

[4] Mr Ayling has already applied to the police for a review of the decision to revoke his firearms licence and has been notified of the reviewer's decision, namely that the police maintain their original decision to revoke Mr Ayling's firearms licence.

[5] In an appeal to the District Court it is for the District Court Judge to satisfy himself or herself *de novo* as to whether the applicant is a fit and proper person to hold a firearms licence.² The judge has the power to confirm, vary or reverse the decision appealed against.³

[6] There is no presumption in favour of the appealed decision and no onus on the applicant to satisfy the judge it was wrong.⁴ In the context of a *de novo* appeal, should the court find the case evenly balanced after hearing evidence, the decision under appeal shall stand.⁵

[7] The test for a fit and proper person is contained within s 24A of the Arms Act 1983. The police may find that a person is not a fit and proper person to be in possession of a firearm, if, for example, the person is charged with or has been convicted of an offence that is punishable by a term of imprisonment. The type of offence that the police may take into consideration includes, but is not limited to, an offence involving violence, drugs, or alcohol.⁶ A further circumstance that the police can take into account is if a person abuses alcohol to an extent that affects detrimentally their judgement or behaviour.⁷

[8] Those are the criteria under which the police have found that Mr Ayling is no longer a fit and proper person. The circumstances need setting out in greater detail.

Background to revocation

[9] The police rely primarily on four incidents, three of which led to Mr Ayling being charged with driving with an excess breath/blood alcohol level, although only

² *Police v Cottle* [1986] 1 NZLR 268 (HC).

³ Arms Act 1983, s 62B(3).

⁴ *Fewtrell v Police* [1997] 1 NZLR 444 (HC).

⁵ *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437.

⁶ Arms Act 1983, s 24A(1)(a).

⁷ Arms Act 1983, s 24A(1)(i).

one of those charges led to him being convicted. There was also a fourth incident involving Mr Ayling, the police and alcohol which did not reveal any offending by Mr Ayling, but which the police believe lends support to their overall assessment.

[10] On 5 October 2018 Mr Ayling was stopped whilst speeding. His blood alcohol level was later ascertained to be 85 micrograms of alcohol per 100 millilitres of blood. The legal limit is 80 micrograms per 100 millilitres. Mr Ayling was charged but acquitted as the level of tolerance incorporated into the analysis meant that the court could not be sure beyond reasonable doubt that Mr Ayling's blood alcohol level was in fact over 80 micrograms.

[11] Mr Ayling's behaviour on that day has also become relevant. Part of the material forwarded to me to consider in support of the police position was the formal written statement of Constable Wallcroft, the police officer who arrested Mr Ayling that day. Mr Ayling's behaviour at the police station can best be described as difficult. On being read the preliminary evidential breath test advice he had to be asked five times whether he would like to speak to a lawyer and on the fifth time replied that "perhaps he should". There was then a 40-minute delay whilst Mr Ayling tried, without success, to contact his lawyer of choice.

[12] When the evidential breath test was eventually carried out Mr Ayling failed to supply any sample of his breath for that test. He was asked to do so six times, but each requirement was met with silence. It is reported that throughout this time he remained "seated looking blankly at a wall with arms and legs crossed at a 45° angle" to where the officer was standing. Eventually Mr Ayling had to be taken to the local hospital so that a blood sample could be taken. That was at 12:33 pm. Mr Ayling had managed to use up approximately three hours by his delaying tactics.

[13] On 16 May 2019 Mr Ayling was charged with driving with a breath alcohol level of 489 micrograms per litre of breath, the upper legal limit being 400 micrograms. He pleaded guilty, was fined and disqualified from driving for six months.

[14] On 12 June 2019 the same police officer who had arrested Mr Ayling on 16 May of that year saw his car in a pub carpark. The officer, Constable Parker, spoke to Mr Ayling who was drinking a beer in the bar. The officer spoke to Mr Ayling, in essence giving him advice that if he drove away from the hotel that night he was likely to get himself into trouble. The exchange as recorded by the police officer indicates that Mr Ayling, whilst not being rude or aggressive, did not think much of the advice.

[15] On 13 September 2020 the same officer, Constable Parker, saw Mr Ayling's vehicle leave that same pub carpark. Mr Ayling eventually pulled over about 300 metres after the police had first indicated for him to stop. Mr Ayling failed the subsequent breath screening test and was advised that he was required to accompany Constable Parker to the local police station. Mr Ayling then told the officer that he wanted to move his vehicle to a safe place. It was conceded by the constable that his vehicle was not in a safe place, it was causing an obstruction to other road users. I understand it also contained some valuable tools. Mr Ayling was advised that he himself could not move his vehicle, for obvious reasons. The police officer offered to move the vehicle for him. Mr Parker however replied, "I will move it" and immediately drove off. He was pursued by the police and drove another 300 metres before pulling over. Mr Ayling's vehicle was eventually secured and he was transported back to the police station. On route Mr Ayling advised the officer that he was "an arsehole".

[16] Once at the police station Mr Ayling took up almost one hour in attempts to contact his lawyer and failed attempts to blow through the evidential breath test machine, before eventually returning the positive result of 457 micrograms of alcohol per litre of breath. In other words he reprised his behaviour of 5 October 2018.

[17] The evidence of a second officer was that, during the hour Mr Ayling was delaying matters, he was "agitated, rude and would step up to Constable Parker standing right in front of him and waving his arms in such a manner that I believed he was about to slap him. At one point he stepped right up to Constable Parker with both hands up like he was about to push him, at this point I stepped into the room, ready to assist, and warned Ayling that he would be arrested for assault if he pushed Constable Parker. Ayling stepped back but continued to rant and wave his arms".

[18] According to that second officer this behaviour was repeated a short while later.

[19] The following day Mr Ayling was served with two notices, a 28-day driver licence suspension notice and a notice prohibiting him from selling or disposing of his motor vehicle. Mr Ayling subsequently disposed of his vehicle and has since pleaded guilty and been convicted of breaching the notice.

[20] It is the combination of those matters, but more particularly the attitude displayed by Mr Ayling to the police, whilst under the influence of alcohol, that has led to the decision that Mr Ayling is not a fit and proper person. The inspector reviewing Mr Ayling's licence took the view that "the evidence I reviewed in relation to the 2020 charges indicated to me that the appellant showed disregard for police authority and instruction...I was also concerned by the appellant's behaviour and attitude towards police...behaviour that [was] aggressive and obstructive towards police. This information showed a pattern of obstructive behaviour on the part of the appellant when dealing with the police".

The case for Mr Ayling

[21] Mr Ayling no longer owns any firearms. He has in the past been a keen hunter but in 2018 became sick with cancer and gave his firearms to his son. He still likes to shoot but his shooting is largely now restricted to pest control on his son's farm. He hopes that one day he may be well enough to hunt again.

[22] Up until 2018 he led an exemplary life. He has received a civic award amongst other achievements. I accept completely Mr Ayling's evidence that he has been an "honest, respectable and responsible citizen".

[23] Shortly before the hearing in front of me Mr Ayling had stood trial on the September 2020 charge of driving with an excess breath alcohol level. (He pleaded guilty to the charge of disposing of his vehicle contrary to the prohibition notice.) I was invited to read the notes of evidence and the judgment but have declined to do so for reasons I will give further on. I accept counsel's advice that the acquittal was

on the basis of procedural failures by the police but also that on a particular point the trial judge favoured Mr Ayling's evidence over that of Constable Parker.

[24] Importantly however Constable Parker was not cross-examined at the hearing in front of me. His evidence as regards this application was therefore unchallenged. It is for that reason that I have elected not to read the evidence or judgment in the recent trial.

[25] As well as contesting the evidence of Constable Parker as to his general conduct in September 2020, Mr Ayling also disagreed with the evidence of Constable Wallcroft as to his behaviour in October 2018. As with the evidence of Constable Parker however, Constable Wallcroft was not cross-examined. No police witness was.

[26] The point was properly made that only one of the three charges involving drinking and driving had resulted in a conviction. I accept that the point was properly made but I also take the view that I am entitled to take account of the evidence that in September 2020 Mr Ayling did drive having had too much to drink and that he was abusive and challenging whilst the police were dealing with him that day. I also accept the evidence that he was challenging and difficult in October 2018.

[27] I accept of course that Mr Ayling has no convictions that directly relate to offending against the police, such as obstructing or assaulting the police. He has never been convicted of an offence of violence or disorder.

[28] The fact that his firearms are not kept at his property and are only used on a limited basis is a relevant factor to be taken into account.

[29] Mr Hannam submitted that, even taking the police evidence and position at its highest point, it was too long a bow to draw to say that, just because Mr Ayling is difficult with the police, he is a danger with firearms. Mr Hannam also had a fallback position in the event that I do find Mr Ayling is not a fit and proper person, and that is to defer a final decision to allow Mr Ayling to undergo an alcohol assessment and possible therapeutic intervention.

Discussion and conclusion

[30] The 2020 legislation, amending the Arms Act, has tightened up the concept of what constitutes a “fit and proper person” to hold a firearms licence; to be in possession of firearms. The assessment of what constituted a fit and proper person, before the amendments, already required a consideration of a person’s overall character and history to determine whether or not they were the sort of person who should be allowed to hold a firearms licence. The long title of the 1983 Arms Act sets out that it is “an act to consolidate and amend the law relating to firearms and to promote both the safe use and the control of firearms and other weapons”. This was noted by Judge Neave in a 2008 decision, when his Honour also observed that: “Considerations of promoting the safe use and control of firearms must inform any decision on the fitness and propriety of any particular person holding firearms licence.”⁸

[31] A person’s character, good or bad, is relevant only where it affects the fit and proper assessment. As was observed by Judge MacAskill, “a person could be destitute of any moral character but a safe possessor of firearms. He could be an offender with respect to areas of the law that have no relevance to the propriety of his possessing firearms... What is required in each case is an evaluation of all the relevant evidence”.⁹

[32] As was said by Judge Hinton in a decision that post-dates the amending legislation, “the assessment the court must make is at least conservative in relation to what is a distinct privilege and where obvious issues of personal and public safety are in play”.¹⁰ In that particular case one incident of drink-driving, coupled with an assault on a police officer, was enough for the Judge to conclude that the applicant was not a fit and proper person.

[33] Possessing a firearms licence is a privilege and the assessment the court must make is a conservative one. I accept that it is probably not a coincidence that Mr Ayling’s otherwise impeccable character has changed since he has become

⁸ *McCabe v NZ Police* DC Timaru, CIV 2008-076-345, 30 January 2009.

⁹ *Baxter v Police* DC Greymouth, CIV 2014-018-000124, 12 February 2015.

¹⁰ *Moosman v Police* DC Whanganui, [2021] NZDC 23700.

seriously unwell. He has my deep sympathy in that regard. It is clear however that Mr Ayling does not have as high a regard for the law as he used to. It is clear that his judgement now becomes significantly affected when he has consumed alcohol. It is clear that, once he has consumed alcohol he can be very difficult and obstructive for the police to deal with. The police have the role of enforcing firearms law, ensuring the safety of the community and responding to any incidents where it is suspected firearms are being used or abused. They are entitled to have their safety borne in mind at least as much as the community at large.

[34] Based on the material before me can I discount the possibility that Mr Ayling will not drink alcohol immediately prior to or even whilst in possession of firearms? I cannot. Can I discount the possibility that Mr Ayling, if under the influence of alcohol whilst in possession of firearms, would not act irresponsibly? I cannot. Can I discount the possibility that if challenged by the police, at a time when Mr Ayling was under the influence of alcohol and in possession of a firearm, that he would not act recklessly or stupidly? I cannot. All of these scenarios are, in my judgement, perfectly possible.

[35] With those findings in mind I cannot conclude that Mr Ayling is a fit and proper person to possess a firearms licence. His application must fail.

Judge AS Greig

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 16/03/2022