EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PER [2021] NZDC 13235

IN THE DISTRICT COURT
AT INVERCARGILL

I TE KŌTI-Ā-ROHE
KI WAIHŌPAI

CIV 2021-025-325
[2022] NZDC 3783

IN THE MATTER	of an Appeal against a Decision to Revoke a Firearms Licence
BETWEEN	[ALEXANDER DUFF] Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	2 March 2022 Judge via AVL (Wellington)
Appearances:	Mr J Ross for the Appellant Mr R W Donnelly for the Respondent
Judgment:	7 March 2022

RESERVED DECISION OF JUDGE K D KELLY

Introduction

[1] On 28 April 2021 the New Zealand Police revoked the appellant's firearms licence. The appellant appeals that decision pursuant to s 62B(1) of the Arms Act 1983 (the Act).

Background

[2] On 28 April 2021, Insp Bowman of the New Zealand Police revoked the appellant's firearms licence pursuant to s 27(2)(a) of the Act because the appellant was not, in the Inspector's opinion, a fit and proper person to be in possession of a firearm. The appellant had been charged with a number of crimes which the Police deemed to be inconsistent with the appellant possessing a firearm.

[3] Pursuant to s 23 of the Act, the effect of revocation is that the appellant is not able to re-apply for a firearms licence for a period of five years. The appellant lives on a farm where and, amongst other things, says that the most humane way to put down stock is by using a firearm and that a firearm is useful for pest control.

[4] The charges were eventually resolved in 2021 with some charges being withdrawn by the Police, and changes being made to the summary of facts by agreement between the Police and counsel for the appellant. Three charges of assaults child (manually) per s 194(a) of the Crimes Act 1961 were before the Court, each carrying a possible 2 year term of imprisonment.

[5] On 30 June 2021 the appellant was discharged without conviction pursuant to s 106 of the Sentencing Act 2002. The discharge was not opposed by the Police.

[6] Subsequently, on 16 August 2021, pursuant to s 62 of the Act the appellant applied to the Commissioner of Police for a review of Insp. Bowman's revocation decision. The appellant acknowledged that his application was late but said that extenuating circumstances applied as the appellant was waiting for the outcome of the substantive proceedings before the District Court. The appellant said:

> The criminal charges were central to the Inspector's decision to revoke the firearms licence. Awaiting their determination was therefore necessary in assessing the merits of the Inspector's decision. Matters were resolved after the statutory 28-day period for bringing a review and the decision was released even later. Essentially, the relevant information only became available on 15 July 2021 (release of the typed decision) or, if earlier, then no earlier than 30 June 2021.

[7] It was submitted that the revocation decision was based on irrelevant information namely allegations not pursued by the Police and that the charges and summary revealed low-level offending not deserving a conviction. It was submitted that none of this was before the Inspector when he made his revocation decision such that it was founded on a false premise.

[8] Three days later on 19 August 2021 Insp Jason Greenhalgh of the Arms Safety and Control division of the Police, wrote to the appellant: "to give you notice of the outcome of my review." Insp Greenhalgh advised:

> Section 62 of the Arms Act 1983 is clear that an application for a review of an official decision must be made within 28 days after the date on which the original decision is received. Under extenuating circumstances that have affected the ability of the claimant to make the application, this timeframe can be extended a further 28 days but no more.
>
> Your application for a section 62 review was outside the legislative timeframe, even with an extension, and Police have no ability to extend the timeframe further.
>
> You therefore have no right of review under section 62.
>
> The original decision to revoke your firearms licence remains unchanged.

Issues

[9] There are two issues for consideration:

(a) first, does this Court have jurisdiction in circumstances where the appellant did not apply for a right of review under s 62 within the prescribed time periods;

(b) secondly, if the first issue is answered in the affirmative, should the revocation decision be reversed on the basis that the appellant is a fit and proper person to be in possession of a firearm?

Submissions on jurisdiction

[10] Section 62B provides that a person who is the subject of certain decisions may appeal to a District Court against those decisions. On hearing an appeal a District Court Judge may confirm, vary, or reverse the decision appealed against.

[11] Subsection (1) is an overarching provision which relates to specified refusal decisions including the refusal of firearms licences (paragraph (a)), and to decisions about the imposition of conditions or the revocation of certain licences, permits endorsements, and certificates (paragraph (b)), including the revocation of firearms licences.

[12] Section 62B(2) specifically relates to s 62 decisions (namely decisions to refuse or revoke firearms licences) and reads:

> (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.

[13] Section 62 reads:

> (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.

[14] The Police submit that the appellant did not apply for a review in accordance with s 62 such that the appellant has no right of appeal under s 62B, as stated in s 62B(2). It is submitted that although s 62B is a relatively new provision, the Police do not have the ability to act otherwise than in accordance with the clear statutory timeframes. As no application was properly made by the appellant within time, it is submitted that this Court has no jurisdiction to hear the appeal.

[15] The appellant accepts that s 62 applies in this case and that his application for review was made outside both the initial 28-day period prescribed in s 62(4), and the further 28-day period in s 62(5). The appellant submits, however, that he did apply for a review 'under s 62' and that the Act does not require him to apply 'in accordance' with s 62.

[16] The appellant submits that the Legislature's purpose in inserting the review process into the Act can be gleaned, in part, from the Commentary on the Arms Legislation Bill by the then Minister of Police, which says:[1]

> Currently a person may make an appeal to the District Court in relation to certain decisions. This is costly to the individual and creates a burden on the Courts. Introducing an intermediary step, for some decisions, provides an opportunity to ensure those decisions are robust and in some cases will avoid the need to appeal to the Courts.

[17] It is submitted that the purposes of the review processes, as a preliminary step to the appeal process, are:

(a) to save money for the people in the appellant's position in so far as it is efficient for a revocation decision to be overturned by the Police without requiring recourse to the courts; and

(b) to reduce the need for the court to consider matters where the Police revisiting the decision would otherwise result in a change to the outcome.

[1] https://www.police.govt.nz/arms-legislation-bill-commentary at page 27

[18] The purpose of the time periods in s 62, it is submitted, relate to efficiency and are intended to "keep things moving". The appellant says that there is no indication that the Legislature intended to remove appeal rights from persons who do not comply strictly with the review time periods.

[19] The appellant submits that the basis for him waiting to seek a review of the revocation decision was that until the charges against him were resolved in the District Court, nothing had materially changed such that a review would not likely have changed the revocation decision, and Police time and money would have been wasted.

[20] It is submitted that if the time periods are strictly interpreted to mean that the failure to comply with them means a revocation decision cannot be challenged, that would result in an extremely harsh outcome given the 5 year stand-down period in s 23 in circumstances where a person makes a simple error in relation to time periods. It is submitted that there is no indication that this is what the Legislature intended.

[21] The appellant submits that the words "first applied under section 62" in s 62B(2)(a) should be interpreted broadly to include persons who apply to the Commissioner of Police for a review of the revocation decision even where the review is sought outside the time periods referred to in s 62(4) and (5). Such an application, it is submitted, is still an application for review under s 62. If the Commissioner is unable to review a decision because the application is made outside the time periods, it is submitted that the opportunity to deal with the decision by way of review will be lost, but s 62B(2) should not be read in a way that removes a person's right to bring an appeal of that revocation decision.

[22] The appellant says that the course adopted by him not to seek a review until the allegations against him had been resolved was a common sense one and that it would be unfortunate to interpret a statutory provision aimed at providing a benefit to individuals, such as himself, in a way that effectively punishes him for trying to address matters efficiently.

Decision and reasons

[23] Section 62B was inserted into the Arms Act 1983 on 24 December 2020 by s 90 of the Arms Legislation Act 2020 following the 15 March 2019 terror attack in Christchurch.

[24] Section 10 of the Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text and in light of its purpose and context.

[25] The purposes of the Act in s 1A(1) are to:

(a) promote the safe possession and use of firearms and other weapons; and

(b) impose controls on the possession and use of firearms and other weapons.

[26] Section 1A(2) provides that the regulatory regime established by the Act to achieve those purposes reflects the principles:

(a) that the possession and use of arms is a privilege; and

(b) that persons authorised to import, manufacture, supply, sell, possess, or use arms have a responsibility to act in the interests of personal and public safety.

[27] As stated in the Minister's Commentary on the Bill referred to by the appellant: "Strengthening licensing requirements will make it harder for firearms to get into the wrong hands. The suite of changes to licensing individuals, dealers, and clubs and ranges will better identify those who are fit and proper to possess firearms and better promote safe use. …".[2]

[28] Unlike other revocation decisions to which s 62B(1) applies, the plain wording of s 62B(2) is that in the case of a decision to revoke a firearm's licence there is no right of appeal unless certain prerequisites are met, namely that the licence holder has 'first applied' for a review and has been notified of the reviewer's decision.

[29] Section 62B(2) makes it clear, that a review is now a jurisdictional pre-requisite to a right of appeal of a decision to revoke a firearms licence in a way that was not the

[2] Above n 1, at page 2

case previously. A right of appeal of a decision to revoke a firearms licence, on a plain reading of s 62B(2), is exceptional. Such a construction does not invite the broad interpretation that the appellant invites the Court to take.

[30] Moreover, the express limitation in s 62(5) can only mean what it says. On a plain reading of s 62, there is no ability to seek a review outside the 28 days unless the Commissioner of Police accepts a late application, and in such a case the application must be made within the following 28-day period. The Act does not say: 'an application must be made within 28 days unless the Commissioner is satisfied that there are extenuating circumstances that affected the ability of the claimant to make the application by the closing date.' Section 28(4) is expressed in mandatory terms subject to the limited discretion vested in the Commissioner.

[31] To read s 62(5) as the appellant invites this Court to do would effectively mean that a review could be made at any time. Section 62(5) would be largely otiose.

[32] Moreover, if a right of appeal was triggered by lodging a pro forma application for review the express words of s 62B(2) that there is "no right of appeal under this section unless", would be defeated.

[33] The words "under section 62" in s 62B(2)(a) must also be read as meaning the entirety of s 62, including s 62(4).

[34] Section 62B(2)(b) also requires that there is no right of appeal unless the person who applied for a review has been notified of the reviewer's decision.

[35] While the outcome of not undertaking a review is that the revocation decision remains unchanged, I am not persuaded that equates with the reviewer having made a decision. The purposes of this review, as the Minister stated in the commentary referred to by the appellant is: "to ensure those decisions are robust and in some cases will avoid the need to appeal to the Courts." In other words, the relevant decision in question is one that follows a merits based consideration of the initial revocation decision. In the present case, I am not satisfied that it can be said that Insp Greenhalgh substituted his decision for that of Insp Bowman by way of confirming Insp Bowman's

decision following merits-based review. Notwithstanding that Inspector Greenhalgh's letter of 19 August 2021 says that he was writing to give the appellant notice of "the outcome of my review", that is plainly not what he intended given that the letter says that the appellant has no right of review. It is difficult to see how the letter of 19 August 2021 could be read to mean anything else.

[36] Denying a right of appeal in circumstances where an application for review is made outside the express statutory timeframes in s 62 accords with a plain reading of s 62B(2) and cannot be said to be consistent with the purpose of the Act in s 1A(1)(b) in so far as the section imposes a control on the possession and use of firearms, reflecting the express principle that the possession and use of arms is a privilege.

Conclusion

[37] As the application for review was not made within the statutory timeframes set out in s 62 of the Act, the appellant has no right of appeal under s 62B(1) by virtue of s 62B(2).

[38] In light of this conclusion, I make no observations or determination on the second issue of whether or not the revocation decision ought to be reversed on the basis that the appellant is a fit and proper person to be in possession of a firearm.

Result

[39] The appeal is dismissed for lack of jurisdiction.

K D Kelly
District Court Judge