

1 of 1 DOCUMENT: New Zealand Law Reports/1992 Volume 1/Practical Shooting Institute (NZ) Inc v Commissioner of Police

Pages: 11

## **Practical Shooting Institute (NZ) Inc v Commissioner of Police - [1992] 1 NZLR 709**

High Court Christchurch  
16, 23 August 1991  
Tipping J

*Administrative law -- Judicial review -- Fetter on exercise of discretion -- Importation of firearms -- Need for police permit to import -- Commissioner of Police purported to ban certain classes of weapon absolutely from importation -- Whether ban constituted a lawful policy decision -- Whether ban constituted fetter on exercise of commissioner's statutory discretion -- Arms Act 1983, ss 4, 16 and 18 - The Arms (Restricted Weapons and Specially Dangerous Air Guns) Order 1984 (SR 1984/122).*

The Commissioner of Police purported to ban the importation into New Zealand of military style semi-automatic firearms. The ban was absolute, permitting of no exceptions. Section 18 of the Arms Act 1983 made provision for the issue of an import permit by any member of the police under certain conditions but, in the case of an application in respect of a pistol or restricted weapon, required the Commissioner of Police to be satisfied that there were special reasons why the pistol or restricted weapon should be allowed into New Zealand. Section 4 of the Act empowered the Governor-General by Order in Council to declare any weapon to be a restricted weapon. The plaintiffs challenged the legality of the ban by way of an application for judicial review seeking a declaration that the commissioner had acted beyond his powers. They argued that the commissioner was neither expressly nor impliedly authorised under the Arms Act 1983 to impose or implement the ban; and that the imposition of the ban constituted an unlawful fetter on the exercise of his discretion.

### **Held:**

Parliament had vested in the commissioner, or his delegate, a discretionary power to grant or refuse import permits for firearms. It had contemplated that certain weapons or classes of weapons should in the public interest be declared, by an Order in Council, to be restricted weapons. The commissioner was not entitled to have an absolute rule about certain classes of weapon, namely a rule banning them without individual adjudication. The effect of what he had done was to legislate. He was not authorised to exercise his discretion by declaring, by means of his own non-legislative fiat, certain classes of weapons to be absolutely banned from importation. There was no express power in the Arms Act entitling him so to do and the structure and content of s 18, read together with s 4, pointed clearly against the existence of the power by implication (see p 717 line 11, p 717 line 17, p 717 line 52, p 718 line 6).

R v Port of London Authority, ex parte Kynoch Ltd [1919] 1 KB 176 (CA), British Oxygen Co Ltd v Minister of Technology [1970] 3 WLR 488; [1970] 3 All ER 165 (HL) and Findlay v Secretary of State of the Home Department [1984] 3 WLR 1159; [1984] 3 All ER 801 (CA & HL) followed.

Attorney-General, ex rel Tilley v Wandsworth Borough Council [1981] 1 WLR 854; [1981] 1 All ER 1162 and R v Anderson, ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177; [1965] ALR 1067 referred to.

[1992] 1 NZLR 709 page 710

Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614; [1971] 3 WLR 113 (CA) distinguished.

**Observations:**

(i) There are two, possibly three, categories into which discretionary powers of the kind in question could be put: (i) those which required an individual case by case examination without any predetermined fetter on the exercise of the discretion, other than contained in the enabling instrument; (ii) those which by dint of the nature of the subject-matter justified the establishment as a matter of discretion of a carefully formulated policy with the reservation that no case was to be rejected automatically because it did not fit the policy; and (iii) possibly those representing cases where the discretionary decision maker was implicitly authorised to exercise his discretion to establish for himself an immutable policy permitting of no exceptions (see p 718 line 18, p 718 line 41).

(ii) If Parliament wished the commissioner to have the power absolutely to ban the entry of certain firearms into New Zealand, whether they be restricted or non-restricted, Parliament should now give the commissioner that power in clear terms or itself legislate for such a ban (see p 718 line 6).

Declaration accordingly.

**Other cases mentioned in judgment**

Carvell v Police [1990] DCR 295.

M v Syms (High Court, Palmerston North, CP 302 and 303/90, 5 December 1990, McGechan J).

R v London County Council, ex parte Corrie [1918] 1 KB 68.

R v Secretary of State for Transport, ex parte Sherriff & Sons Ltd [1986] TLR 685.

**Application**

This was an application for judicial review of a decision of the Commissioner of Police on the grounds that he lacked authority to make the decision.

W G G A Young QC and I G Hunt for the plaintiffs (Practical Shooting Institute (NZ) Inc and R M Woods).

J C Pike for the defendant (Commissioner of Police).

*Cur adv vult*

**TIPPING J.**

On 25 June 1990 the Commissioner of Police purported to ban the importation into New Zealand of military style semi-automatic firearms. On that day he issued a press release to that effect headed "Police Ban Semi-Automatics". At the same time the assistant commissioner advised all regional and district commanders and arms officers of the ban. A list of the firearms concerned was circulated, and was said to include the weapons identified by manufacturer and model on the list. The ban, as publicly notified, was absolute, permitting of no exceptions.

The plaintiffs have challenged by application for judicial review the legality of the ban. They claim that the commissioner had no power to impose an absolute ban on the weapons in question. The commissioner contends that the ban is a lawful policy decision implemented pursuant to his powers and duties under the Arms Act 1983. It is important to note, and indeed to emphasise at the outset, that what is in issue is not the wisdom or the bona fides of the

commissioner's decision but its legality.

The Court is not concerned in this case with the merits or demerits of the importation into New Zealand of weapons of this type. This is an application for judicial review not an appeal. The crucial question is whether the commissioner had the legal power to impose an absolute ban as he purported to do. The steps which the commissioner took before imposing the ban are referred to in evidence

*[1992] 1 NZLR 709 page 711*

but need not be discussed in detail, nor need the circumstances of the plaintiffs. It is accepted they have standing to seek relief and that the commissioner's decision is susceptible of judicial review. It should be noted that in July 1989 the commissioner recommended to the then Minister of Police that consideration should be given to legislating for a ban on the importation of certain firearms. As no intention to legislate had emerged, either then or since, the commissioner obviously decided to take the initiative.

### ***Statutory provisions***

Section 16 of the Arms Act provides that no person shall bring into New Zealand "any firearm, pistol, starting pistol or restricted weapon" without a permit issued to that person by a member of the police. The Arms Regulations 1984 (SR 1984/121) deal with the procedure for making applications for permits. They provide for arms offices and arms officers to whom such applications must be directed. Section 18 of the Act provides as follows:

- "18. Issue of permits to import firearms** -- (1) Any member of the Police to whom application is made for the issue of a permit for the purposes of section 16(1) of this Act --
- (a) May require the applicant to produce for examination and testing such samples of any firearms, pistols, starting pistols, or restricted weapons of any kind referred to in the application as he may deem necessary; and
  - (b) May in his discretion refuse to grant the permit with respect to any firearm, pistol, starting pistol, or restricted weapon of any kind.
- (2) Without limiting the discretion conferred by subsection (1)(b) of this section, no application for a permit for the purposes of section 16(1) of this Act in respect of a pistol or restricted weapon shall be granted otherwise than by the Commissioner who shall satisfy himself that there are special reasons why the pistol or restricted weapon to which the application relates should be allowed into New Zealand.
- (3) Any permit issued for the purposes of section 16(1) of this Act may be at any time revoked by a commissioned officer of Police."

It should next be noted that a "restricted weapon" means a weapon declared to be such by Order in Council under s 4 which provides:

- "4. Power to declare weapons to be restricted weapons or specially dangerous airguns** -- (1) For the purposes of this Act, the Governor-General may from time to time, by Order in Council, declare --
- (a) Any weapon (including an airgun) to be a restricted weapon; or
  - (b) Any airgun to be a specially dangerous airgun.
- (2) Any Order in Council made under this section may relate to any weapon or airgun specified by its name or trade name, or to any class of weapons or airguns identified by a description of that class.
- (3) Every Order in Council made under this section shall be deemed to be a regulation for the purposes of the Regulations Act 1936."

An Order in Council was made by the Governor-General on 14 May 1984. It is entitled "The Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984" (SR 1984/122) and has a schedule listing the weapons thereby declared to be restricted weapons. They include anti-tank projectors, grenade dischargers, molotov cocktails, machine guns,

sub-machine guns, explosive mines, mortars and rocket launchers. It will immediately be noticed that under s 18(2) restricted weapons are not absolutely banned. A restricted weapon may be imported if the commissioner is satisfied that there are special reasons why it should be allowed into New Zealand.

[1992] 1 NZLR 709 page 712

The significant point for present purposes is this: whereas Parliament must have contemplated that there might be a special reason why a person wishing to import a restricted weapon such as an anti-tank projector, a machine gun or a mortar into New Zealand should be allowed to do so, the commissioner has purported to ban absolutely semi-automatic weapons which have not even been classified as restricted weapons. It also seems apparent from the evidence that, at the moment anyway, restricted weapons consist substantially, if not entirely, of firearms capable of fully automatic fire - see para 1.2 of the commissioner's memorandum to the Minister dated 20 July 1989.

Sections 62 to 64 of the Act give a right of appeal to the District Court in respect of various matters, including the refusal of applications to import firearms. It appeared from the commissioner's statement of defence that he was going to rely on this point to some extent, but Mr Pike did not do so in his submissions, so I need not dwell on this topic. In any event, if the commissioner's ban is invalid in law because it is ultra vires no appeal right could save it.

I return to s 18. By its terms the section gives no direct guidance as to the matters to be taken into account by the police officer considering the application to import a firearm. Section 18(1)(b) is expressed as giving a discretion to refuse a permit rather than a discretion to grant one. I doubt much turns on that, but if anything this mode of expression might support the view that there is a prima facie right to import unless sufficient grounds exist to refuse a permit.

The long title to the Act should be noted. It speaks of the purpose of the Act as being inter alia "to promote the safe use and the control of firearms". Obviously therefore those must be relevant considerations. I agree with Mr Young's submission that, by dint of s 18(2), if a category of weapon or firearm is regarded as being generally inappropriate for importation, Parliament has implicitly contemplated that such category should be designated a restricted weapon by Order in Council under s 4. That section allows the Order to relate to weapons specified by name or as a class identified by a description of that class, eg military style semi-automatics (a list of which could then be added without prejudice to the generality of the class).

There is no doubt that the commissioner's purported ban is absolute. Mr Pike acknowledged there was no exceptional case or special reason or similar exclusion from the ban. Pursuant to the assistant commissioner's circular, arms officers were directed to refer all relevant applications to Police National Headquarters for "final refusal". Nothing could be clearer: the press release gave an unambiguous signal that no weapon within the class described would on any account receive an import permit. Nor was there any suggestion that the commissioner would be receptive to a submission that he relax his stance, either generally or in any particular case. On its face the press release plainly indicated that the commissioner was not retaining to himself, or to any of his delegates, any residual discretion to allow the importation of any weapon covered by the ban.

### ***Legal issues and principles***

I turn now to the legal issues arising and the relevant principles of law. Two introductory citations will set the scene. In 1 Halsbury's Laws of England (4th ed) at para 32 it is acknowledged that a public body or official with discretionary statutory powers may adopt a policy as to how those discretionary powers are to be exercised in particular cases but:

"... it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment."

Professor Sir William Wade in his Administrative Law (6th ed, 1988) says at p 370:

[1992] 1 NZLR 709 page 713

"An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid

down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time."

Sir William goes on to note several examples including Attorney-General, ex rel Tilley v Wandsworth London Borough Council [1981] 1 All ER 1162 to which I shall refer again below. He then goes on to refer to R v Secretary of State for Transport, ex parte Sherriff & Sons Ltd [1986] TLR 685, where the Secretary of State had made a rule that he would refuse grants to all projects already started before the application was made. It was held that by so doing he had fettered his discretion unlawfully.

Sir William comments at p 371 that how far a fixed policy may be adopted by authorities or persons granting licences or permits is often a difficult question. He refers to R v London County Council, ex parte Corrie [1918] 1 KB 68. In that case there was an application for a permit to sell pamphlets in public parks for the benefit of the blind. The applicant was told the council had decided to grant no such permits and could make no exceptions. The Court regarded that not as the adoption of a policy to guide the exercise of a discretion, but as a refusal to exercise any discretion at all.

A contrast is drawn between that case and Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614 to which Mr Pike made reference, but it should be noted that the Sagnata case was decided by way of appeal and not on an application for judicial review. That is the reason why, as Mr Pike pointed out, no real issue arose about whether the corporation had fettered its discretion unlawfully by adopting a policy that no permit would be granted for amusement arcades in the centre of the city of Norwich.

This brings me to the case of R v Port of London Authority, ex parte Kynoch Ltd [1919] 1 KB 176, a decision discussed in argument. The Port of London Authority was empowered to grant or withhold permission for the construction of docks. The Court held that it could lawfully adopt a general policy of refusing permission where the proposed new dock would compete with its own docks, provided it gave bona fide consideration to each application. On an oft-cited passage Bankes LJ contrasted two types of case at p 184, namely:

"... cases where a tribunal in the honest exercise of its discretion had adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case."

And:

"... cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made."

The former approach is valid, the latter invalid.

Mr Pike cited and relied on British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165. He submitted that the essence of the Kynoch and British Oxygen cases was that an administrative or judicial body acting in some specialised area where it has a decision-making function may adopt a general policy upon which it will decide cases coming before it. So far so good. However Mr Pike went on to submit that the cases showed that what the body cannot do is refuse to hear any submissions from an interested person as to why the policy ought not to apply in that person's case, or as to why the policy should be altered either generally or in respect of the particular case. Mr Pike accepted that this was exactly what the commissioner had done in the present case, but to get over that difficulty he submitted that the foregoing proposition did not apply to all cases.

*[1992] 1 NZLR 709 page 714*

Before I move on I will refer to certain passages from the speeches in the British Oxygen case, which involved a decision by the respondent Minister not to make investment grants (which were within his discretion) in respect of single units of plant costing less than a stated amount. British Oxygen had applied for a grant but were turned down

because, although their turnover exceeded £4 million, each individual oxygen cylinder was worth less than the fixed limit of £25. Lord Reid at pp 170-171 cited the passage from the judgment of Bankes LJ in *Kynoch* noted above, and said:

"I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not 'shut [his] ears to the application' (to quote from Bankes LJ). I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing."

Viscount Dilhorne in a passage relied on by Mr Pike at p 175 said:

"I must confess that I feel some doubt whether the words used by Bankes LJ in the passage cited above are really applicable to a case of this kind. It seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail. Representations could of course be made that the policy should be changed."

I am of the view that these observations of Viscount Dilhorne are not consistent with the approach taken by Lord Reid following the trend of earlier authority, which approach was expressly concurred in by the other members of the House, Lord Morris, Lord Wilberforce and Lord Diplock. None of the other members concurred in Viscount Dilhorne's speech. What Viscount Dilhorne said is not in harmony with the *Wandsworth* case earlier cited, or with the later decision of the House of Lords in *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801.

In the *Wandsworth* case local authorities had a statutory duty to promote children's welfare and they were specifically empowered to give assistance to children in the form of housing. A committee of a local authority had passed a resolution, subsequently confirmed by the full council, that in cases where a family with young children had become intentionally homeless assistance was not to be provided. The Attorney-General on the relation of a ratepayer sought and was granted a declaration that this resolution was invalid because it amounted to an unlawful fetter on the discretion of the local authority to provide assistance. There was evidence that in spite of the absolute nature of the resolution the local authority had in practice allowed exceptions.

At first instance Judge Mervyn Davies QC, sitting as a Judge of the High Court, held that the resolution was unlawful and the fact that in practice exceptions had been made did not make the resolution itself lawful. In the Court of Appeal Templeman LJ said that if the resolution was *ultra vires*, as it was, the practice of making exceptions was irrelevant to its legal validity. Brandon LJ said that he was satisfied that the resolution laid down a policy without any exceptions at all and was accordingly invalid, and Lawton LJ agreed.

*[1992] 1 NZLR 709 page 715*

*Findlay's* case concerned the granting of parole to sentenced prisoners. The Secretary of State announced a decision to change parole policy with regard to prisoners serving a life sentence. He indicated that the new policy would be that prisoners sentenced to life imprisonment for the murder of police or prison officers, and in certain other categories, would thenceforth normally serve at least 20 years, and in relation to another category of case he announced that prisoners serving fixed sentences of over five years for offences of violence or drug trafficking would be granted parole, save in exceptional circumstances, only when release under supervision for a few months before the end of their sentence was likely to reduce the long-term risk to the public.

The new policy was attacked on an application for judicial review. The House of Lords held that the Secretary of State was entitled to have a policy regarding the exercise of his discretion to grant parole since it would be difficult for him to manage the complexities of his statutory duties in regard to parole without such a policy. It was emphasised however that the policy actually adopted did not exclude the proper consideration of the individual case, albeit that the policy

provided that exceptional circumstances or compelling reasons had to be shown for a departure from the policy because of the weight to be attached to the nature of the offence, the length of the sentence and certain other matters.

The judgment of Griffiths LJ in the Court of Appeal at p 817 is instructive. His Lordship asked whether the policy itself was unlawful. In his view that depended on whether the Home Secretary had power to exercise his discretion to adopt a policy under which he would as a general rule, save in exceptional cases, refuse parole to a particular category of offender or class of offender. His Lordship was of the view that the Secretary of State was authorised to adopt such a policy. He added:

"If the Home Secretary had gone so far as to say that in no circumstances would he grant parole for a particular class of offender, his policy might be unlawful, because it could be argued that he was refusing even to consider the exercise of a discretion with which Parliament had invested him."

The leading speech in the House of Lords was delivered by Lord Scarman. At p 828 his Lordship expressed reservations about some of the remarks of Templeman LJ in the Wandsworth case, although observing that he had no doubt that that case was correctly decided. His Lordship then went on to cite a passage from the judgment of Bankes LJ in *Kynoch's* case and a passage from the speech of Lord Reid in *British Oxygen*. He continued:

"The question, therefore, is simply: did the new policy constitute a refusal to consider the cases of prisoners within the specified classes? The answer is clearly No. Consideration of a case is not excluded by a policy which provides that exceptional circumstances or compelling reasons must be shown because of the weight to be attached to the nature of the offence, the length of the sentence and the factors of deterrence, retribution and public confidence, all of which it was the duty of the Secretary of State to consider. And the Secretary of State accepted the invitation of the board to continue to refer to the board all cases of eligible prisoners notwithstanding the adoption of the new policy."

"For these reasons I think the policy announced on 30 November 1983 was lawful."

A recent case in this Court in which this general approach was taken is the decision of McGechan J in *M v Syms* (Palmerston North, CP 302 and 303/90, 5 December 1990). In that case, which involved expulsion from school for consumption of alcohol, His Honour, following the citation from *Wade* set out earlier, took the view that those responsible for the decision had predetermined the issue in the particular case by adopting a hard and fast policy. The facts are

*[1992] 1 NZLR 709 page 716*

of course far removed from those in the present case but the general approach is the same.

Also of some help are the judgments in the High Court of Australia in *R v Anderson, ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177. The Court (Kitto, Taylor, Menzies, Windeyer and Owen JJ) was divided as to the result, which shows that this can at times be a difficult area of law. One of the issues in the case was whether the decision maker, who was the Director-General of Civil Aviation, had unlawfully fettered his discretion in a case in which he had to decide whether to grant or refuse permission to import aircraft into Australia. As Kitto J mentioned in his judgment at p 188, the refusal of the licence to import which was in issue in the case was based upon nothing except a policy against allowing anyone to participate in the relevant form of interstate trade other than those already engaged in it. It was for this reason that the Director-General had refused the import licence.

Kitto J said in a comment germane to the present case that "however wise and well grounded in reason that policy may be" it could not be upheld unless "the regulations on their true construction authorise a refusal so based". His Honour went on to hold that regulations did not allow the Director-General to refuse an import permit on the basis of the blanket policy which had been adopted, indeed in that case imposed on the Director-General, by the Government of the day. As Kitto J put it at p 189:

"It should be said at once that the integrity of the Director-General is not impugned in this case in the least degree. The complaint that is made is that honestly, but nevertheless contrary to the requirement of the law, he has refused the desired permission otherwise than by due exercise of his discretion."

It was the view of His Honour that that was exactly what the Director-General had done. That view was shared by Menzies and Windeyer JJ. Taylor and Owen JJ were of the view that no remedy should be granted on the basis of its general inutility.

### *Submissions*

I return to Mr Pike's attempt to take this case outside what he acknowledged to be the general rule noted above. Quoting from Mr Pike's written submissions it was his contention on behalf of the commissioner that "the application of fettering rules requires a qualitative assessment of the rights or interests affected within the particular statutory setting". As I understood him what Mr Pike was suggesting was this. The greater the "social value" of the right or interest at issue the less might the decision maker fetter his discretion by some predetermined policy. It was suggested that this approach, although not expressed in the various cases which I have cited, was inherent in them. Mr Pike suggested that if the social value of the right was high then little or no fettering would be permitted. Whereas he contended that there were cases "at the other end of the scale" where the social and individual values at stake are such that in the particular statutory setting a decision-making body need take "few steps" beyond the application of a predetermined policy.

The sliding scale concept inherent in this submission is in my judgment one of some difficulty. It introduces into the equation a subjective approach based on a value judgment as to the rights at issue. Indeed I agree with Mr Young's reply that it is not so much the right or privilege, however one wishes to put it, in jurisprudential terms, to import a firearm into New Zealand which is directly at issue, but rather the right to have one's application for an import permit determined according to law. The approach suggested by Mr Pike is in my view based more on shifting sand than statutory rock. I nevertheless agree with Mr Pike that the particular statutory setting is important because ultimately one has to decide whether the approach taken by the decision maker is either expressly or impliedly authorised under the statutory provisions pursuant to which the decision at issue has been made.

*[1992] 1 NZLR 709 page 717*

Mr Pike summarised his case by suggesting that while *ex facie* the commissioner's discretion had been fettered, the Arms Act impliedly authorised the fettering which had occurred. He suggested that on his sliding scale of social and individual values this case was at the bottom end and accordingly this fact authorised the course which the commissioner had adopted. I invited Mr Pike to indicate how he dealt with Mr Young's point that if restricted weapons by clear implication could not be absolutely banned, but could be imported for special reasons, how could the commissioner purport absolutely to ban non-restricted weapons. I am bound to say that I could not follow Mr Pike's submissions on this point.

In the light of the statutory setting I am unable to accept Mr Pike's submission that the commissioner is entitled to have an absolute rule about certain classes of weapon, namely a rule banning them without individual adjudication. Mr Pike acknowledged that the commissioner could not legislate but submitted that in this instance he had not purported to do so. That however in my view is the effect of what the commissioner has done.

Mr Pike went on to submit that in this case the real issue was not the existence of a fetter on discretionary powers, but rather whether the policy adopted was reasonable. I am unable to accept that proposition. The reasonableness or otherwise of the commissioner's policy is not the issue. The true issue is whether the policy is lawful in the sense of being impliedly authorised under the enabling provisions of the Arms Act.

It is apparent from the commissioner's affidavit, and also from Mr Pike's submissions, that reliance was placed by the commissioner on the decision of Judge Cadenhead in the District Court at Auckland in *Carvell v Police* [1990] DCR 295. That case was an appeal under s 62(1) against a refusal to grant a permit to import certain specified semi-automatic rifles. The case is therefore immediately distinguishable on the basis that it was an appeal on the merits of the exercise of the commissioner's discretionary powers and not in any way a decision on whether the commissioner had power absolutely to ban semi-automatic weapons. Indeed certain passages in the judgment of Judge Cadenhead quite strongly support the stance of the plaintiffs in the present case and not that of the commissioner. At p 300 His Honour said:

"The scheme of the Act reveals that the importation of unrestricted weapons should be regulated upon a case by case discretionary approach . . . In regard to restricted weapons relief is afforded if the Commissioner is satisfied that special reasons exist why the restricted weapons should be allowed into New Zealand."

Mr Pike foundered on the following passage from the judgment at p 303:

"I find on balance that the public interest is against the importation of these rifles. The present society trends should tell in favour of more regulatory gun controls rather than laxity. The bona fide interests of collectors and other dealers does [sic] not outweigh that balance."

I reiterate that this was his Honour's view of the merits of that particular case, having reviewed de novo the exercise of the commissioner's discretion in the individual case to refuse an import permit. That is quite a different context and an entirely different point from that which falls for decision in the present case.

### *Conclusions*

Having reviewed the authorities and counsel's submissions, I can state my own conclusions quite shortly. The fundamental starting point must be that Parliament has vested in the commissioner, or his delegate, a discretionary power to grant or refuse import permits for firearms. Parliament has also contemplated

*[1992] 1 NZLR 709 page 718*

that certain weapons or classes of weapons should in the public interest be declared to be restricted weapons. The commissioner is not given the power to categorise weapons as restricted. That power is given by Parliament to the Governor-General in Council. Even with a restricted weapon no absolute ban is effected by the declaratory Order in Council.

I cannot therefore see how Parliament can be regarded as having authorised the commissioner to exercise his discretion by declaring, by means of his own non-legislative fiat, certain classes of weapons absolutely banned from importation. There is no express power vested in the commissioner by the Act to impose an absolute ban. At best the power which the commissioner asserts must be found by implication. The structure and content of s 18, in combination with s 4, far from providing implicit authorisation for an absolute ban of a class of non-restricted weapons points in my judgment clearly in the other direction. If Parliament wishes the commissioner to have the power absolutely to ban the entry of certain firearms into New Zealand, whether they be restricted or non-restricted, Parliament should now give the commissioner that power in clear terms or itself legislate for such a ban.

The cases suggest that there are two, possibly three, categories into which discretionary powers of this kind can be put:

- (1) First there are those powers which require an individual case by case examination without any predetermined fetter on the exercise of the discretion, other than what might be explicit or implicit in such criteria as may be set out in the enabling instrument.
- (2) Second there are those powers which by dint of the nature of the subject-matter justify the establishment as a matter of discretion of a carefully formulated policy, but always with the reservation that no case is to be rejected automatically because it does not fit the policy. In this category all cases must be considered to see if they are sufficiently special to warrant a departure from the general policy.
- (3) The third category, if it exists at all, represents cases where the discretionary decision maker is implicitly authorised to exercise his discretion to establish for himself an immutable policy admitting of no exceptions.

The only tenuous authority of which I am aware for the suggested third category comes from Viscount Dilhorne's words

in British Oxygen. But rigid policy is really the antithesis of the exercise of discretion and I for one would need to see the power to adopt such a rigid policy for a discretionary assessment appear by clear and necessary implication from the enabling legislation before I was prepared to place a case into the possible third category.

Be that as it may, I am satisfied in the present case that Parliament has not impliedly given the commissioner the power, in the name of reasonable policy, absolutely to ban a class of non-restricted weapons. In my judgment he has acted beyond his powers when purporting to ban the weapons which are the subject of his June 1990 press release. As Mr Young submitted, the issues facing the commissioner were sensitive and one can understand and sympathise with his decision and his reasons. It is however vital in a democratic and free society that decisions such as that in issue are lawfully based. Everyone purporting to exercise power over others in our society and under our constitutional principles must be able, when challenged, to point to either express or implied authority to wield that power.

The commissioner says he had the requisite power by clear and necessary implication under the Arms Act. For the reasons I have given I am unable to agree. While many might applaud what the commissioner was seeking to achieve it is vital that he reach his objective within the law. Unfortunately in my judgment

*[1992] 1 NZLR 709 page 719*

he has not. I make it abundantly clear that I am not ruling that the commissioner must now grant every application for an import permit for weapons of the kind in question. Far from it; all I am deciding is that the absolute ban was beyond the commissioner's powers and therefore invalid.

I make a declaration accordingly, I doubt that other relief is either needed or justified. Leave is however reserved to the plaintiffs to apply for such further or other consequential orders as may be appropriate if they are so advised. As requested, costs are reserved and if agreement cannot be reached memoranda may be filed. Declaration accordingly.

Solicitors for the plaintiffs: Young Hunter (Christchurch).

Solicitors for the defendant: Crown Law Office (Wellington).

---- End of Request ----

Print Request: Current Document: 1

Time Of Request: Wednesday, September 23, 2009 21:48:59