[2022] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00076

BETWEEN	**STEADMAN BRODERICK**	**APPELLANT**
AND	**FIREARM LICENSING AUTHORITY**	**RESPONDENT**

Written submissions filed by Hugh Wildman & Company for the appellant

Written submissions filed by Courtney N Foster and Associates for the respondent

4 March 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read the draft judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA

[2] This is an appeal from the judgment of Hart-Hines J (Ag), as she then was ('the learned judge'), who, on 9 October 2020, refused Mr Steadman Broderick's ('the appellant') application for leave to judicially review the decision of the respondent, the Firearm Licensing Authority ('the FLA'), revoking his Firearm User's Licence ('the

application for leave'). The learned judge also directed the appellant to pursue the alternative remedy available to him by appealing to the Review Board of the FLA.

[3] The important question that arises on this appeal is whether the learned judge improperly exercised her discretion when she refused the application for leave. Specifically, the central issue is whether the learned judge erred when she found that the appellant had an arguable ground for judicial review but refused the application for leave because an alternative remedy was available to him, rejecting his explanation for not pursuing it and directing him to do so.

Factual background

[4] The appellant is an electrician. It would appear that he resides and works in both Canada and Jamaica. The FLA is a statutory body established under section 26A of the Firearms Act ('the Act'). Its core functions concern the granting, renewal and revocation of firearm licences in Jamaica.

[5] On 8 January 2016, the appellant's application for a Firearm User's Licence ('the licence') was granted by the FLA. The appellant was issued the licence on 5 April 2017, which expired on 9 April 2018. He applied to renew the licence on 17 October 2018, more than six months after it had expired. This would mean that at the time of his application for renewal, the appellant was no longer the holder of the licence.

[6] The FLA conducted an investigation to determine if it should renew the licence given the appellant's delay in making the application for renewal. According to the FLA, the investigation revealed that the appellant resided and worked in Canada. Additionally, it had received certain "intelligence" regarding the appellant. As a result, the appellant was requested to provide a statement to explain the delay in making the application for renewal of the licence. However, this was not forthcoming. Following the investigation, the FLA revoked the licence on 12 August 2019. This was on the basis that the appellant had failed to establish "the need to continue to be armed".

[7] The appellant is aggrieved by the FLA's decision. He denies that he no longer needs to be armed. He asserts that he is contracted to carry out electrical works for the Jamaica Public Service Company Limited and S&T Electrical Company Limited and has worked for these entities for eight and nine years, respectively. The appellant states that the nature of his job requires him to work in dangerous communities within the Corporate Area, Saint James and Clarendon. As a result, there was no factual basis to support the FLA's finding, which led to the revocation of the licence.

[8] The appellant received the notice containing the revocation order on 16 October 2019. He was instructed to deliver the licence and certificate to the FLA within five days of receiving the notice, which he failed to do (in breach of section 36(2)(b) of the Act). Additionally, he did not seek to challenge the FLA's decision to revoke the licence by applying to the Review Board within the prescribed time stipulated by the regulations under the Act. Instead, on 14 January 2020, he initiated the application for leave in the Supreme Court. The learned judge heard the matter on 17 September and 1 October 2020. On 9 October 2020, after giving written reasons for her decision, she made the following orders:

> "1. The application for leave to apply for judicial review is refused.
>
> 2. The [appellant] having not first sought to appeal to the Review Board of Firearm Licensing Authority, the [appellant] is now directed to do so.
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> 3. The order of this court and the written judgment are to be served on the Review Board of [the] Firearm Licensing Authority.
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> 4. Costs awarded to the respondent on the basis that the court considers that the [appellant] has acted unreasonably in making the application, when an alternative remedy was available to him. Costs to be agreed or taxed.
>
> 5. Leave to appeal granted.
>
> 6. The [appellant's] Attorneys-at-Law are to prepare, file and serve this order."

[9] On 15 October 2020, the appellant filed a notice of appeal challenging the learned judge's decision on the following grounds:

> "a) The Learned Trial Judge erred in law in failing to appreciate that once she concluded, as she did, that the Respondent had no basis, based on section 36 of the Firearms Act, to revoke the Appellant's firearm licence, then the question of alternative remedy ought not to have arisen and leave should have been granted as a matter of right.
>
> b) The Learned Trial Judge erred in law in concluding that the reason given for not pursuing the alternative remedy, that is, the continuous breach of the Firearms Act by the Review Board, in not determining Appeals within the statutory period of 90 days, is not a good explanation for not pursing [sic] the alternative remedy.
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> c) The Learned Trial Judge erred in law in failing to appreciate that once she concluded that the Respondent acted in breach of the Act by revoking the Appellant's Firearm Licence for reasons not covered under the Act, entitles the Appellant to have the decision set aside *ex debito justitiae* [as a matter of right], as such revocation would amount to an arbitrary abuse of the powers given to the Respondent by the Firearms Act.
>
> d) The Learned Trial Judge erred in law in directing that the Appellant should now pursue his alternative remedy in appealing to the Review Board by failing to appreciate that the time prescribed under the Act for such Review would have expired." (Italics as in the original)

The arguments

<u>On behalf of the appellant</u>

[10] Mr Wildman argued, on behalf of the appellant, that the FLA did not have the power under section 36 of the Act to revoke the licence for the reason that it did. The learned judge, it was further argued, agreed with that proposition and, as a result, found that the appellant had "an arguable ground for judicial review which has a realistic prospect of success". However, the argument continued, the learned judge fell into error

by refusing the application for leave because she failed to appreciate that the appellant would be entitled to have that decision quashed as of right.

[11] Mr Wildman also posited that, in the circumstances, the learned judge was wrong to have considered any other issue such as an alternative remedy or delay as being a discretionary bar to the application for leave. Further, she erroneously exercised her discretion by refusing the application for leave on the premise that the appellant had an alternative remedy. The appellant's position is that in the context of the evidence before the learned judge, as well as the law, "there is no alternative remedy".

[12] The case of **Benjamin Leonard MacFoy v United Africa Company Limited** [1961] UKPC 49 ('**MacFoy**') was cited in support of these submissions. The appellant also relied on section 36 of the Act and **The Commissioner of Independent Commission of Investigations (Appellant) v Police Federation & Others (Respondents) Jamaica** [2020] UKPC 11. The latter authority was cited for the proposition (which is not a subject on appeal) that given the language of section 36 of the Act, "one cannot read into the clear language of section 36, a power which parliament did not confer". It is also noted that the appellant's bundle of authorities filed on 18 November 2020 contained several other cases. However, Mr Wildman did not indicate how they would have advanced the appellant's submissions. Having read them, I did not find that they were particularly helpful in addressing the issues that he raised.

<u>On behalf of the FLA</u>

[13] On behalf of the FLA, Miss Foster contended that although the learned judge found that the appellant had an arguable ground for judicial review, she was entitled, as a matter of law, to consider the discretionary bars of delay and an alternative remedy. Counsel further contended that having done so, she correctly exercised her discretion by refusing the application for leave on the basis that an alternative remedy was available to the appellant.

[14] Miss Foster submitted that judicial review was a remedy of last resort. She pointed out that when the appellant received the revocation order, he had a statutory alternative remedy available to him, by virtue of section 37 of the Act, that he refused to utilise. Counsel further submitted that, in all the circumstances, the appellant had failed to demonstrate that the learned judge breached her duty to act judicially when she refused the application for leave.

[15] Miss Foster further submitted that the learned judge was correct in finding that the application for leave was also to be refused on the ground of delay. She posited that the application for leave was filed "significantly" out of time, and there was no written or oral application made by the appellant for an extension of time.

[16] In support of these submissions, reliance was placed on **Sharma v Brown-Antoine and Others** [2006] UKPC 57 ('**Sharma v Brown**'), **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13 ('**Pinnock and Reid v FID**'), **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**AG v Mackay**'), **Secretary of State for the Home Department v R (on the application of Lim and another)** [2007] EWCA Civ 773 ('**Lim and another**'), **City of Kingston Co-operative Credit Union Limited v Registrar of Co-operatives Societies and Friendly Societies and Yvette Reid** (unreported), Supreme Court, Jamaica, Claim No HCV 0204 of 2010, judgment delivered 8 October 2010 and rule 56.3(1) of the Civil Procedure Rules 2002 (as amended) ('the CPR').

[17] Counsel also submitted that the appellant's reliance on **MacFoy** for the proposition that he was entitled to have the revocation order quashed as of right without pursuing the alternative remedy available to him under the Act was unhelpful. She distinguished the facts of the present case from those in **MacFoy** and further submitted that in the latter, the court was not considering an application for leave where the court's permission was required before filing a claim. Miss Foster also highlighted that different considerations were applicable when the court was considering an application for leave.

Discussion

[18] For the analysis of the issues on appeal, grounds a) and c) will be considered together as these grounds challenge the power of the FLA to revoke the licence for the reason it stated. They also raise the same issue, namely whether the learned judge was wrong when she refused the application for leave because she failed to appreciate that the appellant was entitled to have the decision of the FLA set aside as of right without the need to pursue the alternative remedy set out under section 37 of the Act. Ground b) is concerned with whether the learned judge erred in rejecting the explanation given by the appellant for not pursuing the alternative remedy and will be addressed separately, as will ground d) which raises the issue that the learned judge was wrong in law when she directed the appellant to pursue the alternative remedy although the time for doing so had expired.

[19] As stated earlier, the central issue to be determined on the appeal is whether the learned judge incorrectly exercised her discretion when she refused the application for leave based on the discretionary bar of an alternative remedy. However, the learned judge also found that the appellant was dilatory in making the application for leave and also refused leave on this basis. Surprisingly, this particular finding has not been challenged.

[20] It is now well settled that this court will only set aside the exercise of a judge's discretion if it was "based on a misunderstanding by the judge of the law or of the evidence before him, or an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'" (per Morrison JA (as he then was) in **AG v Mackay** at para. [20] of the judgment, applying **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042). Therefore, it is essential to review the learned judge's decision to determine if she has fallen into error based on any of the stated criteria. However, the

relevant principles to be considered on an application for leave will be examined before doing so.

The legal framework

[21] The applicable test in respect of a grant or refusal of an application for leave to seek judicial review is now beyond debate. In the leading and oft-cited case of **Sharma v Brown**, a decision of the Judicial Committee of the Privy Council, that test was stated at paragraph 14(4) of the judgment:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that **there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy**; *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. …" (Italics as in the original) (Emphasis supplied)

[22] The cases in which this test has been applied in this court are legion. However, it is only necessary to mention, by way of example: **Minister of Finance and Planning and The Public Service and Others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22 at para. [42], **National Commercial Bank Jamaica Ltd v Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27 at para. [9], **Independent Commission of Investigations v Everton Tabannah and Worrell Latchman** [2019] JMCA Civ 15 at para. [16], and **Pinnock and Reid v FID** at para. [22]. Therefore, in considering an application for leave, a judge has the discretion to refuse such leave where there has been a delay in making the application and/or the existence of an alternative remedy. This is so because an applicant is expected to exhaust all other remedies that are available or open to him or her before seeking judicial review. In short, as Miss Foster correctly posited, judicial review is a remedy of last resort.

[23] However, this principle is not absolute. There is a line of authorities that illustrates that in exceptional cases, the court is prepared to grant leave to apply for judicial review even though a viable alternative remedy exists (see **R v Hereford Magistrates' Court, ex parte Rowlands** [1998] QB 110, **R v Chief Constable of the Merseyside Police, ex parte Calveley and others** [1986] 1 All ER 257 ('**R v Chief Constable of the Merseyside Police**'), **R v Hillingdon London Borough Council Ex parte Royco Homes Ltd** [1974] QB 720 ('**R v Hillingdon London Borough Council**'), **R (on the application of Christopher Willford) v Financial Services Authority** [2013] EWCA Civ 677 ('**R v FSA**') and **R v Birmingham City Council, ex parte Ferrero Ltd** [1993] 1 All ER 530 ('**Ferrero**').

[24] Some of these authorities were admirably analysed in **Robert Ivey v Firearm Licensing Authority** [2021] JMCA App 26 ('**Ivey v FLA**') at paras. [57] - [63] by Brooks P, whose dicta, I respectfully adopt. The learned President observed that these cases contained some "very strong statements, which support the principle that, except in exceptional circumstances, where there is an alternative remedy available to the person aggrieved, the court will not normally grant that person leave to apply for judicial review". He further opined that "[t]his principle is especially applicable if the alternative is provided by statute" (emphasis added). He then went on to delineate some of the reasons given in support of this principle such as, "the risk of undermining the will of the legislature as to the preferred approach"; the statutory remedy may be speedier as leave is not required and; the fact that judicial review does not resolve the real issues in dispute but merely "returns the parties to their original positions" (see para. [57] of the judgment). Continuing his analysis of the relevant authorities, Brooks P identified several exceptional circumstances that justified the grant of judicial review, although an alternative remedy existed (see paras. [60] – [63] of the judgment).

[25] Therefore, the established principle is quite clear. Once an alternative remedy is available, the court will not lightly grant permission for judicial review unless there are exceptional circumstances. Having set out the applicable law that should guide a judge

when considering an application for leave, I will now turn to the issues that have been raised on this appeal.

Should leave have been granted as of right without considering the alternative remedy available to the appellant? (grounds a) and c))

[26] It is agreed by the parties that, to borrow the phrase of Brooks P in **Ivey v FLA**, a "statutory appellate process", which is the alternative remedy that was available to the appellant, is set out under section 37 of the Act. Specifically, section 37(1)(c) (which is subject to sections 37 and 37A) provides that "any aggrieved party may within the prescribed time and in the prescribed manner apply to the Review Board for the review of a decision of the [FLA] revoking or refusing to revoke any licence, certificate or permit".

[27] It is also undisputed that the appellant was aware of the alternative remedy available to him but elected or chose not to pursue it. His reason for doing so is two-pronged. Firstly, he was entitled to have been granted leave as of right because the FLA had arbitrarily abused its power under the Act by revoking the licence on the basis it did. Secondly, he had provided good reason for not pursuing it (which will be discussed below). The Privy Council decision of **MacFoy** was cited in support of his position.

[28] In **MacFoy**, the Board was considering the effect of serving a statement of claim during the long vacation of the Supreme Court of Sierra Leone. Rules of that court prohibited this. While Lord Denning's discussion on the distinction between void and voidable in law is instructive, I am inclined to agree with counsel for the FLA that the Board was not considering whether to grant leave for judicial review, which would require the application of different principles. Therefore, I am compelled to the view that the appellant's reliance on **MacFoy** is misconceived.

[29] In addressing this issue, the learned judge exhaustively examined various sections of the Act, including sections 18, 29, 36 and 46. She also looked at several provisions in the 1968 Firearms Act of England and considered the similarities and differences in both pieces of legislation. She concluded that while the words "otherwise unfitted to be

entrusted with such a firearm" in section 36(1)(a) of the Act "seemed wide enough to encompass circumstances where the conduct, activities or circumstances of the licence holder make him/her unsuitable to continue to hold the licence", the revocation order did not state that this was the reason the licence was revoked. The learned judge also decided that the reason given for the revocation did not fall within the ambit of section 36 and, therefore, she was satisfied that the appellant had an arguable ground for judicial review with a realistic prospect of success (paras. [24] – [35] of the judgment).

[30] However, this was not the end of the learned judge's analysis. After correctly identifying the threshold test for an application for leave as set out by the Board in **Sharma v Brown**, as well as examining other authorities, she found that there was an alternative remedy available to the appellant, of which he was aware, "but had elected" to make the application for leave. She ultimately concluded that "[w]ithout an exceptional reason, this court cannot sanction the [appellant's] election to file this application instead of applying to the Review Board pursuant to **section 37**" (para. [52] of the judgment) (bold as in the original).

[31] Addressing the appellant's complaint that the decision of the FLA was a nullity and that the court was the better forum (rather than the statutory appellate process) to tackle this issue, the learned judge stated:

> "[57] I have also given consideration to Mr. Wildman's submissions that where the respondent did something so outrageous, which it lacked jurisdiction to do, the only appropriate body to review the decision is the court. I am not persuaded by either Ms. Patmore's affidavit, or the submissions made by Mr. Wildman on this point. The Act clearly provides a process for redress in respect of decisions of the respondent's Board, which must first be exhausted. At least two members of the Review Board are esteemed persons with a wealth of legal of legal [sic] experience and knowledge. I am confident that these persons will fairly determine whether the Board's decision is a nullity."

[32] It seems quite plain to me that the learned judge correctly exercised her discretion by not granting the appellant "leave as of right", having carefully considered the evidence and the relevant legal principles. As she was entitled to do, she contemplated whether the appellant had placed before the court any "exceptional reason" or circumstance(s) to justify the grant of leave without the engagement of the available statutory appellate process. In the end, she found that he had not. I agree. I say so for the following reasons.

[33] In **R v Falmouth and Truro Port Health Authority ex parte South West Water Ltd** [2001] QB 445 ('**R v Falmouth and Truro Port Health Authority**') (applied in **R v FSA**, which was applied in **Ivey v FLA**), Simon Brown LJ writing for the court said at page 473D of the judgment:

> "The lesson to be learnt is, I suggest this. The critical decision in an alternative remedy case, certainly one which requires a stay, is that taken at the grant of permission stage. **If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will be permission be appropriate in a case concerning public safety**…" (Emphasis supplied)

[34] In **Ivey v FLA**, having thoroughly examined several authorities (see para. [23] above), Brooks P provided guidance on some of the factors to be considered when deciding whether a case meets the threshold of being exceptional. These are set out below for ease of reference and hopefully without doing any injustice to the scholarly analysis of the learned President:

i) **R v Hillingdon London Borough Council** – where a decision is likely to be overturned, as a matter of law, due to the authority's lack of jurisdiction to make that decision;

ii) **R v Chief Constable of the Merseyside Police** – where there is a procedural defect which prejudiced the applicant's ability to adequately prosecute the statutory appeal;

iii) **R v Falmouth and Truro Port Health Authority** – in addition to any issues of public health and safety; the comparative speed, expense and finality of the alternative processes; the need and scope for fact-finding; the desirability of an authoritative ruling on any point of law arising, and the apparent strength of the applicant's substantive challenge; and

iv) **Ferrero** – whether the statutory process will resolve the real issues to be decided.

[35] Applying the principles garnered from these authorities, given that the appellant has a statutory right of appeal to the Review Board, he was required to establish that his case met the threshold of being 'exceptional' to obtain leave without first engaging that process. In my view, on a perusal of the material before the learned judge, it is evident that he failed to do so for the following reasons:

i) Firstly, the statutory appellate process is the better procedure for addressing the issue in this matter. It is for the Review Board to decide whether or not the FLA's finding that the appellant resides and works outside of Jamaica and is no longer in need of a licenced firearm is a decision that was "an arbitrary abuse of its power" or whether it could fall within the rubric of "otherwise unfitted to be entrusted with such firearm" as provided by section 36(1)(a) of the Act (the learned judge described this provision as being "wide". I quite agree). Judicial review cannot decide this question. It is the Review Board that is seized with the relevant information (including "intelligence") and expertise to make this decision. Judicial review will simply return the parties "to their original positions".

ii) Secondly, this matter is concerned with the crucial affair of public safety. As Brooks P pointed out in **Ivey v FLA**, "the public interest

requires that holders of firearm licences be fit to do so" and that "the entities that are established by the Act are equipped to determine fitness". I concur with the learned President's statement on this point.

iii) Finally, it is more probable than not that the review process is swifter and more economical than that of judicial review (as correctly pointed out by the learned judge).

[36] When the learned judge delivered her judgment in this matter, she did not have the advantage of the decision of this court in **Ivey v FLA**. Nonetheless, she considered other authorities and correctly took into account the relevant tenets emphasised and articulated in that case in arriving at her decision. These included the absence of exceptional circumstances or, as the learned judge phrased it, "very good reason" to depart from the established principle; whether the statutory appellate process would adequately protect the appellant's rights and/or interests; if that process would be faster and less expensive than judicial review; the composition of the Review Board and the members' cumulative expertise to determine whether the decision of the FLA was "a nullity" or not.

[37] As a result, I regard the criticisms made of the learned judge under grounds a) and c) as entirely unmeritorious. Therefore, these grounds fail.

Whether the learned judge erred when she rejected the appellant's explanation for not pursuing the alternative remedy (ground b))

[38] The appellant's complaint under this ground is that having disclosed, in the court below, that an alternative remedy under section 37 of the Act was available to him at the time of the revocation order, he also gave a plausible reason for not pursuing it, which the learned judge incorrectly rejected. The appellant's explanation was that the Review Board was continuously breaching the Act by failing to determine the matters before it within the statutory period of 90 days (see paras. 10 and 11 of the appellant's affidavit

in support of the notice of application for leave to apply for judicial review filed on 14 January 2020). The appellant's position is that this was good reason for not pursuing the alternative remedy and the learned judge was wrong when she concluded otherwise.

[39] The learned judge addressed this issue at paras. [58] – [61] of her written reasons. She referred to section 37A(4) of the Act, which provides that an "application for review" may be made to the Minister if the Review Board fails to comply with the statutory requirement of section 37A(2) of the Act (that is, hearing, receiving and examining the evidence in the matter under review and, submitting a written report of its findings and recommendations to the Minister within 90 days of receiving the application for review). The learned judge then considered whether the application to the Review Board would adequately protect the appellant's rights and/or interests and if that application would be faster and less expensive than judicial review. Having done so, the learned judge found:

> "[58] … Anticipated delay on the part of the Review Board cannot be a good reason to avoid the remedy or appeal process provided for by the Act. Further, it is noted that more than 240 days passed between the filing of and the hearing of the application for leave. This is clearly a longer period than that complained of by the [appellant].
>
> …
>
> [60] I am satisfied that the application procedure to the Review Board will adequately protect the [appellant's] rights and/or interests. Further, an application to the Review Board will be comparatively faster and less expensive than an application to the court for judicial review.
>
> [61] It is inappropriate for an applicant to seek to avoid an appeal process provided for by statute unless there is very good reason so to do. No good reason has been provided in this case."

[40] In **Ivey v FLA**, Brooks P, having examined the authority of **R v Chief Constable of the Merseyside Police**, opined that "the mere fact that judicial review may provide a speedier, more effective or more convenient route for challenging a decision, does not by itself justify departure from the established principle" (para. [59] of the judgment). I

am unable to improve upon the sagacious reasoning of the learned President, which I gratefully adopt.

[41] In the present case, the learned judge considered the explanation given by the appellant for not pursuing the alternative remedy in the context of the relevant law and the paucity of evidence before her on this issue. She took into account that he had the option, in any event, of appealing directly to the Minister if the Review Board failed to carry out its mandate within the statutory timeline. She also correctly observed that the time it took for the hearing of the application for leave was much longer than the 90 days prescribed under section 37A(2) of the Act (which to my mind begs the question of whether the appellant's genuine concern was the timeframe within which his matter would be heard or the forum). Having reflected on all these factors, the learned judge concluded that the appellant did not advance a good reason for choosing not to engage the statutory appellate process and refused the application for leave.

[42] On the strength of the authorities discussed above, in my judgment, the appellant has failed to establish that the approach of the learned judge merits criticism, and she exercised her discretion improperly. Ground b), therefore, fails.

Whether the learned judge erred when she directed the appellant to pursue the alternative remedy (ground d))

[43] Under this ground, the appellant complains that since the time for engaging the statutory appellate process has passed, the learned judge was wrong when she directed him to pursue it.

[44] Prior to the 2005 amendment to the Act, an appeal under section 37 was to the Minister. That section, as it now stands, provides that "any aggrieved party may within the prescribed time and in the prescribed manner apply to the Review Board for the review of a decision of the Authority" (section 37(1)). However, the Act does not stipulate the "prescribed time" and "prescribed manner" for engaging the appellate process. The procedure for doing so is found in the Firearms (Appeals to the Minister) Regulations

1967 ('the Regulations'). Regulation 3 states that an appeal under section 37 of the Act is commenced by notice in writing which is addressed to the Minister and should be filed within 21 days of the date "on which the decision from which the applicant is appealing is communicated to him, or within such longer period as the Minister may in any particular case allow".

[45] Brooks P in **Ivey v FLA** termed this as "a conundrum" that has created a "legislative gap" (at paras. [74] and [75] of the judgment). The difficulty or confusion to which he referred concerns the procedure to be utilised to apply for a review of a decision of the FLA before the Review Board. What gave birth to this unsatisfactory circumstance was the amendment to the Act (in 2005), which created the FLA and allowed for a review of its decision by a Review Board without a commensurate revision to the Regulations. I agree with Brooks P that "there is now some inconsistency" between the Act and the Regulations. However, Brooks P observed that there was "perhaps some hope" for Mr Ivey because of the absence of appropriate regulations. As a result, the learned President recommended that either the Review Board or the Minister grant an extension of time to allow Mr Ivey to apply for a review of the FLA's decision revoking the licences for his firearms.

[46] I simply wish to add to the learned President's erudite reasoning that it is clear from the Regulations that the Minister has been given the discretion to extend the time within which an applicant may file an appeal (see Regulation 3, quoted in part above at para. [44]). Although the parties did not make any submissions on this subject, it would seem to me that <u>in appropriate cases and for a good reason</u>, I am unable to envision a bar that would prevent the Review Board from exercising a similar discretion as that afforded to the Minister under the Regulations. In my view, the granting of an extension of time by the Review Board, in appropriate cases, would promote the interests of fairness, which is a crucial consideration that is to guide its deliberations.

[47] The learned judge's pronouncement, for the most part, on this issue can be found at para. [51] of the judgment and is worth setting out in full:

> "[51] An alternative remedy existed at the date of notification of the revocation on August 12, 2019. The [appellant] asks the court to accept that he only received the revocation order on October 16, 2019, more than eight weeks after it had been posted to him. Even if the requisite 21-day period for applying to the Review Board had passed by October 16, 2019, when he allegedly received the revocation order, the [appellant] could still have attempted to pursue that remedy and explain the reason for his tardiness to the Review Board. [The representative of the FLA] has indicated that efforts to reach the [appellant] proved unsuccessful as he was outside of the country up to August 12, 2019. If he was still outside of the country between August 12, 2019 and October 16, 2019, it seems to me that the Review Board was likely to give him an opportunity to be heard, as that would be reasonable. In those circumstances, an alternative remedy would still have been available to the [appellant] on October 16, 2019."

[48] Clearly, the argument that was being advanced before the learned judge to justify the application for leave was that the prescribed time for the appellant to engage the alternative provided under the Act had long passed by the time he received the revocation order. However, the learned judge rejected that proposition and took a practical and common-sense approach to the perceived difficulty that the appellant said he faced. Her finding that he could seek an extension of time from the Review Board to have the revocation order reviewed captures the essence of the reasoning and recommendation made by Brooks P in **Ivey v FLA**. It amply demonstrated that although the learned judge recognised that the statutory timeline for accessing the review process may have passed by the time the appellant received the revocation order, he could seek an extension of time to do so.

[49] In the light of the preceding discussion, it cannot be said that the learned judge was demonstrably wrong for directing the appellant to pursue the alternative remedy provided by section 37 of the Act. Accordingly, ground d) also is devoid of merit and fails.

[50] As stated previously (at para. [19] above), the appellant has not challenged the decision of the learned judge to refuse the application for leave on the basis of delay. Therefore, in any event, the refusal of the application would still stand based on this

criterion. Having examined the approach of the learned judge in arriving at this decision, it is fathomable why the appellant did not seek to impugn this finding.

[51] Before parting with this matter, I wish to make two observations. The first is that parties, who find themselves in circumstances similar to that of the appellant, would be wise to heed, what I consider to be, the caution of the learned President at para. [73] of the judgment in **Ivey v FLA** that:

> "… [I]t must be said that the preponderance of the authorities suggest that the statutory remedy should not be disregarded in the event that there is disagreement with a ruling by the [FLA]."

Secondly, the appellant similarly may apply for an extension of time, either to the Review Board or the Minister, to have the decision of the FLA reviewed if he so chooses. That the opportunity exists for him to do so should alleviate some of the anxieties he may experience (albeit that they are of his own making) in the light of the outcome of the appeal.

Costs

[52] The FLA has succeeded on this appeal. The learned judge in the court below awarded costs to the FLA on the basis that the appellant had "acted unreasonably in making the application [for leave] when an alternative remedy was available to him". This is the exception to the general principle stated in rule 56.15(5) of the CPR (which does not apply to this court). I agree. In my judgment, this is an appropriate case for invoking the standard rule that costs should follow the event. I would, therefore, award costs to the FLA to be taxed if not agreed.

Conclusion

[53] For all the reasons I have sought to explain, the appellant has failed to show that the learned judge exercised her discretion on an erroneous premise when she refused the application for leave for the reason that an alternative remedy is available to him and gave directions that he should pursue it. Therefore, this court has no basis for setting

aside her decision. As a result, I propose that the appeal be dismissed with costs to the respondent, such costs to be taxed, if not agreed.

BROWN BECKFORD JA (AG)

[54] I have read the draft judgment of V Harris JA. I fully concur with her decision and the reasons therefor. There is nothing useful that I could add.

F WILLIAMS JA

ORDER

1) The appeal is dismissed.
2) Costs to the respondent to be taxed if not agreed.