[2023] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV05141

BETWEEN	**KENT BROWN**	**CLAIMANT**
AND	**FIREARM LICENSING AUTHORITY**	**DEFENDANT**

IN OPEN COURT

Mr Hugh Wildman & Jodi-Ann Small instructed by Hugh Wildman & Co. for the claimant.

Ms Courtney Foster instructed by Courtney N. Foster and Associates for the defendant.

Heard: February 23 & 27 and May 5, 2023

Judicial Review – Failure to issue Firearm dealers' licence – Gunsmith's licence & Firearm range licence – Legitimate Expectation – Duty of decision maker to give notification of its decision – Firearms Act, 1967 – Interpretation Act, 1968 – Civil Procedure Rules, 2002 Rule 29.1(1), Rule 29.1(2), Rule 30.3

WINT-BLAIR J

[1] The claimant, by way of Fixed Date Claim Form[1] seeks the following relief:

a) *"A declaration that the Defendant is not permitted under the Firearms Act to withhold the three certificates representing the three licences which were approved for renewal by the Defendant on May 7, 2021 and which have not been issued to the Claimant.*

b) *An order of Mandamus compelling the Defendant to issue to the claimant the three certificates representing the three licences which were approved for renewal by the Defendant on May 7, 2021 and which have not been issued to the Claimant.*

c) *Costs to the Claimant.*

d) *Such further and other relief as this Honourable Court thinks fit."*

BACKGROUND

[2] The claimant, Mr. Kent Brown, is the owner and operator of a gun range trading as Kent Brown Tactical Training Centre ('KBTTC') and a firearm dealers company trading as KBA Dealers Jamaica Limited ('KBA'). The claimant operates as a licensed gunsmith, a licensed firearms trainer and holds a firearm user's licence.

[3] On May 7, 2021, he applied to the Firearm Licensing Authority ('the Authority') for the renewal of these licences. His firearm user's licence and firearm trainer's licence were successfully renewed and issued on the same day. However, the gunsmith's licence and firearm dealers' licence were not.

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[1] Filed on June 6, 2022.

THE EVIDENCE

The Affidavit of Kent Brown

[4] The claimant filed an affidavit in support of his Fixed Date Claim Form which stood as his evidence in chief[2]. In it, he deponed that he was first issued with a firearm user's licence in 1987 and that he had successfully renewed it over the years.

[5] He stated that in 2006, he was issued with a firearm trainer's licence and subsequently opened a firearms range sometime in 2007 or 2008. In September 2011, he opened a firearm dealers' company, located on Maxfield Avenue and another in Temple Hall for which he was issued a gunsmith's licence by the Authority in September 2012. On May 22, 2013, he was issued his first full dealership licence for the gun range.

[6] The claimant deponed that on May 7, 2021, he applied to the Authority for renewal of the firearm dealers' licence, the firearm trainer's licence, the gunsmith's licence and the firearm user's licence. He deponed that he paid a total of Four Hundred and Twenty-Five Thousand Dollars ($425,000) and was issued three receipts. They are marked KB1.

[7] The claimant further stated that the firearm user's licence was renewed upon completion of the process. He was given copies of the application for renewal forms for the dealers' licences and gunsmith's licence, which bore the stamp "*Approved for Renewal"*. This he stated, indicated that the renewals had been approved. Despite this, the licences were not issued. These forms are marked KB2.

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[2] Filed on June 6, 2022.

[8] On May 17, 2021, the claimant deponed that he wrote to the defendant enquiring when the dealer and gunsmith's licences would be ready for collection. This letter is marked KB3.

[9] On May 19, 2021, he sent an email to Ms. Deidre Mullings, Director of Certifications and Applications attaching the letter previously written on May 17, 2021. This email is marked KB4.

[10] He stated that to date, he had not received a response from the Authority regarding his letter of May 17, 2021, or his email of May 19, 2021. He stated that, having waited a considerable period of time, he retained the services of an attorney who wrote to the Authority[3] requesting information regarding the dealers' and gunsmith's licences. No response was received. This letter is marked KB5.

The Affidavits of Letine Allen

[11] In response and on behalf of the Authority, Ms. Letine Allen, deponed[4] that the Authority conducted an annual audit of all stakeholders and the operation of their rang[es], gunsmiths and dealerships. The claimant was notified via email on April 27, 2022, that an audit of KBA Dealers Limited and KBA Tactical Training Centre between May 4-6, 2022 would be conducted.

[12] Ms. Allen deponed that on or about April 27, 2022, the claimant responded via email mail to the Chief Executive Officer of the Authority, Mr. Shane Dalling requesting that arrangements be made for the Authority to check off the inventory of arms, ammunition and gun magazines in his possession at KBA Dealers as well as to collect these items for safe keeping by the Authority. The reason for this, was that the claimant was no longer able to store these items.

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[3] Letter dated October 28, 2021

[4] Filed on March 27, 2022

[13] Ms. Allen deponed that, in response, Mr. Dalling wrote to the claimant on or about May 4, 2022, indicating the procedure for the disposal of firearms and ammunition, which formed a part of the claimant's operations. Ms. Allen further stated that to her knowledge no application for the disposal of firearms and ammunition has been made by the claimant. Nevertheless, the Authority, collected the said items from KBA Dealers for safe keeping.

[14] The Authority wrote to the claimant on or about May 6, 2022, to remind the claimant that the audit at the Temple Hall, St. Andrew location had not been completed. The claimant wrote to the Authority on or about May 9, 2022, requesting that the Authority collect spent casings at the KBA location on Maxfield Avenue, St. Andrew. In response, the Authority wrote on or about May 10, 2022, indicating that a site visit would be needed on May 17, 2022 or May 18, 2022 before the removal of the spent casings.

[15] Ms. Allen deponed that on May 12, 2022, the claimant confirmed May 17, 2022, as a convenient date. The Authority responded by confirming the date but further indicated that the Maxfield Avenue location was not approved for the storage of spent casings, expended at the Temple Hall location. The claimant was also reminded that a site visit was still required. She stated that the claimant in responding, indicated that he disagreed with the Authority's position and that the Temple Hall, St. Andrew location had been closed since 2021. He further stated that Temple Hall, St. Andrew is no longer an "FLA approved range".

[16] Ms. Allen further stated that the claimant has failed to provide the Authority with the statement requested by the Authority, concerning the investigation of the sale of ammunition at the range located at Temple Hall, St. Andrew. Ms. Allen deponed that this is the same range before the Honourable Court for which the claimant is now seeking the grant of licence.

The Affidavit of Alanna Wanliss

[17] In her affidavit[5] in response, Ms. Alanna Wanliss deponed that on or about May 7, 2021, the claimant applied to renew the firearm dealer's licence and gunsmith's licence at the offices of the Authority. Copies of these licences are marked AW1. She stated that the renewal applications were submitted three days before the licences were to expire. These licences were subject to revocation, based on the outcome of a pending investigation into the claimant's operations.[6] This investigation she states, arose as a result of an audit that was being conducted at the claimant's operations, which included his dealership and gun range. She further stated that the claimant was aware of this investigation at the time of his renewal application.

[18] In relation to the firearm dealer's licence, she deponed that a person in possession of this licence, is allowed to sell ammunition and firearms. As such, renewal of this licence included additional scrutiny of the operations of the applicant. In deciding whether to grant this licence to the applicant, the Board may take into consideration factors such as, whether or not the applicant is a fit and proper person, the security of the location of the dealership, the source of funds and the applicant's ability to sustain the operation of the dealership.

[19] She stated that where the request for renewal is made by the applicant, the Compliance and Enforcement Department carries out its checks regarding compliance and if there are no objections to the renewal, the application will be stamped "Approved for Renewal". When the department affixes this stamp, it is an administrative process which means that the department has no objection to

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[5] Filed on October 24, 2022

[6] This condition is found on the rear of the licences

the renewal. It does not mean that the Compliance Department is approving the licence.

[20] She further deponed that no member of staff of the Authority is authorized to grant a licence as the ultimate decision of the grant of a licence lies with the Board pursuant to section 29 of the Firearms Act.

[21] The claimant submitted the applications for renewal on May 7, 2022, and they were stamped *"Approved for renewal."* On that date payment was received, however the renewal process was not completed as the final stage of the application for a licence will either be a non-renewal of the licence(s)/certificate(s) or the issuance of the licence(s)/certificate(s).

[22] She further stated that paragraphs 11 and 12 of the claimant's affidavit, reference is made to correspondence from the defendant, alleging that the firearm dealer's licence and gunsmith's licence had been renewed. However, no indication had been given to the claimant by the Authority that these licences were renewed.

[23] Ms. Wanliss further deponed that she had been advised by Ms. Allen that on or about June 25, 2021, Ms. Allen wrote to the claimant regarding the regularization of operations, at the KBA Dealers, the KBTTC Range and his gunsmiths operations, as a result of the investigation of the claimant's dealership and gunsmith businesses by the Compliance and Enforcement department. In that letter, Ms Allen requested completed application forms for KBA Dealers, KBTTC and the gunsmith operations. She also requested a diagram outlining the specific geographical location of the claimant's business operation where the property is utilized for shared purposes (i.e. residential/commercial.) This letter is marked AW2.

[24] The claimant, in response to Ms. Allen's request, completed application forms outlining the specified location for each of his operations and submitted to the

Authority, renewal applications upon which was written the words *"acting under duress"*. Copies of the application forms are marked AW3.

[25] Ms Wanliss further deponed that the Authority, was also conducting investigations into the claimant and his sons, Sage and Scott Brown, concerning their alleged involvement in and facilitation of the excessive sale, acquisition and usage of ammunition by approved applicants at the KBTTC. She said, both sons, played active roles in the operations of the claimant's dealership.

[26] Ms. Allen again wrote to the claimant on or about July 27, 2021. This letter is marked AW4. The claimant has meanwhile continued to transact business, including the sale/purchase of firearms and ammunition.

[27] Ms. Wanliss further stated that at paragraph 13 of the claimant's affidavit, it is stated that he has not received any response from the defendant in relation to his letter of May 17, 2021 and email of May 19, 2021. This is incorrect as there was correspondence between the claimant and the defendant in relation to its request to audit the KBA Dealers and the KBTTC Range. These letters are marked AW5.

[28] Accordingly, Ms. Wanliss stated that the Authority is not withholding certificates/licences from the claimant as the said certificates/licences were not renewed by the Authority.

SUBMISSIONS

The Claimant

[29] Counsel for the claimant, Mr. Hugh Wildman, submitted that the Authority has a statutory duty to perform in granting licences. The claimant complied with the provisions of the statute by applying for the appropriate licences and paying the necessary fees as prescribed. Accordingly, the defendant having received the appropriate applications and fees from the claimant and granted the necessary

approvals subject to the delivery of the licences/certificates, has failed to deliver the necessary certificates, even though, the approvals were granted.

[30] Counsel relies on the learned authors of De Smith's Judicial Review, Eight Edition which states:

> *"…If the court has found there to be breach of a duty, a mandatory order may be granted if in all the circumstances that appears to the court to be the appropriate form of relief. Mandatory orders will not lie to compel the performance of a mere moral duty, or to order anything to be done that is contrary to law.*
>
> *Many of the narrow technicalities which once applied to the grant of mandamus, for example, that it would not lie for the purpose of undoing that which has already been done in contravention of statute, no longer restrict the remedy. It has long been held to be preferable for the claimant to be able to show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it. A claimant, before applying for judicial review, should address a distinct and specific demand or request to the defendant that he perform the duty imposed upon him. Today this learning is encapsulated in the general obligation on the claimants to follow the steps set out in the Pre-Action Protocol for Judicial Review, which includes writing a letter before claim[7]."*

[31] It is submitted that the principles articulated by De Smith are relevant to this claim. There was a clear breach of the Authority's statutory obligations to the claimant, by the failure to deliver the necessary certificates as per the approvals that were granted. Further, the claimant made specific requests to the Authority requesting that it perform its statutory duty. Accordingly, this failure, triggered the

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[7] Paragraph 18-024, Page 998

claimant to seek the intervention of the court to compel the Authority to perform its statutory duty in keeping with **R v Bristol & Exeter Rly Co[8].**

[32] Mr. Wildman submitted that the Authority's contention that it was carrying out further investigations before issuing the relevant certificates, is misconceived. This is so, since at the time when the Authority granted the approval to the claimant, it would have been satisfied that the claimant met all the requirements for the renewal of the licences, hence the approvals. Further, by granting the approvals, the Authority was indicating to the claimant and the world that he was fit and proper and satisfied the requirements for the issue of the certificates.

[33] As a result, the claimant is entitled to rely on those approvals issued by the Authority and to request that this Honourable Court, make the appropriate mandatory orders to be granted to the claimant to compel the Authority to carry out its statutory duty by issuing the certificates to the claimant.

[34] Upon the request of the Court, Mr. Wildman filed further submissions[9] on behalf of the claimant, in which he submitted that the case of **Chief Immigration Officer of the British Virgin Islands v Burnett[10]**, which demonstrates that where a public authority employs a course of conduct in treating with the public, and on which members of the public rely to their detriment over a period of time in conducting its affairs, then a court will intervene to prevent the public authority from going back on its word.

[35] It is submitted that the claimant's case is similar to that of the respondent in the **Burnett** case. Mr. Brown, having followed the procedure known to him and which

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[8] (1843) 4 Q.B. 162

[9] Filed on March 9, 2023

[10] (1995) 50 WIR 153

had been applied by the defendant over the years beginning in 2012, had a legitimate expectation that the defendant would adhere to its policy and once the approval was granted, issue the licences. There had been no communication of a change of the policy prior to this, therefore, the claimant had a legitimate expectation based on the principles outlined in **Burnett**.

[36] In **Minister of Immigration and the Chief Immigration Officer v Sharon Nettlefield et al**[11], the respondents could not rely on legitimate expectation since their attempt to remain in Grenada was done in a clandestine and surreptitious fashion. In the instant case, unlike the **Nettlefield** case, there was nothing surreptitious or clandestine regarding Mr. Brown's application for renewal of these licences.

[37] The claimant's case is a classic example of the principles of legitimate expectation enunciated in the **Council of Civil Service Union & Others v Minister for the Civil Service**[12] ("the CCSU"), where Lord Diplock states:

> *"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too. It must affect such other person either:*
>
> *[a] by altering rights or obligations of that person which are enforceable by or against him in private law; or*
>
> *[b] by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has*

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[11] Civil Appeal No.6 of 2002

[12] [1985] A.C. 374

been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn…"[13]

[38] It is submitted that the claimant's case falls within clause [b] quoted above, as he has been deprived of a benefit or advantage which he had in the past been permitted by the decision-maker, to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communication to him of some rational grounds for withdrawing it and on which he has been given an opportunity to comment.

[39] It was submitted that where there is a non-response from the defendant, then they have failed to carry out their statutory duty. This non-action of the defendant has serious implications for the businesses that the claimant owns and operates. Accordingly, the court should intervene and grant the order of mandamus against the defendant.

[40] Counsel for the claimant then made an oral application during his closing speech, seeking that sections, paragraphs seven and thirteen of Ms. Wanliss' affidavit, be struck out on the basis that it contained hearsay evidence.

The Defendant

[41] Ms. Courtney Foster, submitted that there is no dispute that the claimant received documents from the Authority on May 7, 2021, which were stamped as *"Approved for renewal",* when he visited the offices of the Authority to renew the varied licences. However, on the reverse side of the licences, it is stated that

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[13] Page 408, [1985] A.C. 374

they are subject to revocation pending an investigation into the claimant's businesses.[14]

[42] The defendant wrote to the claimant by letter dated July 27, 2021, requesting that he should submit a clear outline of the location of the businesses he was seeking to operate. In this regard, there was partial compliance on the part of the claimant.

[43] There has been no breach of the statute by the defendant as section 26B(1)(d) of the Firearms Act, allows the Authority to amend the terms of any licence, certificate or permit where the defendant determines that such amendment was necessary and expedient for the purpose of carrying out its functions. Pursuant to section 33(1) of the Act the certificate shall specify the conditions (if any) subject to which it is held and further by section 33(2), the certificate shall be subject to the prescribed conditions and *"to such other terms and conditions as the Authority may impose"*. It is further submitted, that section 35 also permits the defendant to vary these conditions at any time.

[44] The claimant has failed to demonstrate that there is a breach of duty on the part of the defendant. The defendant in observance of its duty, has by necessity, taken steps to ensure that only competent persons are issued with certificates.

[45] Further, the claimant is not seeking an order for certiorari but an order of mandamus. It is respectfully submitted that based on the Firearms Act, only the Authority or the Minister is empowered to issue certificates.

[46] Counsel submitted that the evidence before the court, is that the application form for renewal of the licences have been stamped *"Approved for Renewal*", however this is merely an administrative process as there are further steps to be taken for the renewal to be regarded as complete. Therefore, the defendant has no duty

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[14] As exhibited to the affidavit of Alanna Wanliss filed on October 24, 2022.

under public law, to issue certificates to the applicant once *"Approved for Renewal"* is stamped on the application forms. Counsel relies on the case of **Milton Llewellyn Baker v The Commissioner of Finsac Commission of Enquiry Warwick Bogle and Anor**[15], where McDonald Bishop J (as she then was) references Halsbury's Laws of England concerning the writ of mandamus and the relevant principles to be used in its application:

> *"…although a mere withholding of compliance with the demand is not sufficient ground for a mandamus, yet it is necessary that there should have been a refusal in as many words. All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded.*[16]*"*

[47] Further at paragraph 90:

> *"Furthermore, even if Mr. Levy's letter could be taken as a distinct demand there is no evidence of a refusal on the part of the Commissioners to perform it. A failure to perform does not necessarily constitute a refusal to perform. There must be shown, by the evidence, that the Commissioners have "distinctly determined not to do what is demanded."*

[48] There has been no refusal on the part of the defendant to perform its duty, as the claimant failed to complete the requirements of the Authority and has gone further by stating that he is acting under duress.

[49] Counsel filed further submissions with the permission of the court to respond to two issues raised by the claimant on the admissibility of hearsay evidence and

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[15] [2013] JMSC 137

[16] Paragraph [75](6), [2013] JMSC 137

the reliance on authorities not supplied in support of the submission by opposing counsel on legitimate expectations.

[50] In respect of the claimant's contention that the affidavit of Ms. Wanliss contains hearsay evidence, counsel submitted that pursuant to Rule 30.3 of the Civil Procedure Rules 2002 ("the CPR"), an affidavit may contain statements of information and belief, where the affidavit is for use in a procedural or interlocutory application, provided that the affidavit indicates which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and (ii) the source for any matters of information and belief.

[51] It was submitted that to grant the claimant's application for strike out, would amount to, an abuse of process since the claimant's attorney made no prior indication that he had need of either Ms. Wanliss or Ms. Allen as witnesses. Further, the application was made orally and impromptu during the claimant's attorney-at-law's closing submissions, an inappropriate stage to challenge the contents of an affidavit filed as evidence before the court. Had counsel for the claimant brought this application at the appropriate time, the court, if it saw fit, could have directed the defendant, under Rules 29.1(1) and 29.1(2) of the CPR on the nature of the evidence and the manner in which the evidence was to be placed before the court. Ms. Wanliss was not called to give *viva voce* evidence, should the application be granted; the defendant would be significantly prejudiced in this matter. This application offends the rules of natural justice and the right to a fair hearing.

[52] It is submitted that because an application for judicial review is a procedural application, it is accordingly appropriate, for Ms. Wanliss to provide an affidavit which included the information told to her. Ms. Wanliss has identified the source of the information in her affidavit, Ms. Letine Allen, and the information is directly relevant to this application, which are the procedural steps taken at the office of the defendant during the claimant's application for renewal of his licences.

[53] Counsel relies on the case of **Alliance Against the Birmingham Northern Relief Road v Secretary of State for the Environment, Transport and the Regions**[17] in particular Lord Woolf statement at page 9 that:

> *"…it is not inappropriate in an affidavit in opposition to an application for judicial review or an application to quash a statutory decision to refer to hearsay. It happens regularly and is encouraged by the courts to enable respondents to place information which would not otherwise be available to the court of which the court should be aware…"*

[54] On the issue of legitimate expectation, counsel submitted that in the **Burnett** case relied on by the claimant, the lower court found that the order of the High Court obtained by the respondent, granting him visitation access to the children of his former marriage, did not give rise to a legitimate expectation that he would be granted leave to enter the Colony. Further, it was also doubtful whether the letter from the Deputy Governor could have given rise to such an expectation. There was no cross-appeal of this finding. It is submitted, that the Chief Immigration Officer, as the person with the decision-making power, must be satisfied on her own about the entry of the appellant and his family in the territory.

[55] Similarly, in the instant case, the Board of the Defendant has the decision-making power and must be satisfied of the claimant's eligibility to be granted a renewal of his licences/certificates. Under the Firearms Act, a licence/certificate from the defendant is not renewed as of right and is always at the discretion of the Board.

[56] Counsel further disagreed with the claimant's submission that there is nothing surreptitious or clandestine about the claimant's case. The claimant carried out acts to affect his own application, as he was aware of an investigation into his operations when he applied for the renewal of the licences/certificates. The letter

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[17] (1999) WL 477754

from Ms. Allen, requested compliance from the claimant, who in turn responded to the request with the words *"acting under duress"* on his application form. Further exhibited, is Ms. Allen's affidavit, which refers to the non-completion of the audit at Temple Hall, where one of the claimant's businesses is located. This was due to the claimant's own inaction.

[57] There is no breach of the principles enunciated in the **CCSU**[18] case by the defendant. There can be no legitimate expectation by an applicant that each time he applies for his licence/certificate, it will be renewed. The claimant was advised on previous licences that his licences were subject to revocation, based on the outcome of a pending investigation into his operations and there could be no legitimate basis on which the claimant should form the view that the licences/certificates would be renewed automatically. Counsel relies on the case of **Angella Robinson v The Pharmacy Council of Jamaica Respondent**[19] in support. In particular, paragraph 52 where the learned judge found:

> *"Based on the wording of the Act it is clear that the Council has the discretion to renew the registration upon receipt of an application for such renewal and the payment of the requisite fees prior to the expiration of the relevant registration period. The use of the word 'may' at section 13(5)(a) suggests that the right of renewal is not automatic and is therefore a matter which is left to the discretion of the Council. The Act does not stipulate that the applicant seeking to re-register must be given an opportunity to be heard prior to the Council's decision not to renew. It is therefore safe to conclude that the applicant does not have an arguable case under this head."*

[58] In addition, at paragraph 66:

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[18] [1985] A.C. 374

[19] [2020] JMSC Civ 171

"I find the dicta of Carey J.A. to be quite useful i[n] determining whether it can be said the applicant had a legitimate expectation that the registration of the pharmacy would have been renewed. I must reiterate the point made by Carey JA in Clarke v The Commissioner of Police, supra, when he noted that

"there is no such thing as automatic right of re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory."

I find that this line of reasoning applies equally to the current situation, there is no such thing as automatic renewal of registration and such renewal will invariably be dependent on the applicant satisfying the Pharmacy Council that the conditions as set out under 13(2) have been satisfied, this includes, the need to satisfy the Council that the business proposed to be carried on in the shop will, so far as it relates to the compounding, dispensing, storing for sale or retailing of drugs, be under the immediate control, management and supervision of a registered pharmacist."

[59] It is submitted that the claimant has failed to demonstrate that the defendant acted unlawfully. Further, the claimant seeks an order of mandamus to compel the defendant to issue the three certificates representing the licences that were not renewed, which it is submitted, is founded on an invalid principle of the operation of the order of mandamus.

ISSUES

[60] The issues for the court to decide are:

(1) Whether paragraphs [7] and [13] of the Alanna Wanliss affidavit should be struck out?

(2) Whether the stamping of the claimant's renewal application documents as *"Approved for Renewal"* is a renewal of his licence?

(3) Whether a legitimate expectation has arisen?

(4) Whether the remedy sought by the claimant, an order of mandamus, should be granted?

THE LAW

Striking Out of Contents of Affidavit

[61] Rule 30.3(1) of the Civil Procedure Rules ("CPR") states:

> *"The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*"

[62] Section 26B(1) of the Firearms Act provides that the functions of the Authority include:

> *"a) to receive and consider applications for firearm licences, certificates or permits;*
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> *b) to grant or renew firearm licences, certificates or permits;*
>
> *c) to revoke any firearm licence; certificate or permit granted under this Act;*
>
> *d) to amend the terms of a firearm licence, certificate or permit;*
>
> *e) to receive and investigate any complaint regarding a breach of a firearm licence, certificate or permit."*

[63] Section 26B(2) further provides:

> *"(2) The Authority shall have the power to-*

(a) summon witnesses;

(b) call for and examine documents; and

(c) *do all such other things as it considers necessary or expedient for the purpose of carrying out its functions under this Act."*

[64] Section 33 further provides in respect of licences, certificates and permits:

"(1) Every licence, certificate or permit shall be in the prescribed form and shall contain the prescribed particulars and shall specify the conditions (if any) subject to which it is held, and if so prescribed, shall bear upon it a photograph of the prescribed dimensions of the person to whom it is granted and a specimen of the signature of such person.

(2) Subject to subsection (1), every licence, certificate or permit shall be subject to the prescribed conditions and to such other terms and conditions as the Authority may impose."

[65] Mr Wildman did not make this oral application with leave of the court or in *limine*. While there is no express provision in the Judicature (Supreme Court) Act or the CPR which speaks to the hearing of submissions in *limine*. In the absence of express provisions, in a statute, or in the rules of court, the court has an inherent jurisdiction, to regulate its own procedures. Section 28 of the Judicature (Supreme Court) Act provides:

"28. Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Rules and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Rules or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which

it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary."

[66] The learned authors of Halsbury's Laws of England, Volume 11 (2020). At paragraph 23 the learned authors summarize the court's inherent jurisdiction thus:

"… it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[67] By invoking its inherent jurisdiction, this court is empowered to exercise its powers fairly and effectively. What, is not permitted, is a disregard for the rules of court. In the exercise of its inherent jurisdiction, this court must ensure that the rules of natural justice are observed and that a party is not denied their right to fully participate in the proceedings.

[68] In **Blackstone's Civil Practice** on the question of facts in issue it states:

"In a civil trial, the facts in issue are those which the claimant must prove in order to succeed in his claim together with those which the defendant must prove in order to succeed in his defence. The facts in issue in a case are therefore determined partly by reference to the substantive law and partly by reference to what the parties allege, admit, do not admit and deny. They should be identifiable by reference to the statements of case, which should set out the issues on which the parties agree and disagree so that it is known in advance what facts have to be proved or disproved at trial.[20]

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[20] 2003, page 562 para 47.2

[69] The court has considered the submissions of counsel and the relevant rules. The application to strike out was made during the claimant's closing submissions. The court was taken by surprise having had no indication from Mr Wildman, that the application was in the offing, no doubt so was opposing counsel. The application timed as it was, vaulted over the case management rules as if what was being engaged in, was a hurdles race at the summer Olympics. It was a tactic which invoked Rule 11.3 which states:

> ***"Application to be dealt with at case management conference***
>
> *Rule 11.3 (1) So far as is practicable* ***all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review****.*
>
> *(2)* ***Where an application is made which could have been dealt with at a case management conference or pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances."*** *(Emphasis mine.)*

[70] The application to strike out is refused, it is an abuse of the process of the court. Mr Wildman indicated to the court at the commencement of the trial that he had no need for the witnesses from the Authority both of whom were present, Ms Wanliss virtually and Ms Allen in person. They were not cross-examined by him.

[71] The oral application was made during closing submissions seeking to challenge the contents of an affidavit filed as evidence before the court. The case of **Alliance Against the Birmingham Northern Relief Road v Secretary of State for the Environment, Transport and the Regions**[21] cited by Ms Foster contains the following statement from Lord Woolf at page 9 of the judgment which I adopt:

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[21] (1999) WL 477754

> *"…it is not inappropriate in an affidavit in opposition to an application for judicial review or an application to quash a statutory decision to refer to hearsay. It happens regularly and is encouraged by the courts to enable respondents to place information which would not otherwise be available to the court of which the court should be aware…"*

[72] The application to strike out was refused. As there were no special circumstances advanced by Mr Wildman, for proceeding in the way that he had and as a consequence of the mid-trial application, the costs of proceeding in such a manner must be visited upon the claimant pursuant to the rule indicated heretofore.

DISCUSSION

[73] It is the claimant's position that on May 7, 2021, he visited the offices of the Authority, and submitted applications for the renewal of his various licences, which include: his firearm dealer licence, his firearm trainer's licence, his gunsmith licence and his firearm user's licence. He stated that he paid a total of Four Hundred and Twenty-Five Thousand Dollars ($425,000) and was issued three receipts.

[74] The application forms were stamped "*Approved for renewa"l* and therefore it is the claimant's contention that the applications were renewed. This assertion has not been met with any proof. The witnesses from the Authority were present at the trial and it was the election of counsel, Mr Wildman, not to put this to them in cross examination.

[75] What is now before the court is evidence from the claimant as to what he believes the words mean. This is not evidence which the court can use to conclude that he is correct in this assertion. The claimant's counsel has argued that the words *"Approved for renewal"* have brought this claim outside of the statutory process, however, there is no **evidence** to show that these words or the

actions that led to them, mean what Mr Wildman submits that they mean. If the evidence on this point is in conflict., then the witnesses from the Authority who were available and at trial should have been cross-examined. They were not. Therefore, the uncontroverted evidence is that of the Authority. The words on the application form having not been challenged, stand as meaning what the defendant asserts that they mean.

[76] At paragraph [49] of **Robert Ivey v The Firearm Licensing Authority**[22], Brooks, P said:

> "…*it is not the CEO who makes decisions to grant or revoke firearm licences. It is the Authority that does so. Section 26A of the Act allows for the establishment of the Authority and section 26B stipulates its functions. Paragraph 1 of the Third Schedule to the Act outlines the constitution of the Authority."*

[77] It is therefore not the officer who stamps any words on the application form that makes the decision to grant, renew or revoke licences issued by the Authority. It is the Authority. The Authority is legally defined in the Firearms Act.

[78] There were no exceptional circumstances advanced by counsel for the claimant to lend itself to the circumvention of the statutory process. The process adopted by the claimant of applying for judicial review has been settled in **Robert Ivey**. The learned President of the Court of Appeal pointedly repeated that which was the position in Raymond Clough:

> *"**There is no constitutional or legal right to own a firearm or to be allowed to hold a firearm. The entitlement or [sic] to or the refusal of the revocation of a grant of a licence is in the hands of the police. The Firearms Act is concerned with the control of, the use, and misuse of***

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[22] [2021] JMCA App 26

firearms in this country. The incidence of violence involving guns is such that the greatest care has to be taken to ensure that such weapons do not fall into the wrong hands. The welfare and security of the entire country is at stake. *The national security must be a matter of the greatest concern. Criminal activity is unarguably a matter which affects national security.[23]" (Emphasis in the judgment of Brooks, P reproduced.)*

[79] In **Robert Ivey**, the learned President at paragraph [51] could not have made it any clearer:

"What was Mr Ivey therefore, to have done after his licences had been revoked? The Act spells out the procedure carefully for him, yet he chose to ignore its provisions and apply, instead, for judicial review of the Authority's decision."

[80] At paragraph [41]:

"…If, however, the licence holder requires a review, the Review Board must:

a. *Secure the Authority's reasons for its decision.*
b. *Grant the licence holder a hearing, which need not be orally conducted and*
c. *Provide its recommendations to the Minister."*

[81] This has been the position since **CCSU**, in which the following statement is made by the court:

"The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way

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[23] Paragraph 26, [2021] JMCA App 26

in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another – a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise[24]."

[82] The competing issues of fact in this claim, in terms of the steps taken by the Authority are best reviewed by the appellate process instituted by the statute. It is settled law that this court will not examine the merits of a decision.

Judicial Review

[83] The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision-making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in **Chief Constable of the North Wales Police v Evans[25]** at page 1161 that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court.

[84] Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Services** at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:

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[24] Per Lord Diplock, At Page 411

[25] [1982] 1 WLR 1155

"By illegality as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...

I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."

[85] In **Chief Constable of The North Wales Police v Evans** at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose

to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."

[86] In addition, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology[26].**) These additional grounds were not argued in this claim.

[87] The approach of the court in determining this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not to decide whether the decision is correct or not. It is not for this court to substitute its own views on the merits of the decision made nor to make its own decision.

[88] What is required is that a *prima facie* case to be placed before the Board. If the Authority is satisfied that a *prima facie* case exists, then it may revoke the licences issued. The Authority is required to act in a manner construed as *bona fide*.[27] For the discretion of the Authority to be interfered with, the claimant would have had to have raised material before this court to show that in performing its statutory duty the Authority was not acting bona fide and reasonably or evidence of exceptional circumstances. This has not been shown on the evidence.

[89] In my judgment, the Authority acted within its statutory remit. It cannot be said that the Authority failed to observe the rules of natural justice or to follow the statutory procedure laid down in the Firearms Act. There is no illegality,

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[26] [2022] JMCA Civ 2

[27] See Raymond Clough at page 299 and Aston Reddie at para [75]

procedural impropriety, irrationality or actions which could be considered ultra vires in relation to the statute which confers jurisdiction on the Authority.

Legitimate Expectations

[90] The test is set out in **R v North and East Devon Health Authority, Ex p Coughlan**[28]. Lord Woolf MR, giving the judgment of the Court of Appeal said, at paragraph 57:

> *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

[91] The test set out in **Coughlan** is applicable to this case. The burden of proof is on the applicant to establish the legitimacy of his expectation. If the claimant asserts that the claim is based on a promise, it is for the applicant to prove that it is "clear, unambiguous and devoid of relevant qualification"[29].

[92] If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then he must prove that. Once these elements have been proved by the applicant, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on

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[28] [2001] QB 213

[29] see Bingham, LJ in R v Inland Revenue Commissioners Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545,1569.

which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest[30].

[93] The claimant argues that the promise in this claim was that the process would be followed, and the licences would have been renewed. He buttresses this submission by exhibiting the applications stamped *"Approved for renewal."* However, the promise must be clear, unambiguous and without relevant qualification. It is unchallenged that the dealers' and gunsmiths' licences were conditional upon the terms set out on the back of the certificates which said: *"Conditions apply: Subject to revocation based on the outcome of a pending investigation into your operations."* Section 33(2) of the Firearms Act provides that the Authority may issue certificates subject to conditions.

[94] In **Angella Robinson v The Pharmacy Council of Jamaica Respondent,**[31] concerning the refusal by the Pharmacy Council of Jamaica to renew the registration of the pharmacy operated by the applicant, Woolfe-Reece J, in examining the function exercised by the Pharmacy Council noted that it was strictly a statutory function and that it would require an evaluation of the provisions of the Pharmacy Act, to determine whether the Council acted outside the ambit of the statute.

[95] The learned outlined in respect of legitimate expectation that:

> *"I find the dicta of Carey J.A. to be quite useful i[n] determining whether it can be said the applicant had a legitimate expectation that the registration of the pharmacy would have been renewed. I must reiterate the point made by Carey JA in Clarke v The Commissioner of Police, supra, when he noted that*

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[30] Per Dyson at paragraph 37, Francis Paponette and Others v The Attorney General of Trinidad and Tobago [2010] UKPC 32

[31] [2020] JMSC Civ 171

"there is no such thing as automatic right of re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory."

I find that this line of reasoning applies equally to the current situation, there is no such thing as automatic renewal of registration and such renewal will invariably be dependent on the applicant satisfying the Pharmacy Council that the conditions as set out under 13(2) have been satisfied, this includes, the need to satisfy the Council that the business proposed to be carried on in the shop will, so far as it relates to the compounding, dispensing, storing for sale or retailing of drugs, be under the immediate control, management and supervision of a registered pharmacist."

[96] Counsel for the defendant relies on the case of **Milton Llewellyn Baker v The Commissioner of Finsac Commission of Enquiry Warwick Bogle and Anor[32].** In that case, the claimant instituted judicial review proceedings against two commissioners of the FINSAC Commission of Enquiry seeking an order of mandamus to produce reports from the evidence at the enquiry over the period of November 2009-November 2011.

[97] McDonald-Bishop J (as she then was) outlined at paragraph [41] that:

"The relevant authorities are clear beyond question that the Court's function at the application for leave stage is to eliminate claims which are hopeless, frivolous and vexatious. A claim should only proceed to substantive hearing upon the Court being satisfied that there is a case fit for consideration. The evidence relied on must disclose that arguable case with the realistic prospect of success of a ground on which the claim is

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[32] [2013] JMSC 137

based. Such a case would then be such as to merit full investigation at a substantive hearing."

[98] In refusing the orders, the court held that the preconditions for the issuing of the order of mandamus were not *prima facie* established from the evidence before the court. Therefore, the claimant had no realistic prospect of success in the claim for judicial review.

[99] In the case at bar, the evidence is that the claimant did not co-operate with the Authority in the exercise of its statutory function. He failed to provided the requested information under duress and therefore his actions are deemed to be involuntary. He has failed to appreciate that while the Authority is to perform a statutory function, so must he, as an individual entrusted with and engaged in very sensitive businesses. He cannot successfully argue that there cannot be a very high level of scrutiny into his operations and consistently so. On the evidence, there is no legitimate expectation established by the claimant as he did not allow the process to be completed before this application was filed.

CONCLUSION

[100] The court cannot find based on the evidence presented, that there has been a breach of duty, therefore a mandatory order is not the appropriate form of relief on in all the circumstances of the case. Mandatory orders will not lie to compel the Authority to order anything to be done that is contrary to law.

[101] ORDERS:

a) The declaration sought that the Defendant is not permitted under the Firearms Act to withhold the three certificates representing the three licences which were approved for renewal by the Defendant on May 7, 2021 and which have not been issued to the Claimant is refused.

b) The order of Mandamus sought compelling the Defendant to issue to the claimant the three certificates representing the three licences which were approved for renewal by the Defendant on May 7, 2021 and which have not been issued to the Claimant is refused.

c) Costs of the mid-trial application to strike out awarded to the defendant to be agreed or taxed.

d) Costs of the claim to the defendant to be agreed or taxed.

e) The parties shall make written submissions as to the proper costs order which should follow. Each should file and serve on the other, within seven days of the delivery of this judgment, written submissions setting out the form of order sought and brief reasons therefor; if so advised, a party may lodge and serve a response to the submissions of the other within fourteen days thereafter. The issue of costs will be determined on paper. Failing which the cost orders made herein shall stand.

Wint-Blair, J.