

APPROVED

[2023] IEHC 45



THE HIGH COURT
JUDICIAL REVIEW

2021 No. 69 J.R.

BETWEEN

FRANK BRENNAN

APPLICANT

AND

THE CHIEF SUPERINTENDENT OF THE CORK WEST DIVISION

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 8 February 2023

INTRODUCTION

1. These judicial review proceedings seek to challenge two related decisions made under the Firearms Act 1925 and the Firearms Act 1964, respectively.
2. The precise interaction between these two pieces of legislation is unclear and an important question of statutory interpretation arises insofar as the regulation of “*short firearms*” is concerned. More specifically, the question is whether it is legitimate to amend a firearm certificate so as to substitute a modern firearm in lieu of a firearm which enjoys legacy rights under the relevant transitional provisions. As explained presently, however, it is not necessary to determine

NO REDACTION REQUIRED

this question of statutory interpretation in order to resolve these judicial review proceedings. This is because these proceedings can, instead, be disposed of on the narrower ground that the respondent failed to comply with his statutory duty to state reasons.

LEGISLATIVE FRAMEWORK

3. These proceedings relate to two firearms of a type described under the legislation as short firearms. A “*short firearm*” is defined under Section 3D of the Firearms Act 1925 as meaning a firearm either with a barrel not longer than 30 centimetres or whose overall length (excluding the length of any detachable component) does not exceed 60 centimetres.
4. The licensing of short firearms is restricted as a result of amendments introduced to the Firearms Act 1925 by the Criminal Justice (Miscellaneous Provisions) Act 2009. There is now a general prohibition on the grant of firearm certificates in respect of short firearms. This is subject to a number of exceptions including, relevantly, where the application for a firearm certificate is made in respect of a short firearm for which the applicant had held a firearm certificate on or before 19 November 2008. Put otherwise, the transitional provisions under the amending legislation include a “*grandfathering*” provision, whereby a person who had previously held a firearm certificate in respect of a particular short firearm is allowed to apply for further certificates in respect of that specific weapon.
5. Once this qualifying threshold has been met, the application for a firearm certificate falls to be determined by reference to the general provisions governing

all firearms. The considerations relevant to an application for a firearm certificate are prescribed as follows under Section 4 of the Firearms Act 1925:

“The conditions subject to which a firearm certificate may be granted are that, in the opinion of the issuing person, the applicant—

- (a) has a good reason for requiring the firearm in respect of which the certificate is applied for,
- (b) can be permitted to possess, use and carry the firearm and ammunition without danger to the public safety or security or the peace,
- (c) is not a person declared by [the Firearms Act 1925] to be disqualified to hold a firearm certificate,
- (d) has provided secure accommodation for the firearm and ammunition at the place where it is to be kept,
- (e) where the firearm is a rifle or pistol to be used for target shooting, is a member of an authorised rifle or pistol club,
- (f) has complied with subsection (3),
- (g) complies with such other conditions (if any) specified in the firearm certificate, including any such conditions to be complied with before a specified date as the issuing person considers necessary in the interests of public safety or security, and
- (h) in case the application is for a restricted firearm certificate—
 - (i) has a good and sufficient reason for requiring such a firearm, and
 - (ii) has demonstrated that the firearm is the only type of weapon that is appropriate for the purpose for which it is required.”

6. Section 3(10) of the Firearms Act 1925 provides that where an application for a firearm certificate is refused, the applicant shall be informed in writing of the refusal and the reason for it.

7. Provision is made elsewhere under the firearms legislation for the substitution of one firearm for another during the currency of a firearm certificate. More specifically, Sections 11(1) and (2) of the Firearms Act 1964 provide as follows:

“(1) Subject to subsection (3) of this section, the Minister or the Commissioner may substitute for the description of a firearm in a firearm certificate granted by him or her the description of another firearm and, upon such substitution, the certificate shall have effect in relation to that other firearm and shall not have effect in relation to the first-mentioned firearm.

(2) Subject to subsection (3) of this section, the Superintendent of any district or any member of the Garda Síochána in any district duly authorised to do so by the Superintendent of that district may substitute for the description of a firearm (*other than a restricted firearm*)* in a firearm certificate held by a person residing in that district the description of another such firearm and, upon such substitution, the certificate shall have effect in relation to that other firearm and shall not have effect in relation to the first-mentioned firearm.”

*Emphasis (italics) added

8. The firearm in the present case is a restricted firearm and thus it would follow that a substitution application may only be determined by the Commissioner or an officer to whom the function has been delegated by an appointment in writing pursuant to Section 25C of the Firearms Act 1925. The parties appear to be agreed that the respondent had authority to issue a firearm certificate in respect of a restricted firearm. Neither side has, however, produced a delegation order to that effect.
9. Section 11 of the Firearms Act 1964 does not itself prescribe the criteria by reference to which a decision on a substitution application is to be made. However, the Firearms Act 1925 and the Firearms Act 1964 are to be construed together: see Section 1(2) of the Criminal Justice (Miscellaneous Provisions) Act

2009. It is necessary, therefore, to “*read across*” the criteria under Section 4 of the Firearms Act 1925. Were it otherwise, an applicant could sidestep the provisions of Section 4 by the simple expedient of making an application for substitution immediately upon an application for a firearm certificate.

10. The precise interaction between Section 3D of the Firearms Act 1925 and Section 11 of the Firearms Act 1964 is unclear. There is a question mark as to whether it would ever be legitimate to allow a substitution application in respect of a grandfathered firearm. This is because to do so would, arguably, undermine the restrictions on the licensing of short firearms introduced by the Criminal Justice (Miscellaneous Provisions) Act 2009. The grandfathering provisions appear to be confined to the specific legacy weapon involved. To allow a form of “*bait and switch*” whereby a different firearm could be substituted for the legacy firearm would appear to be contrary to the legislative intent. As explained below, however, it is not necessary to resolve this question of statutory interpretation in these proceedings.

THE TWO APPLICATIONS IN MAY 2020

11. It is common case that the applicant for judicial review had, prior to 19 November 2008, held a firearm certificate in respect of a particular short firearm (“*the grandfathered firearm*”). As it happens, there was no firearm certificate extant in respect of the grandfathered firearm as of 19 November 2008. However, no point is taken in this regard on behalf of the respondent. This is because—on the respondent’s analysis of the legislation—the benefit of the grandfathering provision is available once the particular firearm had been

licenced at any stage prior to 19 November 2008. The firearm need not have been subject to an extant certificate as of that date.

12. Accordingly, the applicant is entitled, in principle, to apply for a firearm certificate in respect of the grandfathered firearm notwithstanding the general restriction on the licensing of short firearms introduced by way of amendment to the Firearms Act 1925 by the Criminal Justice (Miscellaneous Provisions) Act 2009.
13. The applicant would, of course, still have to satisfy the criteria for the grant of a firearm certificate as prescribed under Section 4 of the Firearms Act 1925.
14. The applicant had been granted a firearm certificate in respect of the grandfathered firearm in February 2017. This firearm certificate was valid for a period of three years. The firearm certificate was amended in July 2019 by the substitution of a modern firearm for the grandfathered firearm. The (amended) firearm certificate duly expired in February 2020.
15. The applicant submitted an application for a firearm certificate in respect of the grandfathered firearm on 4 September 2020. This application was for a *new* firearm certificate (rather than an application for the renewal of an extant firearm certificate). On the same date, the applicant submitted an application to substitute a modern firearm for the grandfathered firearm.
16. The logic of making these two applications had been as follows. The applicant intended that the issuing person would make two decisions in sequence. An initial decision to grant a firearm certificate in respect of the grandfathered firearm, followed immediately by a second decision to substitute the modern firearm for the grandfathered firearm under the (newly issued) firearm certificate.

17. It is important to emphasise that, even though the two applications were made at the same time, it would be necessary, in order to achieve the desired result, that they be determined *consecutively* and that a decision be made to issue a firearm certificate in respect of the grandfathered firearm first, to be followed moments later by a decision to substitute the modern firearm. The first decision would be made pursuant to Sections 3D and 4 of the Firearms Act 1925; the second, pursuant to Section 11 of the Firearms Act 1964. This stratagem on the part of the applicant was contingent on the respondent accepting that an application for substitution can legitimately be made in respect of a short firearm notwithstanding the restrictions on the licensing of this type of firearm imposed by Section 3D of the Firearms Act 1925.
18. In the event, the respondent refused both applications. The rationale for this approach is set out in a chain of correspondence between the respondent and the applicant's solicitors. The respondent had initially written to the applicant's solicitors as follows on 23 October 2020:

"I refer to the above and further to my communication to your office on 19.10.2020.

In May 2019 having considered Mr. Brennan's application I invited him to discuss his application with him personally at my office in Bandon Garda Station. I met Mr. Brennan in the presence of Sgt Kay O Donoghue. I explained to him on that date that I had no difficulty with the substitution but that I would not be giving him a license for the new firearm when the license was due to expire on 9.2.2020.

On 17.10.2019 after further correspondence I personally wrote to Mr. Brennan explaining this to him in writing.

I am governed by section 30, 3D of the Criminal Justice (Miscellaneous Provisions) Act, 2009, therefore I will not be granting Mr. Brennan's application for a substituted license."

19. This letter appears to address only the second of the two applications submitted on 4 September 2020, i.e. the application to substitute the modern firearm for the grandfathered firearm. The citation of the legislative provisions is somewhat confused. It seems that the intended reference is to Section 3D of the Firearms Act 1925 which had been inserted by Section 30 of the Criminal Justice (Miscellaneous Provisions) Act 2009. Section 3D is the provision which imposes restrictions on the licensing of short firearms.
20. Following a further letter from the applicant's solicitor, the respondent sent two letters on 16 November 2020, one in respect of the application for a firearm certificate, the other in respect of the application for substitution. The text of the body of the letter is substantially the same in each instance. It reads as follows in the case of the application for the firearm certificate:

"I am refusing this application. I met you on the 22.5.19 and addressed the substitution of firearm serial number [details of serial number and type of weapon redacted] with gun serial number [redacted].

You outlined to me on that date that the breach (*recte*, breech) on the old gun had become worn and hence the reason for the new firearm. I informed you that if you substituted there would be no going back to the original firearm [serial number redacted]. And secondly informed you that the substituted firearm [serial number redacted] was only licensed up to 9.2.2020. This is in line with current legislation which was clearly outlined to you when I met you."

21. The respondent wrote again by letter of 21 December 2020 (date stamped as received on 8 January 2021):

"There has been no misunderstanding on my behalf in respect of Mr. Brennan's application. I have previously met with Mr. Brennan and clearly outlined to him the consequences of a substitution when he initially substituted one gun for another. I clearly informed Mr. Brennan verbally and in writing that once he substituted he would not get that firearm licensed again.

I outlined that it was clear in the regulations and Mr. Brennan went off to think about it at the time. Mr. Brennan reverted to me saying that he wished to proceed with the substitution, knowing the consequences.

Thank you for your letter, but I will not be reversing my decision in this case. I have to operate within the regulations and I have already outlined this to your client.”

22. As appears, reference is made throughout this correspondence to an earlier substitution application and a meeting between the applicant and respondent in 2019. It should be explained that the applicant had applied in 2019 for the substitution of a modern firearm as the licensed firearm under the firearm certificate granted in respect of the grandfathered firearm. It is common case that the respondent had told the applicant that no further certificate would be granted in respect of the grandfathered firearm once the period of that firearm certificate had expired. The substitution application was granted in July 2019. The (amended) firearm certificate duly expired in February 2020.

DISCUSSION

23. On its ordinary and natural meaning, the correspondence over the period October to December 2020 implies that the respondent, as decision-maker, had taken the view that the legal effect of the amendment of the firearm certificate in July 2019, i.e. by the substitution of the description of the modern firearm for the grandfathered firearm, was to preclude the applicant from seeking, thereafter, to rely on the grandfathering provisions under Section 3D of the Firearms Act 1925. Put otherwise, the applicant was being treated as having given up his legacy right to obtain a firearm certificate in respect of the grandfathered firearm. The correspondence, again on its ordinary and natural meaning, is open to the

interpretation that the respondent considered that there was a jurisdictional bar on his entertaining any subsequent application in respect of the grandfathered firearm. The applicant would be entitled to use the modern firearm for the unexpired period of the firearm certificate but once that certificate had expired, the applicant would have lost the benefit of the grandfathering provision for all time.

24. In his defence of these judicial review proceedings, however, the respondent seeks to attach an entirely different meaning to the correspondence. It is now said that the application for a firearm certificate in respect of the grandfathered firearm was refused on its merits, by reference to the considerations prescribed under Section 4 of the Firearms Act 1925, for the following reasons.
25. First, it is said that the grandfathered firearm is a danger to public safety in circumstances where the rationale of the substitution application made in 2019 had been that the grandfathered firearm was damaged. More specifically, the applicant told the respondent that the breeches were worn. It is also said that the respondent has concerns that substantial modifications or repairs have been made to the grandfathered firearm which may render the firearm fundamentally different from the firearm that had been originally certified prior to 19 November 2008.
26. Secondly, it is said that the applicant does not have “*good reason*”, within the meaning of Section 4(2)(a) of the Firearms Act 1925, for requiring the firearm in respect of which the certificate had been applied for. In particular, it is said that the applicant does not actually intend to use the grandfathered firearm at all, but rather intends to “*substitute out*” that firearm in favour of the more modern firearm identified in the second of the two applications submitted in May 2020.

27. Thirdly, it is said that the applicant, by indicating an intention to constantly and repeatedly substitute and re-substitute a more modern firearm for the grandfathered firearm, is demonstrating a clear intention to subvert the provisions of Section 3D of the Firearms Act 1925.
28. With respect, the foregoing rationale is not at all apparent from the correspondence which had emanated from the respondent in October to December 2020. On its ordinary and natural meaning, this correspondence indicates that the respondent considered that the applicant, by dint of the earlier substitution application in 2019, was not entitled to a further firearm certificate in respect of the grandfathered firearm once the (amended) firearm certificate expired in February 2020. The reference to Section 3D of the Firearms Act 1925, in the letter of 23 October 2020, is open to the interpretation that the respondent understood there to be a jurisdictional bar on the grant of a further firearm certificate. Although the condition of the firearm had been mentioned in the correspondence of 16 November 2020, same was not relied upon as a reason for refusal.
29. The chain of correspondence does not convey the rationale now advanced in the verified statement of opposition and the legal submissions. In circumstances where the rationale underlying the decision has only been disclosed belatedly, the respondent cannot be said to have complied with his obligation, under Section 3(10) of the Firearms Act 1925, to inform the applicant in writing of the reasons for the refusal of the two applications made in May 2020.
30. This failure to provide a proper statement of reasons has undermined the effectiveness of the statutory right of appeal under Section 15A of the Firearms Act 1925. As reiterated by the Supreme Court in *Connelly v. An Bord Pleanála*

[2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, the provision of reasons by a decision-maker is intended to serve at least two purposes. First, to enable a person affected by the decision to understand why a particular decision was reached; and secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision or seek to have it judicially reviewed.

31. The position is put as follows at paragraph 46 of the judgment in *Connelly v. An Bord Pleanála*:

“Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.”

32. The statement of reasons provided by the respondent in the present case is deficient when measured against these benchmarks. The chain of correspondence does not disclose the full of the rationale now said to have been relied upon by the respondent in deciding to refuse the two applications. It would not have been obvious to the applicant—nor indeed to any other reasonable reader—that the applications had supposedly been refused on their merits, having regard to considerations such as public safety and whether it was intended to use the grandfathered firearm. In the circumstances, the applicant could not have made an informed decision on whether or not to exercise his statutory right

of appeal to the District Court. In the event that such an appeal had been brought, there would have been a real risk that the applicant would have been taken by surprise. It would have been entirely reasonable for the applicant to assume that the appeal would be concerned solely with the question of whether the earlier substitution in July 2019 precluded the making of a further application for a further firearm certificate. Had the respondent sought to resist an appeal to the District Court on the same grounds as he opposes these judicial review proceedings, then the applicant would have had to deal with issues, such as the state of repair of the firearms, which were not clearly flagged in the chain of correspondence. This would have put the applicant at a disadvantage and would have undermined the effectiveness of his right of appeal.

33. Accordingly, the decisions on the two applications made in May 2020 should be set aside on the ground that the respondent did not comply with his statutory obligation to provide reasons.
34. The fact that the statement of reasons is deficient is also dispositive of the procedural objection that the applicant should have exhausted his right of appeal to the District Court. It should be explained that one of the principal pleas advanced on behalf of the respondent in his statement of opposition is that the applicant should not be entitled to seek judicial review in circumstances where the applicant had failed to exhaust the alternative remedies available to him prior to seeking judicial review. The plea is not well founded in circumstances where, as outlined above, the effectiveness of the statutory right of appeal had been undermined by the failure to disclose the full of the rationale now said to have been relied upon by the respondent in deciding to refuse the two applications.

35. For completeness, it should be emphasised that the fact that a statement of reasons by the first instance decision-maker is deficient will not necessarily justify a party forgoing their statutory right of appeal and seeking judicial review instead. It will depend on the particular circumstances of the case. Here, the crucial feature is that the statement of reasons conveys the mistaken impression that the applications were refused on jurisdictional grounds when, in fact, the case now made is that same were determined on the merits. This is a very significant discrepancy and, as already explained, undermines the effectiveness of the right of appeal.
36. Generally, an aggrieved person will be expected to exhaust their statutory right of appeal before having recourse to judicial review. In most cases, therefore, an individual who is dissatisfied with the decision in relation to an application for a firearm certificate would be expected to pursue their right of appeal. Indeed, in the circumstances of the present case, this applicant had previously invoked his statutory right of appeal in respect of an earlier firearm certificate application in 2011 and obtained a successful result.

CONCLUSION AND FORM OF ORDER

37. These proceedings are determined on the narrow ground that the respondent failed to comply with his obligation, under Section 3(10) of the Firearms Act 1925, to inform the applicant in writing of the reasons for the refusal of the two firearm certificate applications made in May 2020. This failure undermined the effectiveness of the applicant's statutory right of appeal to the District Court. Accordingly, the applicant was entitled, in the very particular circumstances of

the present case, to seek judicial review without first exhausting the statutory right of appeal.

38. It follows that the two related decisions made by the respondent in October 2020 should be set aside by way of *certiorari* and the matter remitted to a different decision-maker pursuant to Order 84, rule 27 of the Rules of the Superior Courts. This relief is granted by reference to the “*reasons*” ground pleaded as part of paragraph E. 15 of the statement of grounds.
39. It is not immediately apparent from the statement of grounds that both decisions have been challenged. This may be as a result of the fact that the initial correspondence from the respondent failed to address separately the firearm certificate application and the substitution application. It may be that a technical amendment is required to the statement of grounds so as to refer to both decisions. I will discuss the precise form of order with counsel.
40. As to costs, having regard to the provisions of Section 169 of the Legal Services Regulation Act 2015, my *provisional* view is that the applicant, having been entirely successful in the proceedings, is entitled to his costs. If the respondent wishes to contend for a different form of costs order, he will have an opportunity to do so at a short hearing on 22 February 2023 at 10.45 o’clock.
41. Finally, it should be reiterated that it has not been necessary, for the purpose of resolving these judicial review proceedings, for the court to express any concluded view on the interpretation and interaction of Section 3D of the Firearms Act 1925 and Section 11 of the Firearms Act 1964. This judgment does not, therefore, stand as authority for the proposition that it is open to substitute a modern firearm for a grandfathered short firearm, notwithstanding the specific restrictions on the licensing of short firearms introduced under the

amended Section 3D of the Firearms Act 1925. Rather, this is a point which must await decision in a case where it is necessary to do so to determine the underlying judicial review proceedings.

Appearances

Kathleen Leader SC and Miranda Egan Langley for the applicant instructed by William Egan & Associates Solicitors

Séamus Clarke SC and Mark Curran for the respondent instructed by the Chief State Solicitor

Approved
Séamus Clarke