IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CIV-2021-063-000080
[2021] NZDC 2889

BETWEEN	TONY CHARLES FOOTE Plaintiff
AND	NEW ZEALAND POLICE Defendant

Hearing: 25 November 2021

Appearances: D Pawson for the Plaintiff
S Bird for the Defendant

Judgment: 22 February 2022

RESERVED DECISION OF JUDGE T R INGRAM

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[1] Mr Foote has filed an appeal against a decision of a commissioned officer in the New Zealand Police, Inspector Dunsmuir, to revoke his firearms licence. Mr Foote was served with a Notice of Revocation of his Firearms Licence on 18 October 2020, and his guns were uplifted by Police on that day. Section 27(2) of the Arms Act 1983 provides that a commissioned officer of Police may revoke a firearms licence if, in the opinion of the officer, the holder of the licence is not a fit and proper person to be in possession of a firearm. That was the ground upon which the revocation decision was made.

[2] The revocation decision was based on information obtained from a number of sources, and after further inquiry, on 7 December 2020 the Inspector wrote to Mr Foote in the following terms:

> "Dear Mr Foote, following enquiries made by me, and our various interactions, I have decided to offer you the choice of surrendering your firearms licence for a period of 12 months from the date of this letter. The alternative to this is to continue with the revocation process of your firearms licence where you will not be allowed access to any type of firearm …"

[3] After considering his position, on 23 December 2020 Mr Foote notified Police in response to that letter that he refused to surrender his licence in lieu of revocation.

[4] The relevant provision of the Arms Act governing appeals against a firearms licence revocation was s 62, which contained no time restriction on the filing of an appeal, permitting an appeal by originating application direct to the District Court, without qualification, which was in force on 23 December 2020.

[5] But following the Christchurch mosque shootings, the law in relation to firearms licences was changed. New sections were inserted into the Arms Act 1983, under which time limits were imposed on applications for review of any revocation decisions, and the right of appeal to the District Court against any revocation decision was made contingent upon an application for review of the revocation decision being made to the Commissioner. That new legislation received the Royal Assent on 24 June 2020, and it came into force six months after the Royal Assent, on 24 December 2020, the day after Mr Foote notified Police that he declined the offer to surrender his licence in lieu of revocation.

[6] The new legislation sets out a scheme for challenging licence refusals and licence revocation decisions, requiring that an application for review of the refusal or revocation decision be made to the Commissioner of Police within 28 days of the decision being notified to the applicant. The Act also provides that the Commissioner may allow a further 28 days in extenuating circumstances. The current s 62 provides;-

> **62 Right of review of official decisions**
>
> (1) This section applies to a decision to refuse an application for, or to revoke, a firearms licence.
>
> (2) A person who is the subject of a decision to which this section applies may apply in the prescribed manner to the Commissioner for a review of the decision.
>
> (3) An application must state—
>
> (a) the decision that the applicant wishes to be reviewed; and
>
> (b) the reasons why the applicant thinks the decision should be reviewed; and
>
> (c) the outcome the applicant is seeking.
>
> (4) An application must, subject to subsection (5), be made within 28 days after the date on which notice of the relevant decision is given to the person.
>
> (5) The Commissioner may accept a late application no later than 28 days after the closing date in subsection (4) if satisfied that there are extenuating circumstances that affected the ability of the claimant to make the application by the closing date.

[7] The new legislation goes on in s 62B to create a jurisdictional bar to appeals to the District Court unless and until a s 62 review has been completed and the review decision notified to the appellant. s 62B relevantly provides;-

> **62B Right of appeal to District Court**
>
> (1) A person who is the subject of a decision referred to in paragraph (a) or (b) or is a person described in paragraph (c) may, by way of originating application, appeal to a District Court Judge against the decision as follows:
>
> (a) …

(b) a decision to issue subject to conditions imposed by a member of the Police, or to revoke, any of the following:

…

(iii) a firearms licence:

(2) However, in the case of a decision to which section 62 applies, a person has no right of appeal under this section unless the person has—

(a) first applied under section 62 for a review of the decision; and

(b) been notified of the reviewer's decision.

(3) On hearing an appeal under subsection (1), the District Court Judge may, subject to subsection (5), confirm, vary, or reverse the decision appealed against.

(4) …

(5) …

[8] The appeal hearing before me on 25 November 2021 proceeded on the assumption that the new statutory regime applied to this appeal. The Police took the jurisdictional point that Mr Foote had not complied with the s 62 and s 62B time limits, and Counsel were agreed that Mr Foote's legal advisers notified the Commissioner that a review of the decision to revoke the licence was sought by email on 22 February 2021 a date well outside the statutory timetable.

[9] I reserved my decision, and after considering the matter I invited written submissions from the parties as to whether indeed the assumption that the new statutory regime applied to this appeal was correct, asking them to address the question of whether Mr Foote had a "perfected" appeal right under the law as it stood on the day the decision was notified to him, which would, if correct, preclude any objection based on failure to comply with time limits specified in the amended legislation, which came into force on 24 December 2021.

[10] I received written submissions from counsel on this issue.

[11] Counsel for Mr Foote submits that his appeal rights irrevocably accrued on the day Mr Foote received notification of revocation of his licence, namely the 18th October 2020. Because that date precedes the subsequent change in the legislation it

is submitted that the new legislation has no application, and the new time bar cannot apply. Because of uncertainty as to whether the old unlimited appeal rights, or the new time limited appeal rights, applied, notice of both a Commissioners review and an originating application were filed, but both were admittedly filed outside the time limits in the new legislation, and outside the grace period available for a Commissioner's review.

[12] The best argument for the appellant is that this case is covered by *Accolade Autohire Ltd v Aeromax Ltd*, where the Court of Appeal held that a reduction in the permitted time for appeal from 3 months to 28 days did not preclude an appeal filed within three months of the judgment, where the 28 days rule came into force during that three month period.[1]

[13] Counsel for the Police argues that this case is distinguishable from *Accolade Autohire Ltd v Aeromax Ltd* because Mr Foote did not lose his right of appeal on the coming into force of the new legislation, he simply had to comply with new time limits, which had been promulgated on 24 June 2020, and which left him plenty of time to appeal if he wished, given that the revocation was notified on 18 October 2020. On this view, the unlimited time for appeal ran on until the new law came into force.

[14] Counsel for the Police submitted that the new legislation governs appeal rights for each and every appeal commenced after 24 December 2020. The law had been changed on 24 June 2020, and the commencement date for the new provisions, which included the time limits, was promulgated on that day. On this submission, Mr Foote had an unfettered right to appeal direct to the District Court, but that right could only be exercised until 24 December 2020, when that appeal right lapsed, and was replaced by the new time limited review and appeal provisions.

[15] In support of that argument it was submitted that the new provisions were not retrospective, operating prospectively only, to change the process of commencement of appeal, while deliberately limiting the time within which that process must be

[1] *Accolade Autohire Ltd v Aeromax Ltd* [1998] 2 NZLR 15

commenced. That issue is addressed in s 33 of the Legislation Act 2019 which provides;-

> **33 Effect of repeal or amendment on existing rights and proceedings**
>
> (1) The repeal or amendment of legislation does not affect—
>
> (a) the completion of a matter or thing that relates to an existing right, interest, title, immunity, duty, status, or capacity (a legal position); or
>
> (b) the commencing of a proceeding that relates to an existing legal position; or
>
> (c) the completion of a proceeding commenced or in progress under the legislation.
>
> (2) Repealed or amended legislation continues to have effect for the purposes stated in subsection (1) as if the legislation had not been repealed or amended.

[16] It was submitted that the provisions of s 62B did not affect the completion of a matter or thing that related to an existing right, because no step in the appeal process had been taken prior to the new provisions coming into force. Likewise, the provisions of s 62B did not affect the commencement of a proceeding that relates to an existing legal position, because Mr Foote retained the ability to commence the review and appeal process after the law change on 24 December 2020, but he needed to comply with the new requirements if he wished to do so. No proceedings had been commenced on 24 December 2020, so there were no proceedings to complete. On this view, s 33 of the Legislation Act 2019 does not save the formerly unlimited right of appeal, which new legislation has replaced with a limit as to time of filing.

[17] Another view would be that the new legislation, with a six-month period of promulgation prior to its commencement date, should be read as limiting appeal rights, which subsisted unaffected, until the new legislation came into force. On this view, the right to bring an appeal was not abrogated per se by the new provisions, because the appeal right remained extant until the new time limits came into force. The exercise of the right to appeal was made subject to a justified limitation, namely the bringing of a Commissioner's review, within time limits. The promulgation period prior to

commencement of the legislation provided an opportunity for anyone wishing to exercise existing appeal rights to do so before the legislation changed, after which all appeals must comply with the new procedure.

[18] It was also submitted that the law is clear that a litigant has no over-arching right to claim the benefit of a procedure which has been repealed. In *Crown Health Financing Agency v P*, Glazebrook J in the Court of Appeal supported the general principle that "… statutory provisions dealing with procedural matters (as opposed to substantive rights and obligations) would be regarded as operating "retrospectively" unless a contrary intention is expressed or implied in the repealing statute."[2] No contrary intention is expressed in this new legislation. There would usually be savings provisions addressing such issues if that was intended, and the long promulgation period before the time limits came into force can be seen as providing adequate notice and opportunity to exercise a right which was to become qualified.

[19] A significant feature of the new legislation is the imposition of time limits for both the review process and appeals. The legislative purpose must have been to introduce limits on the right to appeal. Those notified of an appealable decision prior to the commencement date of the new legislation must be taken to have had knowledge of the change. In my view, effect must be given to that intention. The legislation can be read as requiring prospective appellants in relation to decisions made after the legislation was passed, but before it came into force, to file their appeals on or before the new legislation's commencement date. Failing that, they are required to comply with the new more restrictive appeal rights.

[20] In light of the Commissioner's power to extend time, and the absence of a corresponding power vested in the Court, and the extended period after the legislation received the Royal Assent before coming into force, I consider that the legislature must have intended that prospective appellants were required to act promptly, or risk the time bar. On this view, the right to appeal an adverse decision was not removed by the new legislation, but the time within which the appeal must be commenced was truncated by the prospective operation of the new time limits.

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[2] *Crown Health Financing Agency v P* [2009] 2 NZLR 149

[21] The new s 62 precludes any appeal to the District Court in circumstances where the review process has not been undertaken within the time limit of 28 days, or a further 28 days if allowed by the Commissioner. That timetable was not met by Mr Foote. The point is novel, and counsel invited me to address the issue in a written decision for the benefit of other applicants.

[22] Before parting with the matter, for the guidance of the police officers doing this kind of work, I wish to record my concerns about the rather ambiguous manner in which the appellant was informed in the letter of 7 December 2020 that the police would be prepared to accept a surrender of his firearms licence in lieu of revocation. It could very well be appropriate for commissioned police officers making such decisions to reach a considered view on all the material before them that something less than a complete revocation of a licence might be justified, and to offer a surrender of licence as an alternative. Whilst the letter of 7 December is tolerably clear in that regard, I would simply observe that clarity and an absence of ambiguity are the most desirable goals in such a situation. Any such letter should be worded along the lines that the prior revocation decision remains in force unless and until the licensee has confirmed in writing within a specified period (perhaps seven or 14 days) that the licence is surrendered.

[23] In this case, I am satisfied that it is crystal clear that although Mr Foote was offered that option, he informed Constable Pedersen that he did not wish to surrender his licence, and the revocation of licence of 18 October 2020 remained in full force and effect throughout. I accept the submissions made on behalf of the Police, and I am satisfied that no valid appeal has been filed within the time limits required by s 62B, and that no appeal was filed before that provision came into force.

[24] For the reasons given, I am satisfied that in these circumstances the District Court has no jurisdiction to entertain an appeal, and the appeal must accordingly be dismissed.

[25] In case the matter has a sequel, I record that if I had jurisdiction to determine this appeal, I would only allow this appeal on condition that Mr Foote resit his firearms licence, after completing the necessary firearms safety course. Mr Foote may well be able to persuade the Inspector to allow him to do so, given the terms of the offer made in the letter of 7 December 2020, and the subsequent effluxion of time.

Judge TR Ingram
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/02/2022