| | |
|---|---|
| **Neutral Citation No: [2024] NICA 36** | *Ref:* **TRE12497** |
| | *ICOS No:* **19/084768** |
| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **01/05/2024** |

**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

---

**BETWEEN:**

**JR86**

**Applicant/Appellant;**

**and**

**SECRETARY OF STATE FOR NORTHERN IRELAND**

**Respondent;**

**and**

**DEPARTMENT OF JUSTICE**

**Proposed Respondent**

**IN THE MATTER OF AN APPLICATION BY JR86 FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND**

---

**Before: Treacy LJ, Horner LJ and Kinney J**

---

**Donal Sayers KC and Wayne T Atchinson KC (instructed by Brian Moss of Worthingtons Solicitors) for the Appellant**
**Phillip McAteer (instructed by the Crown Solicitor's Office & Departmental Solicitor's Office) for the Respondents**

---

**TREACY LJ (*delivering the judgment of the court*)**

***Introduction***

[1] This is an appeal from the judgment of Huddleston J dismissing the appellant's judicial review of the respondent's decision affirming the revocation of the appellant's firearms certificate.

[2] The appeal before us focussed on the issue of procedural unfairness and the judge's reasons for dismissing that aspect of the challenge. The appeal also

challenged the refusal of leave on further and wider grounds of challenge identified in the Order 53 statement.

[3] The key statutory provision is Article 74 of the Firearms (NI) Order 2004 ("the 2004 Order") which provides:

> "**Appeal from decision of Chief Constable**
>
> 74.—(1) A person aggrieved by a decision of the Chief Constable under this Order may appeal to the relevant authority if it is a decision to which this Article applies.
>
> (2) On an appeal under this Article the relevant authority may make such order as the relevant authority thinks fit having regard to the circumstances.
>
> (3) This Article applies to the following decisions of the Chief Constable under this Order—
>
> (a) a refusal to grant or vary any certificate;
>
> (b) a revocation of a certificate;
>
> (c) a condition attached to any certificate or the variation of such a condition;
>
> (d) a requirement to surrender a certificate of approval under Article 17(3) or 18(2);
>
> (e) an order under Article 72(4).
>
> (4) In this Article—
>
> "certificate", except in the expression "certificate of approval", includes a permit or authorisation under this Order;
>
> "grant" includes issue;
>
> "revocation" includes—
>
> (a) in relation to a firearm certificate, partial revocation under Article 9;
>
> (b) in relation to a firearms dealer's certificate, the removal of a place of business under Article 32;

"vary any certificate", in relation to a firearms dealer's certificate, includes adding a place of business under Article 31.

(5) In this Article "the relevant authority" means—

(a) the Secretary of State, in any case where the Chief Constable's decision was taken wholly or partly on the basis of information the disclosure of which may, in the view of the Secretary of State or of the Chief Constable, be against the interests of national security;

(b) the Department of Justice, in any other case.

(6) Where the Chief Constable makes a decision within paragraph (3)(a) to (d), he must notify (as the case may be)—

(a) the applicant, or

(b) the holder of the certificate,

who the relevant authority is for the purposes of any appeal against the decision.

(7) An order under Article 72(4) must be accompanied by a written statement by the Chief Constable specifying who the relevant authority is for the purposes of any appeal against the order."

***Background***

[4] The background, which is not in dispute, has been helpfully set out in the appellant's skeleton argument which, to a substantial degree, we have adopted.

[5] The appellant's firearm certificate (FAC) was revoked by a notice dated 14 May 2014, on the basis that the Chief Constable of the Police Service of Northern Ireland (PSNI):

"… is not satisfied that you are a fit person to be entrusted with a firearm. The Chief Constable is unable to provide you with any further information by way of reasons for his decision as to do so would not be in the public interest."

[6] An appeal against that decision was refused by the Secretary of State. The appeal was determined without provision to the appellant of the reasons for the Chief Constable's decision, or even a gist of those reasons.

***First Judicial Review application***

[7] This revocation decision was challenged by way of judicial review. Following the grant of leave and an application for discovery, a gist was provided of the reasons for revocation. This read:

> "Police hold information from 2005 that [the appellant] was a member of the Provisional IRA in Londonderry who was on the run at that time."

[8] On this development, the Secretary of State agreed to afford an opportunity for the appellant to make representations in response to this information, and to reconsider the case thereafter. The first judicial review was then dismissed with costs to the appellant.

***Subsequent developments***

[9] Substantial representations, supported by a large body of vouching material, were addressed to the Minister considering the appeal to rebut the gisted adverse material.

[10] This reconsideration resulted in a further refusal on 12 June 2019.

[11] Unknown to the appellant that subsequent decision was not based only on the adverse information in respect of which a gist, and an opportunity to make representations, had been provided. It was only after the further refusal and in response to pre-action correspondence in respect of this impugned decision that the Crown Solicitor's Office (CSO) on behalf of the respondent confirmed on 21 August 2019 that:

> "… further new information was also taken into account by the respondent on reconsideration of the case which it was not possible to gist."

[12] That letter was the first time that the appellant was informed that *new* information was also taken into account, and it does not explain why the appellant was not informed of the fact, as opposed to the content, of further information being taken into account.

*The second judicial review application (Minister's decision of 12 June 2019)*

[13] By this second application the appellant sought leave to apply for judicial review of the respondent's decision of 12 June 2019. By that decision, the Secretary of State had again refused the appellant's appeal under Article 74 of the 2004 Order.

[14] The appellant sought to challenge that decision on grounds of procedural unfairness. Relatedly, he also sought to challenge the compatibility of Article 74 of the 2004 Order with, inter alia, article 6(1) ECHR and article 1 of the First Protocol (A1P1) ECHR, and the requirements of fairness at common law. It was contended that Article 74, in breach of the ECHR, does not confer a right to a public hearing of a firearms appeal, by which property rights are determined, by an independent and impartial tribunal within a reasonable time.

[15] Leave to apply for judicial review was granted by Keegan J in the following terms. The court's order dated 14 October 2019 stated:

> "IT IS ORDERED -
>
> 1. Leave be granted on the procedural fairness point only, the court reserving on the other areas of claim."

[16] Thus, leave was granted on the ground of challenge identified at para 5(i) of the Order 53 statement but reserved on those grounds at para 5(ii)-(vi).

*Progress of the application*

[17] On 9 January 2020, the respondent - the Secretary of State alone, the court having reserved on those areas of claim directed against the Department of Justice - filed affidavit evidence from Nikki Bodel, Head of Security Casework and Protection in the Northern Ireland Office (NIO).

[18] In correspondence, the respondent indicated on 24 February 2021 that:

- no gist had been provided of the further security information considered in the appellant's case;
- the appellant was not made aware that new information was being considered before his appeal was redetermined;
- the disclosure of the existence of new information at that time would not in fact have been problematic in national security terms; but
- that there was in any event 'nothing that he could have contributed in response' and that no procedural unfairness arose.

Thereafter - it having become apparent that the procedural fairness point was not likely of itself to see a resolution of the case comparable to that in the first judicial review application - the lower court was asked again to grant leave in respect of the 'other areas of claim'.

[19] The respondent however contended that the application could be dismissed in light of the affidavit evidence then available to the court.

[20] By order dated 1 December 2021, the first instance judge (Huddleston J) determined that the case should 'proceed as a split trial, the court exercising its powers pursuant to the provisions of Order 33 Rule 3.' The case was then listed on 28 April 2022:

> "… to hear the parties on the specific question if there is enough evidence before the court to fairly allow a determination of the case without a widening of the grounds upon which leave was granted."

***Judgment of Huddleston J***

[21] Huddleston J dismissed the appellant's application for judicial review on the procedural fairness point. The court's order further confirmed that: "… leave is refused on all the other grounds as set out in the judgment."

***Procedural fairness***

[22] On the issue of procedural fairness, the respondent contended at first instance that the NIO affidavit evidence disclosed the close scrutiny required by Weatherup J in *Re JR20's Application* [2010] NIQB 11 at [28]-[37].

[23] Mr Sayers sought to distinguish JR20 on the basis that it was a case in which the appellant did have the benefit of a gist of the adverse information relied on: see [4], [5], [7], [25], [37]. The court's discussion of close scrutiny in *JR20* followed its identification at [32] of the 'principle' that 'limited disclosure of information to a party adversely affected by a decision does not diminish the requirement for overall procedural fairness in all the circumstances.' [This, Mr Sayers contended, is consistent with the court's earlier decision in *Re Henry's Application* [2004] NIQB 11, to which Weatherup J referred in *JR20.* In *Henry*, the court identified at [24] five elements of a system of anxious scrutiny; third of these being that 'the gist of the concern should be disclosed to the prisoner']. Its conclusion was that 'further' disclosure was not required. *JR20* was therefore, Mr Sayers argued, a determination of the adequacy of a gist. The present case he contended is qualitatively different because here the Secretary of State took into account further adverse information of which the appellant was unaware before the decision was taken, which was never the subject of a gist of any kind. Indeed, the existence of the fact that new

information was even being considered was only disclosed in the Crown Solicitor's response to the pre-action protocol letter. This response acknowledges that the appellant was never made aware that new information was being considered. This was because "the concern was about whether disclosure of the *existence* of the new material might itself prove problematic in *national security terms*." However, the same response then states, without any elaborating detail, that "it was subsequently determined, in swearing the affidavit, that [disclosure of its existence] was not" problematic in national security terms.

[24] Mr Sayers correctly pointed out that it was not disputed that the information was material; nor was it contended that a further gist was unnecessary on the basis that the information was covered by the gist provided as a result of the first judicial review application. Instead, it was asserted that it 'was, and is not in any event possible' to provide the appellant with a gist of the information. No public interest immunity certificate was advanced in respect of the information. Further, this assertion has not been tested in the court below because the judge has not seen and was wholly unaware of its contents.

[25] In the absence of even a gist of that adverse information with which the appellant could meaningfully engage, counsel submitted that the appellant's firearms appeal did not see him afforded procedural fairness: as a general principle, a party has the right to know and to respond to an adverse case. He referred us to *De Smith's Principles of Judicial Review* (2nd edition, 2020) at para 7-055:

> "If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by this, there is prima facie unfairness."

[26] Huddleston J rejected the appellant's complaint of procedural unfairness. The decision, it is submitted, was based on the lower court's conclusion at [41] that:

> "... it was quite clear ... what the exact issue was which the respondent has seized upon as the ground for considering that the applicant was unfit to hold a firearm license. Fundamentally it was the applicant's former affiliation to a proscribed organisation."

[27] Further, at [43] - in the context of the additional information of which no gist was provided - the lower court said that:

> "The reality is that the applicant was aware of the substance, if not the minutiae, of the case against him and had an opportunity to respond to it."

[28] The lower court considered that this response was taken into account and "... that is sufficient to satisfy the requirements of fairness as per *JR20*": [43].

[29] The conclusion that the appellant was aware of the substance of the additional information (rather than of that which gave rise to the first judicial review application) was simply incorrect, counsel contended. The information considered by the Secretary of State included information of which the appellant was unaware before the decision was taken, and of which no gist was provided to him. The nature of that information and the part it played in the impugned decision was not known to the first instance judge.

[30] This being so, the conclusion that the appellant was aware of the substance of the case against him and had an opportunity to respond to it could not properly be drawn from the evidence in the case.

[31] Accordingly, counsel submitted that the lower court fell into error in concluding that the appellant was so aware and had such an opportunity, and in failing to conclude that the impugned decision was reached in a manner that was procedurally unfair.

[32] Mr McAteer contended that the judge knew that the appellant had not seen the new material, not even by gist and of course knew that he had not had sight of the material. Reading the judgment fairly, and in its entirety, he submitted that it is plain that the judge did not fall into the errors attributed to him.

***Consideration***

[33] Having first identified the question he must determine as being whether or not, on the facts, there was procedural unfairness in this case the judge stated his conclusion at the beginning of para [41] that there was no procedural unfairness and thereafter explained his reasoning:

> "[41] … Fundamentally, in the disclosure of the gist as part of the First Judicial Review and in the subsequent correspondence passing between the parties, it was quite clear, in my view, what the exact issue was which the respondent had seized upon as the ground for considering that the applicant was unfit to hold a firearm license. Fundamentally, it was the applicant's former affiliation to a proscribed organisation. That seems to me to have been the crux of the decision and the applicant can and did avail of his right to provide a case in rebuttal. Substantial information was provided to the decision maker and, on the affidavit evidence before me, was considered when that review decision was taken.
>
> [42] The applicant seems most concerned that the revocation (which occurred in 2014) followed a period in

which he had held firearm licenses in both Northern Ireland and the Republic of Ireland. Whilst that is something to be noted and probably heightens the question of "close scrutiny" (as per *JR20*) it is certainly not in my view any basis for saying that subsequent revocation and/or refusal to grant a firearm licence is necessarily unlawful or procedurally unfair. It might raise in the decision maker's mind a question as to why the licence should be revoked but does little more than that. The fundamental question is one of fairness – fairness which falls to be considered in light of the very detailed approach which I think was very fairly and carefully outlined by Weatherup J in *JR20*. On looking at the affidavit evidence and the correspondence which has passed between the parties it seems very clear to me that the respondent was anxious to adopt and indeed adhere to the guidelines promoted by Weatherup J in that judgment. I have concluded, having considered all the evidence, that they did just that and there was 'close scrutiny' of the available information, and that the applicant's submissions were considered as part of that process.

[43] In relation to the "additional" information that was considered on the affidavit evidence, it is clear that thought was given as to whether or not that additional information could be gisted and provided to the applicant. There was an initial meeting held in January 2019 after which there was a period of time (almost 3 months) for consideration following a questioning by the Minister and a reconvening of a meeting at which it was then determined that it was not possible to gist the additional information in a meaningful way. The failure to do so does not, in my view, render the process intrinsically unfair. *The reality is that the applicant was aware of the substance, if not the minutiae, of the case against him and had an opportunity to respond to it.* He did respond to it and the evidence confirms that the information he provided was taken into account. In my view that is sufficient to satisfy the requirements of fairness as per *JR20*. Fundamentally the decision was taken by reason of the applicant's association with the Provisional IRA and in both the Chief Constable's and then the Minister's mind, that association was sufficient to render him "unfit" to hold a FAC. That decision was not, on the evidence available to this court, taken lightly but was

> subjected to exactly the "close scrutiny" which Weatherup J advocated in *JR20*. I am satisfied that the steps outlined in the affidavit evidence and in the correspondence between the parties were indeed taken and that all relevant considerations were taken into account and that nothing irrelevant was included in the final determination such as would attract *Wednesbury* irrationality or unreasonableness."

[34] It is clear that the judge rejected the complaint of procedural unfairness. The decision, was based, argued Mr Sayers, on his conclusion at [41] that:

> "... it was quite clear ... what the exact issue was which the respondent has seized upon as the ground for considering that the applicant was unfit to hold a firearm license. Fundamentally it was the applicant's former affiliation to a proscribed organisation";

and further, at [43] - in the context of the additional information of which no gist was provided – he said that:

> "The reality is that the applicant was aware of the substance, if not the minutiae, of the case against him and had an opportunity to respond to it";

and that the judge considered that this response was taken into account and:

> "... that is sufficient to satisfy the requirements of fairness as per *JR20*."

[35] We agree that the conclusion that the appellant was aware of the substance of the additional information (rather than of that which gave rise to the first judicial review application) was incorrect. The information considered by the Minister included information of which the appellant was unaware before the decision was taken, and of which no gist was provided to him. The nature of that information and the part it played in the impugned decision was not known to the first instance judge. On receipt of the gist in the first judicial review the appellant had submitted detailed representations supported by a significant body of written material said to vouch those representations. The judge did not know what the impact of those detailed representations were on the decision maker because no reasons were given for the impugned decision. As for the new material the very existence of that material was improperly withheld from the appellant on national security grounds prior to the taking of the impugned decision. We say improperly because it was conceded after the decision was taken that there were no valid national security grounds justifying this failure to disclose this important fact. If the goalposts were being moved the appellant was entitled to be made aware of that fact which is a

separate issue from disclosing the content. Furthermore, had this fact been disclosed representations could have been made and we shall return to this below. The judge did not address the procedural impropriety of the failure to disclose this fact. It is therefore clear that the appellant's failure to make any representations was a failure brought about by the respondent not providing the appellant with the information he required to make any necessarily informed submissions.

[36] As already pointed out the judge did not know and could not know of the impact on the Minister of the detailed representations advanced by the appellant to rebut the gisted material. Equally, the judge did not know the impact of the material that he had not seen. This was in circumstances where the decision maker had given no reasons for its decision. For all we know it could have been the sole or decisive factor in reaching the impugned decision. Further, the judge's decision was made without any adjudication on the extant discovery application and there were no countervailing safeguards to meet the serious disadvantage to the appellant flowing from the complete non-disclosure of material potentially decisive as to the result. The judge seems to have assumed that the new material related to the gisted reason and that it therefore followed no procedural unfairness can have resulted. That is not a safe assumption when the material has not been seen by the court and where no countervailing safeguards were deployed such as a closed material procedure.

[37] It appears that there has been or may be a systemic problem regarding the provision of sufficient information to those affected by revocation decisions. This is perhaps reflected in the number of cases in which information was withheld on public interest/national security grounds, even by way of gist, before any impugned decision was made. A troubling aspect is that in those other cases, as in this case, when the respondent's complete non-disclosure is challenged, by way of an application for discovery or otherwise, the respondent reverses its position and the gist which was hitherto not possible on public interest grounds becomes disclosable. This appears to be a recurring feature which has resulted in fresh decisions having to be taken giving the affected party the opportunity to make representations in respect of the belatedly and unjustifiably withheld gisted material that could and should have been furnished earlier. This potentially systemic issue has attracted the concern of officials worried inter alia about the mounting costs awarded against the respondent because of the late disclosure, aborted judicial reviews and the need to make fresh decisions in light of the representations made possible by gisting. In a briefing paper to Minister Hopkins which commences at page 728 of the Book of Appeal our attention was drawn to the following two paragraphs:

> "27. In the current JR, Minister Murrison pressed for a 'gist' to be made available but was told it would not be in the public interest to do so. Subsequently, officials also attempted, but failed, to convince [redacted] to provide a 'gist' in order that we could avoid a JR, and warned them of our concern that a 'gist' would be made available during the JR and what the outcome of this would be.

28. [redacted]

29. In each of the following cases [redacted] have refused to release a 'gist' or further 'gist' of adverse information after examination by the NIO Minister, only to release information during JR proceedings, thereby causing us to concede the JR and the Secretary of State to bear costs. Each of these cases cost (or is expected to cost) approximately [redacted] as we have to pay costs to the other side, court costs and fees to our own Counsel: [there then follows a list of 7 cases the names of the first six being redacted; the seventh is this applicant]".

The problem of deficient disclosure is exacerbated by the fact that the decision maker, as in this case, gives no meaningful reasons for his decision.

[38] The judge in this case did not see the materials, the discovery application was not adjudicated upon and there were no countervailing safeguards to offset the disadvantage that the appellant faced as a result of the failure in the first instance to even alert the appellant that unspecified new material was going to be taken into account by the decision maker. Had that been done the appellant could have made representations, for example, as to why as a matter of procedural fairness in this particular case the issue of disclosure by way of gisting or otherwise needed to be anxiously scrutinised. A discovery summons was sufficient in the first judicial review to cause the Minister to gist that which was previously claimed to be undisclosable on national security grounds. Who knows what might have resulted from well marshalled submissions from the appellant's legal team to the Minister. At least it would have been an alternative voice to the owners of the material who wrongly claimed to the Minister that even the fact of the material and not just its content had to be protected on NS grounds. In its response dated 24 February 2021 to the pre-action protocol letter the Crown Solicitor's Office stated:

> "It is accepted that no gist of the further security information that was considered has been provided in the affidavit. The respondent's position was (at the time that the decision was made and at the time the affidavit was sworn) and remains that it is not possible to gist the information.
>
> It is also accepted that the applicant was not made aware that new information was being considered before his appeal was redetermined. Although no relevant documents have been identified in this regard the deponent recalls that the concern was about whether disclosure of the new information at that time might itself

> prove problematic in national security terms. It was subsequently determined, in swearing the affidavit, that it was not. None of that is however relevant or material, given that it remains the Respondent's position that it was, and is, not in any event possible to provide the applicant with any gist of the said information. There is nothing that he could have contributed in response and no procedural unfairness arises. The question as to what could and could not be gisted is an operational one and not a legal one."

[39] One can see how confidence in the Article 74 process can be undermined by (i) the failure to disclose in the first judicial review; (ii) the failure to disclose even the existence of the new material in the second judicial review; (iii) the unjustified assertion of national security as the ground for withholding the fact of the existence of the new material; (iv) the volte face in the respondent's pre-action protocol ("PAP") response; (v) the conflict in the chronology between the PAP response and the affidavit evidence and (vi) the untested maintenance of the ongoing position that not even a gist can be given; and, (vii) the absence of any affidavit evidence from the Minister or anyone else addressing (i)–(iii) above. Sufficient scrutiny and countervailing safeguards lie at the heart of the judicial assessment of whether the objective standards of procedural fairness have been met in a given case. Non-disclosure, absence of reliable scrutiny and absence of reasons can be a potent source of unfairness especially when not accompanied by procedural safeguards to mitigate the obvious risks. It is difficult to have confidence when the respondent's scrutiny failed in the first judicial review to produce any gist until the wholesale non-disclosure was challenged resulting in a gist and the ending of the first judicial review to enable a fresh reconsideration, taking account of the detailed representations made possible by the gist. Confidence and trust is further eroded when the respondent (with a different Minister retaking the fresh reconsideration) failed to acknowledge or disclose even the fact that new material was to be considered. This is especially so when there is no satisfactory or any explanation given for the false attribution of public interest/national security in the first instance, the person who gave the false designation is not identified nor are the circumstances in which the assertion came to be made. One assumes that the person(s) who claimed public interest in non-disclosure of the contents was the same as the person(s) who asserted the same public interest justifying non-disclosure of even the *existence* of the material. The Minister was misinformed that even the existence of the material had to be protected from disclosure on the basis of PI/NS. Had he known this was a baseless claim it may have caused him to make more searching inquiry or to take a different course of action in relation to disclosure.

[40] The appellant submitted that an appeal on paper to the Secretary of State, determined behind closed doors, does not comply with ECHR standards. Further, it is contended that the availability of judicial review does not rescue the situation, since the court has limited fact-finding capability and does not enjoy full jurisdiction

to review on the merits. Our attention has been drawn to the provisions in England & Wales which expressly make clear that the appeal available to the court 'shall be determined on the merits and not by way of review': see section 44(2) of the Firearms Act 1968.

[41] In England and Wales, a firearms holder whose FAC is interfered with by police, or someone who has had a firearms application refused by police, has the right of appeal to the Crown Court. Similarly, in Scotland such an aggrieved person has a right of appeal to the sheriff court. In the Republic of Ireland, such a person may appeal to their local district court. As such, in each neighbouring jurisdiction an aggrieved person can appeal to a court which affords an oral hearing in public.

[42] It follows that all of the jurisdictions in the British Isles, except Northern Ireland, have arguably enhanced procedural safeguards via statutory provisions establishing a court based system for determining whether a person's firearms licence should be revoked or not. Standards which the appellant contends sit more comfortably with the Convention framework. In contrast, the system in Northern Ireland does not involve the courts in making such decisions. The power of revocation vests in the Chief Constable with a right of appeal to the Secretary of State. The only role for the court is by way of judicial review where the High Court exercises its supervisory jurisdiction to review the lawfulness of the impugned decision in accordance with established public law principles. The difference of approach between NI and all the other jurisdictions in the British Isles together with article 6 of the ECHR and article one the First Protocol (A1P1) have been a catalyst for the contention that the current statutory framework is incompatible with the ECHR and with the requirements of the common law. This latter contention has already been the subject of consideration at appellate level in the case of *Chalmers Brown* [2003] NICA 7 and in decisions of the High Court which have firmly rejected the contention. The appellant contends that the case of *Chalmers Brown* needs to be revisited in light of European jurisprudence which emerged after the Court of Appeal decision in *Chalmers Brown*. Although there has been at least one first instance decision in which the matter was considered in light of the European jurisprudence the fact remains that the matter has not been reconsidered at appellate level in light of the European jurisprudence. The respondent is therefore invited to indicate whether leave is still opposed on the additional grounds. We will also hear the parties as to remedy in respect of our substantive decision allowing the appeal.