that an order of *certiorari* may be granted, the Court retains its discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is granted, and the degree of fairness of the procedures, should be waived by the Court in determining whether *certiorari* is the appropriate remedy to obtain a just result."

25. This principle has been applied in a wide range of judicial review applications; see, for instance, *McGoldrick v. An Bord Pleanála*, [1997] 1 I.R. 497 at 507 and *A.Z. v. The Refugee Appeals Commissioner* (High Court, Unreported, McGovern J., 6th February, 2004).

Result

26. In the result I must refuse the application for judicial review. I feel it necessary to add, however, that the piecemeal spreading over multiple pieces of legislation of the statutory rules for the control of firearms is undesirable. Codification in that area is almost as pressing a need as it is in the area of sexual violence.