

Neutral Citation No: [2019] NIQB 92

Ref: KEE11093

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 24/10/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY GERARD McGUINNESS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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

KEEGAN J

Introduction

[1] This is an application for leave to apply for judicial review brought against the Secretary of State for Northern Ireland ("Secretary of State"). The applicant is a person prohibited from possessing firearms and/or ammunition by virtue of Article 63(2) of the Firearms (Northern Ireland) Order 2004 ("the 2004 Order").

[2] Article 63 of the 2004 Order reads as follows:

"Prohibition of possession, etc. of firearm by certain persons

63.—(1) Subject to paragraph (7), a person who has been sentenced to—

(a) Imprisonment; or

(b) Detention in a young offenders centre,

shall not at any time purchase, acquire or have in his possession a firearm or ammunition unless the term of imprisonment or detention to which he was sentenced was less than three years.

(2) Subject to paragraph (7), a person who has been sentenced to—

(a) Imprisonment for a term of three months or more but less than three years; or

- (b) Detention in a young offenders centre or a juvenile justice centre for such a term,

shall not at any time before the expiration of the period of eight years from the date of his conviction, purchase, acquire or have in his possession a firearm or ammunition.

(3) Subject to paragraph (7), while a person is prohibited by Section 21 of the Firearms Act 1968 in Great Britain from having a firearm or ammunition in his possession, he shall also be prohibited from purchasing, acquiring or having in his possession a firearm or ammunition in Northern Ireland.

(4) Subject to paragraph (7), a person who has been sentenced to detention during the pleasure of the Minister of Justice under Article 45(1) of the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9) shall not purchase, acquire or have in his possession a firearm or ammunition.

(5) A person shall not, while he is subject to—

- (a) A recognizance to keep the peace or to be of good behaviour, a condition of which is that he shall not possess, use or carry a firearm;
- (b) A probation order containing a requirement that he shall not possess, use or carry a firearm, or
- (c) A licence under Article 46 of the Criminal Justice (Children) (Northern Ireland) Order 1998,

purchase, acquire or have in his possession a firearm or ammunition.

(6) A person who contravenes any of the foregoing provisions of this Article shall be guilty of an offence.

(7) A person prohibited under paragraph (1), (2), (3) or (4) from purchasing, acquiring or having in his possession a firearm or ammunition may apply to the Secretary of State to remove the prohibition.

(7A) Where an application is made to the Secretary of State under paragraph (7) for the removal of prohibition, the Secretary of State must:

- (a) Remove the prohibition,

- (b) Refuse the application,
- (c) Refer the application to the Minister of Justice.

(7B) But the Secretary of State may act under paragraph (7A)(a) or (b) only if the Secretary of State's view that the prohibition should be removed or the application should be refused is arrived at (wholly or partly) on the basis of information the disclosure of which may, in the view of the Secretary of State, be against the interests of national security.

(7C) Where an application is referred to the Minister of Justice under paragraph (7A)(c), the Minister may remove the prohibition or refuse the application."

[3] The applicant challenges the proposed respondent's failure to process his application for removal of the prohibition referred to in Article 63(7A) to (7C) of the 2004 Order. The applicant seeks the following primary relief:

- (i) A declaration that the Secretary of State for Northern Ireland is in breach of the mandatory requirement of Article 63(7A) of the 2004 Order to refer the applicant's Article 63(7) application for removal of a prohibition to the Minister of Justice.
- (ii) A declaration that, by virtue of the failure of the Secretary of State to refer his Article 63(7) application to the Minister of Justice, the applicant has been deprived of a determination of his application within a reasonable time.
- (iii) A declaration that, in the absence of an effective discretion under Article 63(7C), the Article 63(2) prohibition is an unlawful prohibition of blanket application, constituting a disproportionate interference with the right to peaceful enjoyment of possessions contrary to Article 1 of the First Protocol ECHR.
- (iv) A declaration that the said decision is unlawful, ultra vires and of no force and effect.
- (v) An order that the matters be reconsidered and determined in accordance with law.
- (vi) Such further or other relief shall seem just.
- (vii) Costs.

(viii) All necessary and consequential directions.

[4] It will be apparent from the above that the applicant's core challenge is based upon alleged illegality. The applicant contends that the impugned decisions were unlawful in the following respects:

- (a) The failure of the Secretary of State for Northern Ireland to refer the applicant's application to the Minister of Justice is in breach of the mandatory requirement to do so imposed by Article 63(7A) of the 2004 Order.
- (b) By virtue of the failure of the Secretary of State for Northern Ireland to refer the applicant's application to the Minister of Justice, the applicant has been deprived of a determination of his Article 63(7) application within a reasonable time (in breach of the duty to act within a reasonable time implicit in the statutory scheme of 2004 Order, or imposed by virtue of the general law principle that the decision-maker must act reasonably).
- (c) The effect of the Secretary of State for Northern Ireland's failure is to cause the Article 63(2) prohibition to become (contrary to the intention of the legislature) a measure of blanket application with no provision for consideration of the individual case, constituting a disproportionate interference with the right to peaceful enjoyment of possessions contrary to Article 1 of the First Protocol ECHR.

The evidence

[5] The evidence of the applicant is contained in his affidavit which is dated 24 May 2019. In this, the applicant states that on 28 February 2018 he was sentenced at Belfast Crown Court to 18 months imprisonment (suspended for 2 years), imposed concurrently following pleas of guilty to three offences of fraud by way of abuse of position. The applicant states that these offences related to his failure to discharge his duties as executor of the will of his late uncle. The applicant then confirms that following this sentencing he received a notice of refusal and notice of revocation in relation to his firearms each dated 12 April 2018 and that these were issued on the basis and as a consequence of his sentencing.

[6] As a result of the notices the applicant became a person prohibited from possessing firearms and/or ammunition by virtue of Article 63 of the 2004 Order. The applicant explains that each notice advised him that he might apply to the Northern Ireland Office ("NIO") for removal of the prohibition. He refers to the fact that he has taken that opportunity. The applicant then states that he is advised and believes that the circumstances of his application are such that the Secretary of State is required to refer the application to the Minister of Justice (as a decision on his application would not involve the consideration of information, the disclosure of

which may be against the interests of national security). The applicant contends that the Secretary of State has not referred his application to the Minister of Justice and that “he cannot as no Minister of Justice presently holds office”. The applicant concludes his affidavit by commenting that as a result his application remains undetermined and it cannot be said when a determination will be available.

[7] The applicant’s solicitor Mr MacDermott has also filed an affidavit dated 24 May 2019 in which he helpfully sets out the relevant correspondence in this case. In particular he confirms that:

“By letter dated 22 August 2018 and follow up letter of 12 October 2018 on behalf of the applicant the Secretary of State was asked to confirm how an application for removal of the Article 63 prohibition would lawfully be determined in circumstances engaging 63(7A) and (7C) of the 2004 Order.”

[8] Mr MacDermott then refers to a response from the NIO dated 29 October 2018 which declined to engage with this issue in the absence of an application in the applicant’s case.

[9] Mr MacDermott confirms that by cover of a letter dated 13 December 2018 the applicant made an application as advised. By letter dated 11 February 2018 the Crown Solicitor’s Office replied and stated as follows:

“The present position is that the NIO are awaiting the report from PSNI which is expected immediately. If no adverse trace is reported, the application will then be sent immediately to the Department of Justice to make a decision on the application.”

[10] By letter dated 27 February 2018 the NIO also stated that:

“Your client’s application is to the Secretary of State under Article 63 of the Firearms (Northern Ireland) Order for the removal of the statutory prohibition, which prevents him from holding a firearm or ammunition.

As a consequence of the devolution of policing and justice from 12 April 2010 your client’s appeal will be transferred from the Secretary of State to the Department of Justice by virtue of Article 63 as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. There has been no delay in processing your

appeal during this time and all reports have been forwarded by DOJ.”

[11] Mr MacDermott then refers to a letter dated 28 February 2019 from the Department of Justice which provided a copy of Notes for Guidance in respect of applications for the removal of prohibition. He points out that the letter concludes with the following lines:

“Please be aware that as there is currently no Minister of Justice your client’s application will be prepared and held in abeyance until a Minister is appointed.”

[12] Mr MacDermott concludes by exhibiting the pre-action correspondence which began with his letter of 8 April 2019. He also refers to the response received on 2 May 2019 from the Crown Solicitor’s Office which contains the statement that as the decision on the applicant’s application would not involve the consideration of information the disclosure of which may be against the interests of national security:

“the Secretary of State did not have the power to determine the application and was required by statute to refer it to the Minister of Justice”

and that

“Pending appointment of a Minister of Justice, the Secretary of State’s position is that the 2004 Order applies. It contains an express default outcome, namely the statutory prohibition upon possession of a firearm and ammunition, unless removed by decision of the Minister of Justice.”

The arguments

[13] I commend both counsel for the economy and skill with which they presented the legal arguments in this case. Mr Sayers BL appeared for the applicant and Mr McLaughlin BL for the proposed respondent. In essence Mr Sayers argued that public law unlawfulness could be established in this case because there had been no determination within a reasonable time and so the prohibition under the legislation had become absolute. As such, he argued that the SoS had acted in an unlawful manner. Mr Sayers did not accept that a referral had been made to the Minister as he said it had simply been made to the Department. Mr Sayers relied on the case of *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 and drawing from that authority he contended that this case amounted to an unlawful exercise of power because there was effectively a blanket prohibition in place. Mr Sayers also mentioned a Convention point relying on the case of *Re Brown’s Application for Judicial Review* [2003] NICA 7 (applied in *Re GMJ’s Application* [2014] NIQB 135 and *EH v Minister of*

Justice [2017] NIQB 107) however he accepted that *Brown* was a Court of Appeal authority and that it was not the core issue in this case.

[14] In response, Mr McLaughlin pointed out that there was no challenge to the security assessment in this case. He also stressed the point that this decision required to be taken by the Minister of Justice. Mr McLaughlin also contended that the Secretary of State had no residual power unlike an argument mounted in *JR80* [2019] NIQB 43. Finally, Mr McLaughlin argued that the referral had been made by the Secretary of State on the basis of the correspondence of 27 and 28 February 2019 referred to above. Overall, Mr McLaughlin made the case that no unlawfulness attached to the Secretary of State by virtue of the process that had been followed. He also made the point that the *Hirst* case is not applicable as there is no absolute prohibition in this case. Rather, he said that the applicant's predicament is a product of the political situation which means that there is no Minister of Justice in place rather than any unlawfulness on the part of the Secretary of State.

Conclusion

[15] This is an application for leave to apply for judicial review. It is clear that all of the material upon which the parties wish to rely was before this court given that this case turns on alleged public law illegality flowing from a statutory obligation. In those circumstances I must decide whether there is "*the demonstration of an arguable case with a reasonable prospect of success*" see paragraphs [5] and [43] of *Omagh District Council v The Minister with Responsibility for Health, Social Services and Public Safety* [2004] NICA 10 and paragraph [8] of *The Chief Constable PSNI's Application* [2008] NIQB 100.

[16] I have considered all of the papers and the submissions of counsel and having done so I consider that the applicant has not established an arguable case with a reasonable prospect of success for the following reasons:

- (i) The terms of the 2004 Order are clear. There was no argument in relation to the national security assessment. It is therefore clear that the application has to be decided by the Minister of Justice.
- (ii) In my view the correspondence highlighted by Mr McLaughlin also establishes the fact that this matter was referred by the Secretary of State in accordance with the statutory provisions.
- (iii) The correspondence also shows that the matter has been taken up by the Department of Justice and "*held in abeyance whilst a Minister for Justice is appointed.*"
- (iv) There is no blanket prohibition in this case unlike the case of *Hirst* given that in certain circumstances the prohibition can be removed under the statutory scheme.

- (v) The fact that it has not been removed in this case is not due to any unlawfulness on the part of the Secretary of State, it is simply down to the regrettable political situation which means that no Minister of Justice is in place at present to undertake this task along with many other tasks.
- (vi) It was accepted that the point raised in relation to the Article 1 of the First Protocol ECHR has been determined in the case of *Brown* by the Court of Appeal which is binding upon me. I should say that in another case I am being asked to look at this issue, but in any event, as Mr Sayers realistically accepted, the point is ancillary to the alleged illegality. As such it is not necessary to consider the point any further in this case, the core challenge having failed.

[17] Accordingly, whilst I can well understand that the applicant is frustrated by the fact that his application cannot be dealt with at the moment, I can find no unlawfulness in relation to the actions of the Secretary of State who is the subject of the challenge. I am not satisfied that there is an arguable case with a reasonable prospect of success and consequently the application for leave to apply for judicial review is dismissed.