

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CIV-2018-004-000452
[2018] NZDC 21431**

BETWEEN

DALE FRANKLIN JENNER
Appellant

AND

COMMISSIONER OF POLICE
Respondent

Hearing: 21 September 2018

Appearances: Mr N J Taylor for the Appellant
Mr M L Dillon for the Respondent

Judgment: 18 October 2018

**RESERVED JUDGMENT OF JUDGE A S MENZIES
[On an Appeal under s 62 Arms Act 1983]**

Introduction

[1] Mr Jenner has appealed pursuant to s 62 of the Arms Act 1983, against the decision of the respondent declining his application for endorsements to his firearms licence.

[2] Specifically Mr Jenner sought endorsements for:

- (a) Military style semi-automatic (MSSA) firearms (often referred to as an “E” endorsement);
- (b) Restricted weapons (RWs) (often referred to as a “C” endorsement).

[3] Those applications were declined by the respondent in a decision dated 1 November 2017. The reasons expressed for the refusal were:

- (1) That you have previously acted contrary to the provisions of the Arms Act 1983 and in particular were charged with the following offences against the Act:

Unlawfully carry/possess firearms/restricted weapons, unlawfully possess pistols/restricted weapons and sell/supply pistols/restricted weapons.

- (2) That your general character is such that there is a risk of non-compliance with the laws of New Zealand relating to the possession and use of firearms.
- (3) That owing to the above reasons, you are not suitable to be in possession of endorsement firearms.

Background

[4] The background to this application has been traversed in earlier proceedings before the District Court in a reserved decision of Judge P A Cunningham, DCJ dated 15 March 2016.

[5] That decision was again an appeal under s 62 of the Arms Act 1983 against a decision of the respondent, on that occasion in relation to the issue of a firearms licence. By way of appeal that decision was overturned. Her Honour determined that Mr Jenner was a fit and proper person to hold a firearms licence and Mr Jenner is the holder of a firearm's licence accordingly.

[6] That decision is directly relevant to the issues before the Court in this appeal. The respondent relies substantially on the same grounds to oppose the current appeal as were relied upon to oppose the earlier appeal. It is not therefore necessary to repeat in detail the background circumstances as they are recorded extensively in the decision.

[7] I rely upon and respectfully adopt the position as reflected in that decision. I direct that a copy of that decision is to be attached to this decision for completeness.

[8] The respondent relies upon the same matters reflected in that decision to oppose this appeal but also argues that there are statements by Mr Jenner in support of the appeal relating to the earlier events which the respondent challenges as misleading and/or wrong which in the respondent's view reflect a concerning state of mind on the part of Mr Jenner towards weapons.

[9] A brief precise of the circumstances which are reflected in the earlier decision in full, reflect that Mr Jenner obtained a firearms licence in the 1970s and from 1990 onwards obtained a number of endorsements allowing him to collect firearms and possess MSSAs and in 2005 he obtained a gun dealer's licence.

[10] In an undercover police operation, he sold two MSSA weapons to an undercover police officer in the context of a police operation entitled "Operation Daisy".

[11] Mr Jenner was charged with a range of offences under the Arms Act and in 2009 was sentenced to six months home detention, fines totalling \$4,000.00 with a number of additional charges the subject of a conviction and discharge.

[12] In 2013, Mr Jenner re-applied for his firearms licence, which the police refused. Mr Jenner appealed and that appeal was the subject of the earlier decision.

The law

[13] Where a request for endorsements to a firearms licence is refused, an appeal is available to the District Court under s 62(1) and (1A) of the Arms Act 1983. The District Court has the ability to confirm, vary or reverse the decision appealed against (s 62(2)).

[14] The legal issues arising in respect of such an appeal were traversed in the earlier decision and again with respect I adopt that analysis. There is no suggestion by either counsel that any different approach should be adopted.

[15] In essence, the appeal is a hearing de novo with no onus on the appellant to persuade the Judge on appeal that the initial decision was wrong. In this appeal

therefore I am required to reach my own decision and the key test is whether Mr Jenner is a fit and proper person to hold the endorsements sought.

[16] Obviously the earlier decision determined that Mr Jenner was a fit and proper person to hold a firearms licence. While on the face of it the same test arises in respect of the endorsements sought, (ie is Mr Jenner a fit and proper person), there is a different assessment in this appeal. The earlier decision determined that Mr Jenner was a fit and proper person to hold a firearm's licence. A further and separate determination is required as to whether or not Mr Jenner is a fit and proper person to hold the endorsements sought.

[17] The legislation clearly contemplates that further inquiry is required given the steps a current licence holder is required to undertake in order to acquire endorsements. Given that the endorsement provisions potentially enable the possession of a far more extensive range of weapons, many of which are potentially more lethal (eg MSSAs), there must be a corresponding scrutiny of the applicant commensurate with the gravity of the authorities allowed by such endorsements.

[18] Put simply, it does not follow that because Mr Jenner was determined to be a fit and proper person to hold a firearms licence, he is a fit and proper person to enjoy the endorsements sought. Further inquiry is warranted and in my view there is no reason why that inquiry would not encompass the same material reviewed for the purposes of the earlier decision.

Endorsements

[19] A standard firearms licence entitles the holder to possess and use what are known as category "A" firearms which are firearms that are in a sporting configuration and do not contain a free-standing pistol grip, a magazine capacity of more than seven rounds and a flash suppressor. As a result of an amendment to the legislation in 2012, the definition is expressed in positive terms to reflect that an MSSA is a firearm that does not have any of those three features. An "E" endorsement would allow Mr Jenner to buy, sell and possess MSSAs.

[20] A “C” endorsement would entitle Mr Jenner to buy, sell and possess pistols, sub-machine guns, machine guns, heavy machine guns, and other restricted weapons including hand grenades, mines and rocket launchers (decommissioned).

[21] In the event of an endorsement being granted, there are ongoing controls under the legislation including tighter security and permits to procure, along with a system of registration of each firearm with the police.

Mr Jenner’s case

[22] In addition to the submissions in support of the appeal, Mr Jenner swore an affidavit himself and provided affidavits from a number of friends and colleagues who have known him for many years and support his application. That evidence is in the nature of supportive character evidence.

[23] Mr Jenner’s case is reflected in the following propositions:

- (a) Prior to the events related to Operation Daisy, and subsequent convictions, Mr Jenner had held a firearms licence and various endorsements (including those currently sought) without difficulty. The only convictions he has of any sort are those associated with Operation Daisy.
- (b) Those offences are now 12 years old and the sentences have been served.
- (c) Mr Jenner has legitimate intentions in relation to the endorsements. Involvement with firearms is a big part of Mr Jenner’s life being involved in competitive shooting and he has an extensive collection as a bona fide collector of militaria and items of historical military nature.
- (d) The Hamilton Police appear to have a strong “dislike” for Mr Jenner relating back to frustrations by police associated with Operation Daisy, by a misreading and miscalculation by the police of the lawful authority

to own and possess firearms along with a lack of clarity, inconsistencies and grey areas within the Arms Act itself.

- (e) Mr Jenner has a long history of legitimate use for firearms and has worked and continues to work for the promotion and safe use of firearms at gun ranges and club events and is highly regarded by people who have known him his whole life.
- (f) Refusal to grant the endorsements sought amounts to ongoing punishment.
- (g) Mr Jenner has been determined as a fit and proper person to have a firearms licence and is equally a fit and proper person to have the endorsements sought.

Respondent's case

[24] Much of the opposition stems from the circumstances arising from Operation Daisy. The submissions detail the number and nature of offences for which Mr Jenner was convicted. The respondent argues Mr Jenner's behaviour in those circumstances indicated a sense of entitlement to weapons, notwithstanding firearms laws. He had in his possession live hand grenades, improvised mines and Emulite blasting explosive. He also had assault rifles capable of full automatic firing, a shotgun found unsecured in a wardrobe with ammunition alongside. Significantly in terms of the convictions, he sold untraceable restricted weapons to buyers, who as far as he knew did not hold firearms licences.

[25] In addition to those offences, there were interactions between Mr Jenner and the police in 2011 and 2012 which were also raised in the earlier decision. Her Honour regarded that those interchanges did not reflect well on Mr Jenner but were not sufficient to decline the appeal.

[26] The respondent argues that Mr Jenner's affidavit in support of the current appeal contains misleading statements, which in the police submission, argue that he

will still do or say what he needs to in order to access the firearms to which he believes he is entitled. For example, the respondent points to Mr Jenner's reference to the main difference between a standard firearm by referring to a MSSA as "having a slightly larger capacity magazine". The respondent argues that comment downplays the potential firepower of an MSSA which, by definition, would hold more than 15 rim fire cartridges or seven centre fire cartridges. With an MSSA the capacity beyond those limits is extensive.

[27] The respondent also argues that the description of what Mr Jenner had in his possession at the time of Operation Daisy was misleading. While reference is made to badges, medals, uniforms, bayonets, swords, shell casings, books, documents and photos, there was no reference to other items such as the anti-aircraft gun, the machine guns, sub-machine guns, assault rifles, rocket launches and pistols.

[28] The respondent argues that allowing Mr Jenner the kinds of weapons he has previously offended with, does not promote the control of them and would give rise to a significant risk of harm to the community by him collecting and selling very lethal and illegal weapons.

Discussion

[29] The focus of this appeal is whether or not Mr Jenner is a fit and proper person to hold the endorsements sought. The term "fit and proper person" is not defined in the Act and therefore requires an assessment of an applicant's background, character and history in the context of firearms. The tenor of the legislation is the promotion of the safe use and control of firearms which must guide any assessment of the fit and proper person test.

[30] The approach to this assessment advanced by Mr Jenner's counsel proposed a three step approach involving inquiry as to the following issues:

- (a) Public safety
- (b) Control of firearms

(c) Legitimate use

[31] These are legitimate and appropriate inquiries. To a degree the public safety issue and control of firearms are linked.

[32] Dealing first with the legitimate use consideration, there is clearly evidence that Mr Jenner has had a lifetime involvement with firearms in a legitimate manner, putting aside the issues arising in relation to Operation Daisy. The obvious problem with Mr Jenner's behaviour in respect of Operation Daisy is that he chose to depart from the position of trust and responsibility inherent in the holding of both a licence and endorsements to further his own ends in contravention of the legislation. There have then been subsequent issues and the allegations by the respondent in this appeal that Mr Jenner still attempts to downplay and mislead in order to achieve what the respondent argues, is his sense of entitlement to firearms access.

[33] Mr Jenner maintains that the purpose of the endorsements is to enable him to pursue legitimate club and sporting activities which the endorsements will enable him to extend beyond his current such activities. There is no reason to doubt that is the primary intention and there is no real suggestion by the respondent to the contrary. However the past offending occurred within a similar context. Mr Jenner was involved in a vast range of legitimate activity with his former licence and endorsements yet he elected to offend. Therefore his expressed intention to pursue legitimate interests with the assistance of the endorsements is no guarantee against further offending. Based on the historical events, the risk of offending under the relevant pressures cannot be excluded.

[34] These are legitimate concerns that need to be weighed against the arguments for Mr Jenner that much of the opposition stems from events that are from many years ago and, putting aside the respondent's view that Mr Jenner puts a misleading slant on past events in his affidavit, there are no new concerns arising.

[35] One of the arguments advanced by Mr Jenner is that he has been punished for his wrong doing in the past, but "it appears as if he is still being punished by the police for something that occurred 12 years ago. This double punishment is unreasonable

and unfair as there is no potential end to it. What is a long enough period? It is not specified in the Arms Act because that is not the test established by the Courts.”¹

[36] These comments argue that Mr Jenner has served his time and is therefore entitled to the endorsements now sought. I do not regard that as a relevant consideration nor an appropriate approach.

[37] Bearing in mind the fundamental principles of the Act relating to the control of firearms and protection of the community, the assessment to be made is whether or not Mr Jenner is a fit and proper person based on all the information currently before the Court relating to his background, character and history. Both the endorsements sought enable access to extended categories of firearms, including those that are potentially the most lethal. Scrutiny of those seeking such endorsements needs to be exacting. If there are any doubts about suitability, they should be determined in favour of firearms control and public safety.

[38] Mr Jenner was assessed as a fit and proper person for the return of his firearms licence. However no suggestion was made in the earlier appeal that any further endorsements were sought or might be sought in the future. Indeed the earlier decision reflects the contrary.²

[39] The earlier decision determined that Mr Jenner had changed in his character to a degree that warranted the return of his firearms licence. However I consider that the nature and scope of the issues associated with Operation Daisy, combined with the concerns raised by the respondent as to Mr Jenner’s attitude and sense of entitlement, persuade me that the endorsements sought are a step too far.

[40] I am not persuaded that Mr Jenner is a fit and proper person to hold the endorsements sought.

¹ Applicant’s submissions paragraph 7.11.

² See for example paragraph [69] of the earlier decision.

[41] The respondent's decision to decline the application was appropriate and is confirmed.

A S Menzies
District Court Judge