Neutral Citation no. [2008] NIQB 86 **FINAL** *Ref:* **COG7245**

Judgment: approved by the Court for handing down *Delivered:* **3/9/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GARY McILVEEN FOR JUDICIAL REVIEW

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COGHLIN J

[1] In this case the applicant, Gary McIlveen, is the Managing Director of Communications Systems (GMcE) limited a firm that specialises in the installation and maintenance of alarm and security systems at residential and commercial premises. The company's activities include business relationships with the Ministry of Defence ("MOD") and Police Service of Northern Ireland ("PSNI"). As such, the company requires a level of security clearance. The applicant seeks judicial review of a decision by the PSNI to remove the company from the list of compliant security companies. Mr McGleenan appeared on behalf of the applicant while the respondent was represented by Mr McMillen. I am grateful to both sets of counsel for their carefully prepared and well presented written and oral submissions.

Background Facts

[2] The applicant's company has been involved in the security systems business for a number of years and, prior to the impugned decision, it employed six people, three of whom were the engineers who installed, serviced and maintained the alarm/security equipment. The applicant is the Managing Director and the only other director is his wife. An administrator was employed to manage the business. The applicant maintains that all of the installation, maintenance and monitoring work is carried out by the engineers while his role is one of marketing and management. When contacted by security consultants or contractors and invited to tender for alarm contracts the applicant's function is to estimate the value of the job and submit tenders. In his affidavits the applicant has asserted that he does not now, and has not

for many years, personally attended upon premises in which alarms/security systems have been installed.

[3] On or about 28 July 2005 the applicant, together with another individual, was charged with the offence of blackmail contrary to Section 20 of the Theft Act (Northern Ireland) 1969. A Bill of Indictment was laid before the Crown Court in Belfast on 2 September 2006 when a further count was included alleging that the applicant had in his possession on 27 July 2005 a weapon adapted for the discharge of electricity contrary to Article 45(1) of the Firearms (Northern Ireland) Order 2004. The latter charge related to a "stun gun" which had been found by police on a shelf in the kitchen of the applicant's home during the course of a search carried out on 27 July 2005. The applicant asserted that he acquired this weapon for the purposes of personal protection as a consequence of threats of violence that he had received from a nephew, Richard McIlveen. In his affidavits he has stated that he purchased the device on the internet and was not aware that to do so was unlawful or that he required a licence.

[4] The applicant was acquitted by the jury of the offence of blackmail but he pleaded guilty to the offence of possession of the stun gun. On 22 February 2008 His Honour Judge Finnegan dealt with the applicant by the imposition of a fine of £500. At the time of imposing such penalty the learned judge had the benefit of a pre-sentence report from a probation officer. His sentencing remarks included the observation that the applicant was a person of good character and that he was prepared to accept the reasons put forward as to the circumstances under which he had come to possess the stun gun.

[5] On 14 March 2008 Sergeant McNeely, Deputy Crime Prevention Officer, wrote to the applicant notifying him that in accordance with PSNI Police Response to Security Systems Policy PDO1/06 (the "policy") paragraphs 7.10.3 and 7.10.4 the applicant was "UNSUITABLE". On 7 April 2008 the applicant's solicitor wrote to Sergeant McNeely asking him to set out in full the reasons for regarding the applicant as unsuitable. On 15 May Sergeant McNeely again wrote to the applicant explaining that the decision to return his vetting application marked as unsuitable was due to his conviction of the offence of unlawful possession of a prohibited weapon. He also confirmed that the company would be removed from the list of compliant security companies and that he would write to existing customers informing them that they would have to chose another approved security company or lose the benefit of police response to their alarm systems. He also gave notice that the PSNI would inform SSAIB, the relevant registration authority, of the removal of the company from the compliant list. On 21 May SSAIB wrote to the applicant confirming that they had been informed by the PSNI of the removal of the company from the compliant list and indicating that, as a consequence, the registration of the company would be terminated in 21 days.

[6] On 7 July 2008 Detective Inspector David Connery, Senior Crime Prevention Officer, wrote to the applicant in response to the application for leave to apply for judicial review of the decision to remove the company from the list of compliant security companies. The Detective Inspector explained that he considered the conviction of possession of the stun gun to be a relevant conviction for the purposes of paragraph 7.10.2 of PDO1/O6 since a stun gun was a prohibited weapon which was not available in Northern Ireland and therefore considerable effort must have been taken to acquire it and that the sole purpose of such a weapon was to incapacitate, there being no innocent reason for its possession. The Detective Inspector confirmed that he had considered correspondence from the applicant's solicitors and taken into account the position that he held within the company. Having done so, he was not persuaded that the conviction was a matter of little consequence "…..especially in view of the fact that part of your business involves the installation of security systems qualifying for a police response and thus access to the premises of individuals and companies."

The Policy

[7] The relevant policy directive is PD01/06 implemented on 9 February 2006 with the current version being issued on 11 December 2007. The relevant sections of the policy provides as follows:

> **"7.10 Compliant Companies Installing Type A Systems**
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> 7.10.1 To identify companies conforming to this Policy the Police Service of Northern Ireland hold a list of compliant companies. Inclusion on the list does not mean that the police have inspected the company, or its work. Only companies so listed may install, maintain and/or monitor type A systems in Northern Ireland. Where a company loses police recognition under this policy, its existing customers will have three months in which to make alternative maintenance/monitoring arrangements.
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> 7.10.2 Companies applying for inclusion on the above list must do so using form **Appendix B** and must:
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> (*a*) be inspected and recognised by an independent inspectorate body as at paragraph 7.4.2; and
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> (*b*) not have as a principle or employee in the surveying, sale, installation, monitoring,

maintenance or administration of security systems, persons with relevant criminal convictions (other than spent convictions). Relevant convictions include but are not limited to those involving violence, dishonesty, sexual offences or drugs. Form **Appendix C** sets out the procedure for the implementation of this requirement and all decisions, by Crime Prevention, on whether a person is suitable or unsuitable will be documented and audited.

7.10.3 Whilst convictions will only prevent a person from being deemed suitable if they are 'relevant', **every** unspent conviction (including motoring offences) must be declared, by applicants as a decision as to what convictions are 'relevant' rests with the Senior Crime Prevention Officer.

7.10.4 Applicants for employment with compliant security companies **must not be appointed** to posts involving the sales, surveying, installation, monitoring or administration of security systems until written notification is received from Crime Prevention that they are suitable."

The Applicant's Submissions

[8] The applicant submits that the respondent failed to provide the applicant with any or adequate reasons for the relevant decision and failed to afford him an opportunity to make representations or otherwise respond and that, in such circumstances, the decision was:

(i) Taken in breach of the requirements of procedural fairness;

(ii) Taken in breach of the requirements of Article 6 of ECHR:

(iii) That the relevant decision was irrational insofar as Detective/Inspector Connery erroneously took into account the fact that the applicant was a person who would attend upon the premises of clients to install, maintain, supervise or respond to alarms or security systems when determining that his conviction was 'relevant'.

[9] During the course of the hearing Mr McGleenan founded his primary argument upon the failure by the respondent to adhere to the principles of procedural fairness. He referred the court to paragraph 7.043 of De Smith, Woolf and Jowell `Judicial Review of Administrative Action' and to the level of disclosure referred to by the learned authors at paragraph 7.057 with

particular regard to the need to provide the subject of a decision with sufficient information to enable him to comprehend and respond to the case against him and make "meaningful and focussed representations". Mr McGleenan also referred to the observations of Weatherup J in Re Watters [2008] NIQB 74 when he said at paragraph [34]:

> "[34] In general it is a central requirement of procedural fairness that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected and the statutory context may allow disclosure of the substance of the material facts and may not require the details or the sources of those facts. In the context of prison management and the assessment of the needs of good order and discipline within the prison and the need to protect sources of information there may be necessary limitations on the extent of disclosure of such information to a prisoner. R (Doody) v. Secretary of State for the Home Department [1994] 1 AC 531 at 560."

Mr McGleenan submitted that the court should subject the decision-making process in the circumstances of this case to particularly close scrutiny in the context of a procedure that did not include any appeal mechanism. By way of contrast he drew the court's attention to the manner in which the respondent had dealt with the question of renewal of the applicant's firearms licence proceeding, initially, by way of a "minded to" letter that included an invitation to make any comments or representations before a final decision was made.

The Respondent's Submissions

[10] On behalf of the respondent Mr McMillen reminded the court that two decisions had been taken by the respondent. These were, initially, the decision that the applicant was `unsuitable' on 14 March 2008 and, subsequently, the decision to remove the company from the compliant list on 15 May 2008. Mr McMillen submitted that the decision of 15 May necessarily followed on from the earlier decision of 14 March but he noted that the latter had not been made the subject of any criticism in the applicant's Order 53 statement. He accepted that the letter of 14th March should have contained a reference to paragraph 7.10.2 of the policy. Mr McMillan further submitted that the question of the relevance of the applicant's conviction of possession of the stun gun was essentially a matter for the exercise of Detective Inspector Connery's discretion in accordance with the policy and, as such, could only be challenged as being Wednesbury unreasonable. He argued that, in the circumstances of this case, the respondent had not been under a duty to

provide the applicant with any further information other than that he had become `unsuitable' because of his conviction and that it was enough that he was head of a company part of the business of which involved the installation of security systems in public and private premises. To the extent that there had been any failure to comply with the requirements of procedural fairness Mr McMillen submitted that the plaintiff's solicitors had a clear opportunity to make whatever representations their client wished to advance in their letter of 7 April 2008 and, subsequently, during the judicial review proceedings .

Conclusion

[11] It is generally regarded as a fundamental principle of the common law that an individual who may be adversely affected by a decision should be given advance notification of the central issue which the decision maker must address. The corollary of the right to notification is the opportunity to respond and this, in turn, generally requires disclosure of material facts and/or reasons to the party affected. However, fairness, by its very nature, is and must be a flexible concept and the application of the principles of procedural fairness must always take into account the circumstances of the particular case including, for example, the nature and application of the relevant decision, the character of the decision making body, any relevant statutory or policy context, the urgency of the decision, the relationships between the relevant parties etc. In this case the respondent argues that the reasons for the decision must have been obvious to the applicant who had pleaded guilty to a criminal offence and that his solicitors had been afforded an opportunity to make any relevant representations in the letter of 7 April and, subsequently, during the judicial review proceedings. While the letter of the 7 April certainly did not do the applicant's case any favours by appearing to trivialise the criminal offence, I bear in mind that no reasons at all had been given by the respondent at that stage. Ultimately, it seems to me that, in this type of situation, it is helpful to bear in mind the frequently cited views of Bingham LJ (as he then was) in an article `Should Public Law Remedies be Discretionary' [1991] PL 64 at 72 when he said:

> "(1) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could or would have put if he had had the chance.
>
> (2) As memorably pointed out by Megarry J in John v Ross [1970] Ch 345, 402 experience shows that that which is confidently expected is by no means always that which happens.
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> (3) It is generally desirable that the decision-maker should be reasonably receptive to

> argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
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> (4) In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.
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> (5) This is a field in which appearances are generally thought to matter.
>
> (6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."

[12] In this case the removal of the applicant's company from the compliant list will undoubtedly have a significant adverse impact upon the success of his business and, in such circumstances, while he has clearly been convicted of a serious offence, it does not seem to me that the letters from Sergeant McNeely of 14 March and 15 May 2008 complied with the relevant requirements of procedural fairness. Indeed, it does not appear that any consideration seems to have been given by the respondent to the potential application of the principles of procedural fairness to this type of decision and I consider that there is substance in the comparison drawn by Mr McGleenan with the approach of the Firearms and Explosives Branch. In the course of his written and oral submissions Mr McGleenan argued that, as a consequence of the respondents failure to comply with procedural fairness, the applicant had been prevented from making highly relevant representations that would have served to correct the respondent's mistaken assumption that the applicant himself was a person who would regularly be present on the relevant premises in the course of installing, maintaining or responding to Type A alarm systems. That the respondent clearly did make such an assumption is reflected in the words of Detective Inspector Connery's affidavit at paragraph 12 when he said:

> "It was my view that a person who feels that he needs to arm himself with a weapon that is unlawful per se and who will be called upon to attend the premises of clients to fit and maintain alarms and to check alarm actions is not a suitable person."

In the course of a replying affidavit sworn on 7 August 2008 the applicant roundly rejected the accuracy of that assumption maintaining that he had not attended upon the premises of any clients for many years. He relied upon the Service Report logs of two of his engineers and explained that he did not have such a book because he did not install or maintain any alarm systems. On the other hand, during the decision making process, neither the applicant nor the respondent referred to the pre-sentence report in which the applicant was recorded as informing the probation officer that he needed to have a certain level of security clearance to facilitate his access to, for example, prisons, airports and the homes of high profile personnel who may have a requirement for CCTV or special alarm systems. The applicant may or may not have a satisfactory explanation for this passage in the pre-sentence report consistent with the case made in his affidavits. It is clearly a point that needs to be properly considered

[13] In the circumstances I propose to quash the decision and direct that the matter be further reconsidered in accordance with the principles of procedural fairness in circumstances in which both parties have an adequate opportunity to make representations and provide reasons. Taking into account the history of the matter to date, it seems to me that it would be appropriate for any such further reconsideration to be carried out by an alternative decision-maker.