

IN THE SUPREME COURT OF BELIZE, A. D. 2018

CLAIM NO. 312 OF 2018

(DARRELL USHER CLAIMANT

(

BETWEEN (AND

(

(COMMISSIONER OF POLICE DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Anthony Sylvestre of Musa and Balderamos for the Applicant

Ms. Leonia Duncan, Senior Crown Counsel, for the Solicitor General for the Respondent

J U D G M E N T

1. This is an application for leave for judicial review of the decision of the Commissioner of Police revoking a gun license issued to the Applicant, Cpl. Darrell Usher. The parties agreed that the hearing of this application would be by way of written submissions filed and exchanged. The Respondent is

objecting to leave being granted to the Applicant, saying that the process by which the license was revoked by the Commissioner of Police was fair, so there is no basis for the court to grant leave for judicial review. The Applicant contends *inter alia* that the process was flawed in that the Commissioner did not grant natural justice to the Applicant before revoking the license and the Commissioner had no basis upon which to revoke the license under the Firearm Act. The court now reviews these submissions filed on behalf of the Applicant and the Respondent and gives its decision.

2. The Applicant Darrell Usher is a Corporal of Police. He joined the Police Force on September 9th, 2001 and he has served as an officer in the Belize Police Force for eleven of the seventeen years since he became a member. He was issued with a firearm license in respect of a 9 mm pistol at all material times. Cpl. Usher has a wife and infant daughter. He has served with distinction in various intensive arms of the police department, including the Patrol Branch and the Special Patrol Branch (formerly Dragon Unit). The Special Patrol Unit is a specialized unit tasked to address gang, drug and gun crimes just to name a few. The Applicant was therefore engaged in numerous operations in Belize City targeting gang ridden areas. On 19th January, 2018 the Applicant received a letter from the Commissioner of Police requesting the Applicant

to provide reasons why his firearm license should not be revoked. The said letter cited two allegations made against Cpl. Usher: (i) in respect of Cpl. Usher being charged for drug trafficking on 13th March, 2017; and (ii) in respect to an allegation made against Cpl. Usher by one Moses Middleton. Cpl. Usher responded to the letter from the Commissioner of Police through his then attorneys Bradley & Company outlining that the first matter in respect of his charge for the offence of drug trafficking was the subject of court proceedings and therefore no final determination could be made on that issue just yet, and in any event the allegations did not suggest the Applicant had *“improperly and intemperately used his licensed firearm”*. In relation to the second matter raised in the letter from the Commissioner of Police, the Applicant’s then attorneys pointed out that the Applicant was not provided with a copy of the purported *“police investigation”* relating to the Moses Middleton allegation nor was the Applicant provided an opportunity to present his version of events. On March 13th, 2018 the Commissioner of Police sent Cpl. Usher a letter revoking his gun license and it is this decision for which the Applicant now seeks leave for this court to review.

Legal Submissions on behalf of the Respondent

3. Ms. Leonia Duncan submits on behalf of the Respondent that the court should refuse to grant leave to the Applicant for judicial review. She argues that the Applicant has failed to demonstrate that there is an arguable case with a realistic prospect of success and that there is a ground for seeking judicial review. Learned Counsel cites Lord Diplock in ***O'Reilly v Mackman*** [1983] 2 AC 237 who stated that the purpose of the leave requirement in judicial review proceedings was to protect public administration against false, frivolous or tardy challenges to official action. Lord Diplock also stated ***R v. Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd.*** [1980] 2 ALL ER 378 that the purpose of the requirement for leave to be granted is *“to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error...”* Ms. Duncan contends that since judicial review is concerned with ensuring that the decision making process was fair rather than whether it was correct, the Court can look at case at bar and see that the process was fair. The Applicant was informed of reasons for considering the revocation of his license, he was asked to give reasons why it should not be revoked and he was informed of the decision to revoke it after the contemplation and determination of the matter. Ms. Duncan submits that

the Applicant does not have an arguable case and even if he did, he does not have a realistic prospect of success. On this basis, leave for judicial review should not be granted.

Legal Submissions on behalf of the Applicant

4. Mr. Anthony Sylvestre on behalf of the Applicant argues that the Commissioner of Police has a duty, in the exercise of his statutory powers, to act fairly and to follow the time hallowed principles of natural justice. The decision of the Respondent to revoke the Applicant's gun license is unreasonable, irrational and contrary to law. As a result of the Respondent's decision, the Applicant can suffer irreparable harm as he does not have a firearm for the protection of himself and his family. Learned Counsel further argues that there has been an upsurge in violent crimes being committed against innocent and law abiding citizens, and the Applicant is fearful that if those criminals who he has arrested in the past become aware that he no longer has a licensed firearm for protection, then there is a serious possibility that his life and the lives of his family members will be at risk.
5. Turning to the role of the Court at leave stage, Mr. Sylvestre cites SCA No. 166 of 2017 ***Speednet Communications Ltd. v. Public Utilities Commission***,

where this Court, after referring to relevant case law, set out the requirements which must be established before leave is granted for judicial review: (i) the Applicant has sufficient interest in the subject matter; (ii) the Applicant has arguable grounds having a realistic prospect of success; and (iii) there is no discretionary bar such as delay or alternative remedy. In relation to the first limb, whether the Applicant has sufficient interest in the subject matter, Mr. Sylvester argues that that is indisputable. The Applicant is a Corporal of Police and during the time he served as a Police Officer since 2001, he has been engaged in numerous police anti-crime operations targeting crime ridden areas and has developed a reputation as a fearless crime fighter. The Applicant is therefore not liked by many criminal gangs and needs his licensed firearm for his protection and that of his family.

6. On the issue of whether the Applicant has an arguable ground having a realistic prospect of success, Mr. Sylvestre contends that the Respondent's submissions miss the point. The purpose of the instant application for judicial review is to determine that very issue and the Respondent's simply saying so does not render the Applicant not having an arguable case with a realistic prospect of success. He cites Lord Bingham of Cornhill in ***Sharma v. Deputy Director of Public Prosecutions(Trinidad & Tobago)*** [2006] UKPC 57:

“Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005]EWCA Civ. 1605 [2006] QB 468 para.62 in a passage applicable mutatis mutandis to arguability:

‘... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.’”

Mr. Sylvestre argues that the question of whether the Applicant has an arguable case with a realistic prospect of success has to be determined after an examination of the nature and gravity of the issues in which leave for

judicial review is being sought. In the case at bar, it is the revocation of a firearm license of a holder who has detailed the grave peril his life and that of his family will be in were the revocation to stand.

7. In considering whether the decision to revoke the Applicant's license was unreasonable, irrational, and contrary to law, Mr. Sylvestre then examines the circumstances that lead to the revocation of the license. In his first letter to the Applicant dated 19th January, 2018 the Commissioner of Police cited two allegations made against Cpl. Usher for which he was to give reasons why his firearm license was not to be revoked pursuant to section 26(b) and (g) of the Firearms Act. These allegations were (i) in respect of his charge for the offence of drug trafficking on the 13th March, 2017; and (ii) in respect to an allegation purportedly made against the Applicant by one Moses Middleton. Mr. Sylvestre points out that no criminal charges were levied against the Applicant regarding the second allegation, even though the Commissioner of Police regarded these allegations as constituting a crime and presumably had evidence to support them. The previous attorneys for the Applicant wrote the Respondent stating that the matters raised in the letter of 19th January, 2018 were not capable of constituting valid reasons for the revocation of his license. On the 23rd March, 2018 the Commissioner of

Police wrote the Applicant informing him that he had revoked the Applicant's license pursuant to section 26(g) of the Firearms Act. Mr. Sylvestre contends that the significance of this is that the Commissioner of Police is taken to have considered the matters set out in his letter and concluded that they did not constitute the "*holder is of intemperate habits*". He submits that the question is whether those matters set out in the Respondent's first letter are capable of constituting "*some other fit and proper cause*" within the meaning of section 26(g) of the Firearms Act. Learned Counsel for the Applicant further argues that the Respondent appears to have misconceived how the statutory regime under Section 26 operates. He submits that while subsections (a) to (f) list specific reasons for which the Respondent can revoke a license, with evidence to support same, subsection (g) does list specific reasons but provides that in any other case for "*some other fit and proper cause*" the license can be revoked. He further submits that the "*other fit and proper cause*" must be identified in the same way subsections (a) to (f) identifies the causes for revocation.

8. Mr. Sylvestre points out that the phrase "*fit and proper cause*" used in Section 26(g) of the Belize Firearms Act as a ground for revoking a firearm license is not found in the UK Firearms Act 1968. As the UK statute does not

contain this provision, UK case law is not of ready assistance for the purpose of interpreting what may amount to *“fit and proper cause”* within the meaning of section 26(g) of the Belize Firearms Act. However, Mr. Sylvestre submits that in interpreting what may be regarded as *“some other fit and proper cause”* within the meaning of the section, an *ejusdem generis* reading must be employed. This means that the phrase *“some other fit and proper cause”* must be of the same causes as identified in sub-sections (a) to (f). The *ejusdem generis* rule is a rule of interpretation that where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted to things of the same type as the listed items: Osborn’s Concise Law Dictionary at p. 127. Applying this rule of interpretation to Section 26 of the Firearms Act, Mr. Sylvestre then goes on to examine briefly the causes of revocation listed in subsections (a) to (f). Subsections (a), (c) and (d) relate to the license holder being convicted of criminal offences. Proof of a high standard would have been required before a conviction could have been obtained and the license holder would be designated a convict. Subsection (b) relates to the license holder being of intemperate habits or of unsound mind. The Respondent is taken to have accepted that the allegations in his letter of 19 January 2018 were not sufficient to establish

that the Applicant was of intemperate habits as a matter of law. In any event, the Respondent did not revoke the Applicant's license pursuant to Subsection 26(b). Subsection (e) relates to non-payment of license fees, and subsection (f) relates to prohibited immigrant; neither subsection is relevant to the Applicant. Mr. Sylvestre contends that this examination of the grounds/causes for revocation of a firearm license in subsections (a) to (f) reveals that the grounds/causes relate to conduct of a serious or particular nature which is proved; further the cause is specifically stated. Applying the *ejusdem generis* rule, Learned Counsel argues that it is not any cause which in the opinion of the Respondent will satisfy the requirement of section 26(g) as being "*fit and proper*". It must be serious conduct that must be proved. In relation to the allegations in the letter of January 19th, 2018 it was pointed out that neither allegation was proved and were mere allegations. If the Respondent held a hearing and took evidence from witnesses with respect to both allegations in the absence of the Applicant, then the Respondent acted in breach of natural justice. On any view, the decision taken is unreasonable, irrational and contrary to law. On these bases, it is submitted that the decision to revoke is unreasonable, irrational and contrary to law and therefore leave to launch judicial review proceedings should be given. In

conclusion, Mr. Sylvestre states that there is no statutory right of appeal to a person aggrieved by a decision to revoke his license, as exists in the United Kingdom. This application was filed just under a month after the decision to revoke was communicated to the Applicant on April 26th, 2018. There are therefore no discretionary bars such as alternative remedy or delay which would prevent the court from granting leave and the application should be granted.

Legal Submissions on behalf of the Respondent (In Reply)

9. Ms. Duncan filed submissions in reply and in opposition to those filed by the Applicant. She states that it is common ground that at the leave stage, the court must find that there is an arguable ground for judicial review having a realistic prospect of success. She cites Abel J. in ***James Duncan v. National Council for Education et. al.*** Claim No. 391 of 2014 where His Lordship reiterated this principle, and cited with approval the decision of the Judicial Committee of the Privy Council in ***Sharma Browne-Antoine et. al.*** in relation to the test to be applied to an application for permission to apply for leave for judicial review:

“...the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic

prospect of success and not subject to a discretionary bar such as delay or an alternative remedy...But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application..."

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to “*justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen*”. (emphasis added)

At paragraphs 81 and 82 Justice Abel further stated:

“In exercising its gate keeping function it is clear that this court has a discretion, and therefore may refuse permission to argue certain grounds because a particular ground or challenge does not rise to the level of being arguable with a realistic prospect of success, and may therefore grant limited permission to hear one or more of the grounds while refusing permission in respect of others.

As judicial review is concerned not with the merit of a decision by a public body but with the lawfulness of the decision making process itself, at the point of considering an application for permission to

apply for judicial review, this court will be concerned with identifying whether or not one or more grounds of judicial review may be established.” (emphasis added)

Ms. Duncan reiterates on behalf of the Respondent that it is not the merit of the decision that the court is concerned with at the leave stage, but with the lawfulness of the decision making process itself. She submits that if the court can see that the process was fair then there would be no grounds for judicial review. Learned Counsel further submits that the Commissioner of Police followed the procedure and the law governing the revocation of licenses. The Applicant was informed of the intention to revoke his license, he was informed of the reasons for the intention, he was given an opportunity to be heard, the decision was considered and determined and he was informed of the decision and its reason, all within a reasonable time. The decision of the Respondent was therefore made fairly, constitutionally and reasonably in accordance with the law.

In conclusion, Ms. Duncan contends that the Applicant has not raised that the granting of a gun license is a privilege and not a right, nor that he had a legitimate expectation that his license would be issued or continually

renewed. The Applicant was informed that his license would be revoked in accordance with section 26(b) or (g) of the Firearms Act, and it is submitted that the behavior of the Applicant can certainly be categorized as being intemperate and certainly section 26(g) gives the Commissioner of Police a wide discretion to determine in any case, what would be a fit and proper cause. While the Applicant has focused his arguments on the statutory regime under section 26 of the Firearms Act, Ms. Duncan contends that this is not a case where the statutory regime is called into question, where the discretion or powers of the Commissioner of Police is being impugned or where the Commissioner's decision should be justified. Judicial review proceedings are concerned with the lawfulness of the decision making process itself and this stage the Court is only concerned with identifying whether the Applicant has established any grounds for judicial review. Learned Counsel submits that the Applicant has not satisfied the requirements for permission to be granted to apply for judicial review and that this application should be dismissed with costs to the Respondent.

Ruling

10. I wish to thank counsel for both sides for their submissions which have assisted this Court in determining this application. I will first of all set out the

letters written by the Commissioner of Police to Cpl. Darrell Usher in their entirety.

“19th January, 2018

*Mr. Darrel Usher
Hattievillle Village
Belize District*

Dear Mr. Usher

Re: Improper Use of Firearm

I write in respect to the above-mentioned matter.

On Friday 10th March, 2017 about 9:15 pm police in Belize City stopped a Chevrolet SUV with L/P BC C41809 on Faber’s Road. At the time the vehicle was being driven at the time by you accompanied by another male person. You were informed that a search would be conducted on the vehicle where you indicated that you will park to the side of the road. However, instead of parking on the side of the road you sped off. The police officers pursued you. Upon reaching the dike area the said vehicle was found parked on the left side of the road with it engine running. You were seen running toward the dike with a camouflage kitbag on your back and made good your escape. A green camouflage kitbag matching the one you were carrying was found floating on the dike. It contained 3 brown parcels of suspected drugs with a combined weight of 9353.83 grams.

On 13th March, 2017 you handed in yourself to the police where you were formally arrested and charged with the offence of Drug Trafficking.

On 28th November, 2017 at about 6:15 pm police responded to a report of two persons struggling in a gold Kia Sorento SUV with L/P BC-C56338. Upon arrival they found you and another man struggling inside the vehicle. You were separated by the police and at the time you were in possession of your licensed 9mm pistol S/N VAM8732.

Initial police investigation revealed that you tried to repossess the said vehicle from the other person, Mr. Moses Middleton who had pawn the vehicle with a business place reportedly own by a family member of yours. Middleton in an effort to prevent you from taking the vehicle sped off with the vehicle. In response, and without lawful excuse, you discharged your firearm in an effort to get Middleton to stop. This was done in total disregard for other persons in the area. The round from your firearm damaged the left front wheel of the vehicle causing it to stop. It was then that you and Middleton struggled for the keys to the vehicle.

Your actions were tantamount to 'discharging a firearm in public'. Furthermore shooting at a fleeing vehicle can be interpreted as a proper temperament to continue to be in possession of a firearm and are inconsistent to the purpose for which a license was granted to you.

In view of the above you are hereby asked to give reasons why your firearms licence should not be revoked pursuant to section 26 of the Firearm Act Chapter 143 of the Substantive Laws of Belize R. E. 2011. Section 26 of the Act states 'The Commissioner of Police may in his discretion revoke any licence, certificate or permit granted under this Act... (b) If he is satisfied that the holder thereof is of an intemperate habits...' It further states in paragraph '(g) in any other case if there is some other fit and proper cause...'

You are to provide your response within fourteen (14) days from the receipt of this letter. Failure to reply may result in the revocation of your licence without any further notice.

Respectfully,

*Bartholomew Jones, Sr. Supt.
For Commissioner of Police"*

"March 13, 2018

Mr. Darrel Usher
Hattievillle Village
Belize District

Dear Mr. Usher

Re: Revocation of Firearm Licence

I write in respect to the above-mentioned matter.

I further to our HQ GEN/3/03/2001 dated 19th January, 2018 under subject Re: Improper Use of Firearm. In that correspondence you are asked to give reasons why your firearm should not be revoked pursuant to section 26 of the Firearm Act Chapter 143 of the Substantive Laws of Belize R.E. 2011. Section 26 of the Act states 'The Commissioner of Police may in his discretion revoke any licence, certificate or permit granted under this Act... (b) If he is satisfied that the holder thereof is of an intemperate habits...' It further states in paragraph '(g) in any other case, if there is some other fit and proper cause...' You were given fourteen (14) days in which to provide reason why the licence should not be revoked, which you have since done.

After careful consideration of the circumstances outlined in the above-captioned letter and due regards to the detailed response provided to you by your Legal Counsel, please be informed that I have taken the decision to exercise my discretion proved by Section 26(g) of the Act to revoke your licence with immediate effect.

Pursuant to Section 9(2) or the Act, you have twelve (12) months from the date of receipt of the letter to find a suitably qualified person who the Commissioner of Police would grant a license, to purchase the firearm from you. In the meantime you are to hand over the firearm and all ammunition to Regional Commander Eastern (Police) Division or her designate, who will ensure that you are provided with a custody receipt.

Respectfully,

*ALLEN WHYLIE, LSM, MSM, DSM, CSC
COMMISSIONER OF POLICE*

*CC: Divisional Commander Eastern (Police) Division
Firearms Clerk – Eastern Division”*

Having reviewed the submissions for and against this application, I must state that I am in full agreement with the submissions made by Ms. Duncan on behalf of the Respondent. I find that the arguments presented on behalf of the Applicant by Mr. Sylvester, as skillful, mentally stimulating and certainly arguable as they appear to be, do not (to quote my brother Judge Abel J. in **James Duncan** case Claim No. 391 of 2014) “*rise to the level*” that would constitute grounds for which leave for judicial review should be granted. Without determining the merits or otherwise of the allegations made against the Applicant (as that is not the matter before me), I must state that I am truly appalled that such an experienced and esteemed officer of the Police Force such as Cpl. Usher would be charged for Drug Trafficking in the first place, and then several months after that incident allegedly involve himself in a physical altercation with a civilian, discharging his firearm in a manner which potentially endangered the very public which as an officer he is sworn to protect and serve. I fully agree with Ms. Duncan that the

Commissioner of Police has a wide discretion whether or not to grant the privilege of a gun license to an individual. I find that that the Respondent informed the officer of the allegations made against him in a timely manner, he gave the officer an opportunity to respond, after which he decided to revoke his license. I find that the decision making process exercised by the Respondent was fair, and in my respectful view, there is therefore nothing to review. The application for leave for judicial review is dismissed with costs awarded to the Respondent to be agreed or assessed.

Dated this Thursday, May 2nd, 2019

**Michelle Arana
Supreme Court Judge**