

IN THE MAGISTRATE'S COURT

MC/CIV/06/15  
and  
MC/CIV/07/15

IN THE MATTER OF APPEALS under Section 4(8) Firearms and Ammunition Ordinance  
1987

Between:

(1) Bono John <u>McKAY</u>	First Appellant
and	
(2) Arthur Leonard Pitaluga <u>TURNER</u>	Second Appellant
v	
Len Stanford <u>McGILL</u> , Chief Police Officer	Respondent

JUDGMENT

*Decisions appealed*

1. The First Appellant and the Second Appellant (together the "Appellants") had each filed a Notice of Appeal dated 4<sup>th</sup> May 2015 in respect of a decision of the Respondent taken under section 4 of the Firearms and Ammunition Ordinance ("FAAO"). They consented to their appeals being heard together. Mr Crowder represented both Appellants; Mr Rowe represented the Respondent.
2. The First Appellant had received a letter dated 22<sup>nd</sup> April 2015 from the Respondent in the following terms:

"On Friday 17<sup>th</sup> April 2015, you were found Guilty within the Magistrates Court, Stanley for Three Offences - Two counts of Battery and One of Assault occasioning Actual Bodily Harm.

I have considered these matters and believe that public safety, public order and the peace may be endangered by you continuing to hold a firearms licence which enables you access to firearms and those that you own. I have concluded that this new information means that I am no longer satisfied that you are suitable to hold a firearms licence as I believe that you are of intemperate habits.

I write to inform you that I have revoked your Firearms Licence No. FAL09014 with effect from today's date under section 4(6)(a) Firearms and Ammunition Ordinance.

Section 4(8) Firearms and Ammunition Ordinance states, "Any person aggrieved by a refusal of the chief police officer to grant him a licence or renew his licence or by the conditions included in his licence or by the revocation of his licence may appeal to the senior magistrate.

Under section 4(4) Firearms and Ammunition Ordinance I require you to surrender the above licence to the Royal Falkland Islands Police within 21 days for amendment. I must inform you that if you fail to do so you will commit an offence.

If you hold or are the registered holder of any firearms you must ensure that the firearms are re-registered in the name of another firearms licence holder and deposited with them immediately. Similarly if you hold any ammunition you must deposit it with a firearms licence holder who is licensed to hold such ammunition immediately.

Alternatively you may deposit all firearms and ammunition held by you with the Royal Falkland Islands Police until such times as you are able to [effect] the above."

3. The Second Appellant had received a letter dated 23<sup>rd</sup> April 2015 from the Respondent in similar terms but adapted to the Second Appellant's particular situation:

"On Friday 17<sup>th</sup> April 2015, you were found Guilty within the Magistrates Court, Stanley for One Offence - Assault occasioning Actual Bodily Harm.

I have considered these matters and believe that public safety, public order and the peace may be endangered by you continuing to hold a firearms licence which enables you access to firearms and those that you own. I have concluded that this new information means that I am no longer satisfied that you are suitable to hold a firearms licence as I believe that you are of intemperate habits.

However, with the above stated, I am fully aware that you are a Land holder and Farmer and with that profession you need capacity to hold a Firearms Licence in order to tend to the good governance of your Livestock.

Our records show that you hold the following Firearms-

Shotgun - Webley & Scott - .410g

Rifle - BSA - .22mm

Pistol - BRNO - 9mm

Revolver – Smith & Wesson - .44mm

Human [sic] Killer – Cash Special - .22mm

I write to inform you that I have revoked your Firearms Licence No. 96308 in respect of the following weapons – Shotgun/Rifle/Pistol and Revolver with effect from today's date under section 4(6)(a) Firearms and Ammunition Ordinance.

Your Firearms Licence has been amended under Condition No 7 – Supplementary Conditions – stating the following – Restricted to the use of .22 Cash Special Humane Killer – Certificate No 12304, Serial No 16448, this is to allow you to [humanely] dispatch animals in the course of your farming activities.

Section 4(8) Firearms and Ammunition Ordinance states, "Any person aggrieved by a refusal of the chief police officer to grant him a licence or renew his licence or by the conditions included in his licence or by the revocation of his licence may appeal to the senior magistrate".

Under section 4(4) Firearms and Ammunition Ordinance I require you to surrender the above licence to the Royal Falkland Islands Police within 21 days for amendment. I must inform you that if you fail to do so you will commit an offence.

If you hold or are the registered holder of any firearms you must ensure that the firearms are re-registered in the name of another firearms licence holder and deposited with them immediately. Similarly if you hold any ammunition you must deposit it with a firearms licence holder who is licensed to hold such ammunition immediately.

Alternatively you may deposit all firearms and ammunition held by you with the Royal Falkland Islands Police until such times as you are able to [effect] the above."

### ***Appeal procedure***

4. Section 4(8) of the FAAO states;

*"Any person aggrieved by a refusal of the chief police officer to grant him a licence or renew his licence or by the conditions included in his licence or by the revocation of his licence may appeal to the Senior Magistrate".*

5. Section 26(1) of the Administration of Justice Ordinance ("AOJO") provides:

*"There is hereby constituted a court subordinate to the Supreme Court to be called the Magistrate's Court, which shall consist of and be held before a Senior Magistrate appointed by the Governor for this purpose."*

6. Section 30(1) and (2) of the AOJO sets out a list of actions and proceedings within the civil jurisdiction the Magistrate's Court. The list does not include hearing an appeal under section 4(8) of the FAAO. However, section 30(9) of the AOJO states:

*“Subsections (1) and (2) have effect in addition to and without prejudice to any other law of the Falkland Islands which confers jurisdiction upon the Magistrate’s Court to hear and determine any action or proceedings”.*

7. The constitution of the Magistrate’s Court is governed by the AOJO. Section 30(7) states:

*“Subject to section 33 the jurisdiction of the Magistrate’s Court in any civil action or proceedings shall be exercised by the Senior Magistrate sitting alone.”*

8. Section 33(2) of the AOJO authorises the Senior Magistrate to appoint one or more persons to sit as assessors in the exercise of the civil jurisdiction of the Magistrate’s Court but subsection (3) provides that, where the Senior Magistrate sits with such assessors, the decision of the Magistrate’s Court shall be deemed always to be that of the Senior Magistrate alone. As the appointment of assessors is not mandatory and the decision would, in any event, be mine alone, I have sat alone in these proceedings.

9. The FAAO does not prescribe the procedure to be followed in an appeal under section 4(8) of the FAAO. Section 30(8) of the AOJO therefore applies. It states:

*“Subject to this Ordinance, any rules under this Ordinance, any other law of the Falkland Islands and to any practice direction under subsection (11), the practice and procedure of the Magistrate’s Court in its civil jurisdiction shall as nearly as possible be that of a county court in England. Except where otherwise in this Ordinance specifically provided to the contrary, every reference in any English enactment relating to county courts to a “registrar”, a “judge” or “district judge” shall be construed as if it were a reference to the Senior Magistrate.”*

10. No practice direction has been made under subsection (11) of section 30 AOJO. Although the County Courts Rules 1981 no longer apply in England, having been superseded by the Civil Procedure Rules 1998, they still apply to the practice and procedure of the Magistrate’s Court because the operation of the Civil Procedure Rules 1998 was excluded by the Administration of Justice (Practice and Procedure) Ordinance 1999 which came into effect on the 26<sup>th</sup> April 1999. The practice and procedure for the appellate jurisdiction of a county court is prescribed by rules 6 and 7 of Order 3, of the County Court Rules 1981.
11. The documents submitted by the Appellants were not in strictly in accordance with rules 6 and 7 of Order 3 of the County Court Rules 1981 but, though compliance with

the County Court Rules 1981 is generally to be encouraged, I consider the deviations from prescribed form to be of no consequence in these cases.

12. The FAAO is silent as to the form that an appeal under section 4(8) should take. The parties have submitted that the appeals should proceed by way of re-hearing. I agreed and that course has been adopted.

***The Respondent's authority under FAAO to grant, vary and revoke firearms licences***

13. The Respondent's authority to grant, vary and revoke firearms licences is to be found in subsections (3),(4) and (6) of section 4 FAAO and is as follows:

*"(3) The chief police officer shall grant an application for a licence if he is satisfied that –*

- (a) The applicant has good reason for requiring the licence;*
- (b) defence, internal security, public safety, public order and the peace will not be endangered by the grant of the licence; and*
- (c) The applicant is not of intemperate habits or of unsound mind or for any other reason unfitted to hold the licence.*

*(4) The chief police officer may include in any licence such conditions as he considers necessary in the interests of defence, internal security, public safety, public order and the peace, and may during the currency of any licence introduce, add to, delete or vary any such conditions, for which purpose he may give the holder of the licence written notice to deliver his licence to the chief police officer within twenty-one days for amendment."*

*(6) The chief police officer may revoke any licence if-*

*(a) Due to a change of circumstances or the acquisition of new information he is no longer satisfied concerning the matters specified in subsection (3); or*

*(b) The holder of the licence fails to comply with a notice given under subsection (4)."*

14. It is convenient at this point also to refer to subsection (7) of section 4 FAAO. It says:

*"When he revokes a licence the chief police officer shall give written notice to the holder requiring him to surrender his licence within twenty-one days, and if the holder fails to comply with such notice he commits an offence and is liable on conviction to a fine not exceeding £50."*

15. The nature of a firearms licence is governed by section 13 FAAO:-

*"(1) A licence to hold a firearm and ammunition therefor may be obtained on application to the chief police officer and on payment of the prescribed fee and shall be in the prescribed form or, if no form is prescribed, in such form as the chief police officer may consider appropriate.*

*(2) Such a licence shall have effect until it is revoked under the provisions of this Ordinance, and if not revoked, until the death of the holder and a fee in respect of such a licence shall be prescribed. A licence in force at the commencement of this subsection as*

*an annual licence in respect of a firearm shall continue in force as if this subsection had been in force on the date on which the licence was granted.*

*(3) A firearm licence shall specify the type or types of firearm or firearms to which it relates.*

*(4) The chief police officer may endorse any licence issued under this section with authority to manufacture firearms or ammunition.*

*(5) A licence under this section is not required for a person to hold an airgun or ammunition for an airgun, but such a licence is required for the manufacture of an airgun or of any ammunition for an airgun."*

### ***The evidence***

16. The Respondent gave evidence that he had made himself aware of the details of the circumstances in which the Appellants had been convicted of offences arising out of an incident at The Trough on 28<sup>th</sup>/29<sup>th</sup> June 2014 and was concerned at the evident level of violence. He had learned that the victim had fallen to the ground and was subjected to kicks to the head and upper body by the Appellants and a third party and other members of the public had had to intervene. The Respondent also had concerns that the offences indicated that the Appellants had held a grudge for considerable period of time over a posting on FaceBook and it had resulted in the offences being committed several months later. He felt that both Appellants lacked self-control. He said that he had exercised his authority to revoke the Appellants firearms licences to protect public safety, public order and the peace.
17. The Respondent said that First Appellant had a caution for failing to wear a seatbelt. He knew the First Appellant's mother and father were also firearms licence holders.
18. The Respondent was not aware of either of the Appellants having any convictions for violence or drunkenness between when their firearms licences were issued and the most recent convictions.
19. The Respondent was aware that the Second Appellant had previous criminal convictions involving assault occasioning actual bodily harm in 1988, common assault in 1989, assault occasioning grievous bodily harm in 1992, common assault in 1993, assault occasioning actual bodily harm in 1993. All these were before his firearms licence had been granted in 1996. The Respondent had not taken these offences into account when deciding to revoke the firearms licence. He believed that the Second Appellant was a farmer and lived at Rincon Grande with his wife who

also held a firearms licence. He said the Second Appellant's son also held a full firearms licence and worked on the farm. He explained that when revoking the Second Appellant's firearms licence he had permitted him to keep the captive bolt device as a humane killer to use on the farm as a matter of animal welfare. He agreed that the bolt gun would need to be held against the target animal to be effective.

20. He denied that he had a vested interest in the cases against the Appellants after The Trough incident and explained that he was related by marriage, not blood, to the mother of the victim of the assaults as she was his sister's step-daughter, i.e. his sister's husband's daughter from his first marriage.
21. He did not deny that each Appellant had good reasons to hold firearms licences but said he based his decision to revoke the licences on considerations of public order, public safety and their intemperate habits after receiving new information of new convictions. He said he had waited until he knew the outcome of the trial of the charges from The Trough incident before making a decision to revoke the licences. He had wished to be in possession of factual information before making his decision. He had made his decision purely on the grounds given in the Firearms Ordinance.
22. The First Appellant gave evidence in which he explained that he held his firearms licence for shooting in competitions both in the Falkland Islands and overseas, for example at the Island Games and the Commonwealth Games. He had undertaken training and been coached for competition shooting. He used his shotguns at the range at Phillips Point and they were kept in a gun safe at home. He took part in a seasonal duck shoot once a year. He was always responsible when handling a gun and never left it loaded. Most of his shooting was done on the range and he needed a licence to transport his guns to and from the range. He said he would never use a gun to endanger public safety or public order. He admitted having been drinking on the night of The Trough incident and having been drunk. He also recalled going out on Liberation night (14<sup>th</sup> June) 2014 with the Second Appellant and getting "extremely drunk".
23. The Second Appellant also gave evidence and confirmed that his main employment was as a farmer of 25,600 acres, mainly with sheep but with some cattle and horses. He described his guns which included antique guns, passed down his family,

ranging between 90 and 190 years old. They were of considerable sentimental value to him. He said he mostly used a 0.22 rifle and a pistol for daily work on the farm, when checking animals and shooting geese which, if not culled, damaged his crops. He had been aware of his responsibilities with firearms since being a child and had trained in the Falkland Islands Defence Force, including training with the military. He found the permission to keep only the bolt gun was inadequate for practical purposes on the farm. He explained that a humane killer with a captive bolt action required the user to get too close to the animal to be of use on loose animals. He said he rarely took his guns off the farm where they were kept in a proper gun cabinet but occasionally helped a friend at Port San Carlos which involved him taking his guns by road. Otherwise the guns remained on the farm and were never brought into Stanley.

24. The Second Appellant admitted having got very drunk on Liberation night 2014 with the First Appellant.
25. Steven John Dent gave evidence in his capacity as chairman of the Falkland Gun Club and a licensed firearms holder and dealer. He described being a competitor at the Commonwealth Games and Island Games and shooting extensively in the Falklands. He said he was also a reserve officer in the Royal Falkland Islands Police and had received formal training in firearms. He had acted as mentor to the First Appellant since the First Appellant had joined the Falkland Gun Club and had been the team manager when the First Appellant went to the Commonwealth Youth Games in India. He had never had to call the First Appellant's behaviour into question and had observed that the First Appellant treated his responsibility towards firearms very seriously. He agreed that the shooting range was a controlled environment and he had not seen the First Appellant shooting except on a range. He was aware as a firearms dealer that the importation of ammunition into the Falklands was exceedingly difficult and there were currently no captive bolt caps available, which rendered the humane killer absolutely useless. He could not see that using a humane killer on sheep and cows at large on a farm would be possible. He was not able to comment on how responsible the Second Appellant was as a firearms owner or user.



### *The basis for the appeals*

26. In their written grounds of appeal each Appellant took issue with the Respondent's statement that the Appellants were of intemperate habits and each denied that he was a danger to public safety, public order and the peace through his possession of a firearms licence. They relied on *Chief Constable of Essex v Germain*, [1992] 156 JP 109, as providing the tests that should be applied and quoted Stuart-Smith LJ's comment in that case:

*"It is a matter for the chief constable to exercise his discretion upon the material which is before him, but plainly it may be that the mere fact of a conviction, or two convictions, may not of itself suffice".*

27. It was submitted that the Respondent's letters implied that he had made his decision solely on the basis of the convictions on the 17<sup>th</sup> April 2015. The First Respondent contended that he had only been cautioned for a minor road traffic matter prior to the convictions on 17<sup>th</sup> April 2015. The Second Respondent accepted that he had previous convictions but argued that they were historic, incurred a number of years ago, before his firearms licence had been issued and should not be treated as any longer relevant.

27. At the hearing Mr Crowder submitted that *Spencer-Stewart v Chief Constable of Kent*, 89 Crim App Rep 307, provided authority for arguing that the law clearly required something more than just the commission of any offence for a firearms licence to be revoked. He drew attention to Lord Bingham's words:

*"[The decision in Ackers v Taylor, [1974] 1 WLR 405], therefore shows quite plainly that a danger to the peace is not to be construed as meaning a crime of violence, but it is to be understood as meaning any crime involving the use of a shotgun."*

28. Mr Crowder pointed to the evidence given by the Appellants about their responsible behaviour and Mr Dent's testimony. He submitted that there had been no finding of fact at the trial to show any misuse of a firearm by either of the Appellants who also denied any past, present or future misuse of firearms. This had not been challenged and the decision to revoke had been made on the basis of the Appellants' convictions without reference to the court's reasons for convicting them. There had been no

change from the test for public safety, public order and peace that had been applied when the Appellants were first granted licences and the issue should be confined to the three stage test set in *Spencer-Stewart v Chief Constable of Kent*. The evidence did not show the Appellants to be of “intemperate habits”. The decision in *Chief Constable of Essex v Campbell*, [2012] EWHC 2331, showed that the decision to revoke should be made after careful inquiry into the licence holder’s general attitude and offending. The availability of others to use their guns on the Second Appellant’s farm or at the range was irrelevant to the Appellants’ suitability to hold gun licences and the question which the Respondent should have addressed was the suitability of the Appellants.

### ***The Respondent’s submission***

29. On behalf of the Respondent, Mr Rowe urged the court to act in executive capacity in hearing the appeal and apply its own discretion as to whether the Appellants’ firearms licences should be revoked or have conditions added to them. He cited *R v Acton Crown Court ex p Varney*, [1984] Crim L R 683, as authority. He noted that the letter to the Second Appellant purported to revoke his licence but the actual decision was to add a condition limiting the Second Appellant’s authority to possess a firearm to a 0.22 calibre humane killer. He submitted that section 4(4) FAFO gave the Respondent power to add conditions to the firearms licence during its currency as he thought necessary in the interests of public safety, public order and the peace. He also submitted that the test for adding conditions carried a lower threshold than the test applicable to revoking a licence. He cited *Ackers and others v Taylor*, [1974] WLR 405, as authority for the matters to be taken into account when considering the revocation of a firearms licence. I summarise his points thus:

- The decision-maker should consider the danger to the peace arising out of the possession, use or misuse of a firearm (citing *Ackers and others v Taylor*).
- The perceived danger should not be limited to the possibility of misuse of a firearm in circumstances of violence (citing *Ackers and others v Taylor*).
- The approach should be “preventative justice” for the preservation of good order in public (citing *Ackers and others v Taylor*).

- The conduct of the licence-holder may be judged by taking into account irresponsible and uncontrolled behaviour analogous to irresponsible conduct with a firearm (citing *Luke v Little* [1980] SLT (Sh Ct) 138 and *Chief Constable of Essex v Germain*).
- Drunkenness may properly be substituted for violence (citing *Spencer-Stewart v Chief Constable of Kent*).
- Violent conduct that has not resulted in a conviction may be sufficient (citing *Chief Constable of Essex v Campbell*).

30. Mr Rowe submitted that the Respondent had grounds for believing that the conduct of the Appellants in respect of an assault occasioning actual bodily harm was such as to give grounds for believing that the Appellants might behave in such a way as to present a danger to public safety, public order and the peace. By the Appellants' own admissions they had been drunk at the time of The Trough incident and also earlier in the same month, on Liberation night. This showed that they were of intemperate habits. The Trough incident demonstrated violence and a lack of self-control. The Respondent had made his decision properly having proper consideration of his powers and the law, after taking proper account of all known information and facts and his decision was neither arbitrary nor capricious.

31. Mr Rowe also submitted that the tests referred to in the cases cited in the Appellants' submission had been refined after the Cullen Report on the Dunblane School Massacre on 13<sup>th</sup> March 1996. In the more recent case of *Chief Constable of Essex v Campbell* there had not been a conviction, only a complaint against Mr Campbell. Parker, J had said:

*"On any view of the events there had been a violent domestic incident in which Mr Campbell had hit his partner, whether that was an unlawful assault or whether he was responding to some act of violence on her part. It was open to the Crown Court to conclude that Ms Bartlett's first account of the incident was the truth, and that Mr Campbell had committed a serious assault. Given the terms of the applicable legislation and the guidance, that alone would have been powerful grounds for revoking the Firearms Certificate."*

32. Mr Rowe contended that hardship on the Appellants resulting from the revocation of the licences was irrelevant and that only public safety, public order and the peace should be taken into account.

### *The Law*

33. In considering the authorities to which I have been referred or which have been cited, I have borne in mind some important differences between the law in England and Scotland and that of the Falkland Islands.

34. First, under the provisions of section 13(2) FAAO a firearms licence in the Falkland Islands, if not revoked, has effect until death of the holder. Prior to this provision of FAAO coming into force firearms licences were renewable annually.

35. Secondly, whilst English cases may have considerable persuasive authority they are not the only precedents to which I must turn. Precedent is to be found in the judgments of the Falkland Island courts and I have considered the decision handed down by Davis, CJ on 28th August 1991 in *R v Director of Fisheries, ex part Fu Chun Fishing Company Ltd* which is to be found in the law reports section of Volume 7 of the Revised Laws of the Falkland Islands (1FLR 28). The Chief Justice's judgment is in respect of an application for judicial review and contains a detailed review of the law on the principles of natural justice in relation to the revocation of a fishing licence, albeit a fishing licence revoked by the Director of Fisheries, and parts of the judgment are pertinent to the present appeals. I set out the head note:

*"Held, allowing the application in part:*

*The [Director of Fisheries'] decision had been made contrary to the principles of natural justice, since he had failed to give the applicants adequate notice of the alleged breach of the agreement, inform them that revocation of their licence was under consideration, or give them sufficient opportunity to make written representations to him, for which no good administrative reasons had been shown. Although the present case was not one in which the applicant's livelihood was at stake or one dealing with individual rights, it did involve the applicant's reputation, their future participation in F.I.C.Z. and a considerable potential loss of earnings. The principles of natural justice were therefore clearly applicable."*

36. The Chief Justice said (page 48):

*"As to revocation of the licence-  
The applicants claim that the revocation of the Fu Chun's licence of which they were informed in the Director's letter of 14th February was in breach of*

*the rules of natural justice in that (a) the Director's letter of 12th February, from the tentative terms in which it was expressed, gave no clear indication as to exactly what was the case alleged by the Director; (b) it gave no clear indication that they had an opportunity to meet that case; (c) it gave no specific indication that revocation of the Fu Chun's licence was under consideration; (d) it gave no indication that the applicants or their agents to make any representations to the Director in response to his letter of 12th February. There is no evidence as to when, if at all, Mr. Cheek's letter to Capt. Lei of 13th February was passed on to Mr. Wu. Assuming, however, that he received it or was apprised of its contents on 13th February (14th February in Taiwan), that would still have meant that he had little more than 24 hours in which to make representations to the Director to avert the possibility of revocation of the Fu Chun's licence if, as suggested in his letter by Mr. Cheek, this was under consideration.*

.....

*Ridge v. Baldwin, [1964] AC 40; [1963] 2 All ER 66) related to the dismissal of the appellant, a chief constable, by the watch committee for negligence in the discharge of his duties. It was held by Lord Reid, Lord Morris and Lord Hodson that the watch committee was bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard and that it had not done so. R. v. Barnsley Metropolitan B.C., ex p. Hook, [1976] 1 WLR 1052; [1976] 3 All ER 452) related to the termination by the council of the oral licence of a stallholder to trade in an ancient town market. It was held that where the council was exercising its discretionary power to regulate the common law public right to trade in a market, it was not merely dealing with the contractual relationship between the council and the stallholder but also with the common law right of a man to earn his living in the market and that, in those circumstances, it was under a duty to act judicially.*

.....

*Similarly, in the case of Att. Gen. v. Ryan, [1980] AC 718, a case involving the right under the Constitution of the Bahamas to registration as a citizen, it was held that the minister empowered to grant or refuse applications for registration was a person having legal authority to determine a question affecting the rights of individuals and was therefore bound to observe the principles of natural justice when exercising that authority. In R. v. Wear Valley D.C., ex p. Binks, [1985] 2 All ER 66 it was held that where the council had without prior notification or reasons given notice to quit to a street trader who operated a hot food take-away caravan from a market place as her livelihood under an informal arrangement with the council, the council's decision amounted to a denial of natural justice and was quashed. Taylor, J. held that the rules of natural justice applied in that there was a public law element in the decisions of the council whom they licensed to trade in the market place and also that the applicant (the street trader) depended on her trade for her livelihood.*

.....

*In John v. Rees, [1970] Ch 345; [1969]; All ER 27 which related in part to the suspension of the local branch of a political party, Megarry J., as he then was, in dealing with the question as to whether the principles of natural justice applied, said ([1970] Ch. at 400):*

*"Put a little differently, I would say that if there is any doubt, the applicability of the principles of natural justice will be given the benefit of that doubt. The cry 'That isn't fair' is to be found from earliest days, in nursery, street and school alike; and those who wish to confer upon the committee or other governing body of a club or association a power to act unfairly or arbitrarily in derogation of common and universal expectation must make it plain beyond a peradventure that this has been done."*

*De Smith's Judicial Review of Administrative Action, 4th ed., at 224 (1980), in relation to administrative powers to control or regulate activities by licensing, says:*

*"There ought to be a strong presumption that prior notice and opportunity to be heard should be given before a licence can be revoked. It should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss, or is dependent on a finding of misconduct." In *McInnes v. Onslow-Fane*, [1978] 1 WLR 1520 a case of refusal by a board of an application for a boxer's manager's licence without giving the applicant an oral hearing or, on their refusal of his application, reasons for refusal, Megarry, V.-C. said in relation to licences ([1978] 1 W.L.R. at 1529):*

*"It seems plain there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which in *Ridge v. Baldwin* . . . Lord Hodson said were three features of natural justice which stood out) are plainly apt."*

*In my view, this is a case to which the principles of natural justice apply. Consequently, in exercising his discretion in this case, the Director was under a duty to observe the three features of natural justice which Lord Hodson in *Ridge v. Baldwin* said stood out ([1964] A.C. at 132).*

*We are not concerned in this case with the first of three features, the right to an unbiased tribunal, ..... In my view we are concerned, however, with the second and third features of natural justice as enunciated by Lord Hodson. Accordingly, I find that the Director was under a duty to give proper notice to the applicants of the alleged breach of the voluntary restraint agreement by the Fu Chun, and that he was under a duty to give the applicants an opportunity to be heard in answer to that allegation. .... In my view, it would still have behoved the Director to tell the skipper of the breach of the voluntary restraint agreement with which he was charged and that, subject to what the skipper had to say, he intended to revoke the Fu Chun's licence and then to give the skipper an opportunity to be heard in reply."*

37. Thirdly, there is the Falkland Islands' written constitution to take into account. The Chief Justice touched on constitutional matters in his judgment in *R v Director of Fisheries, ex part Fu Chun* and declared himself not prepared to apply the principle of proportionality as applied by the European Court of Human Rights as applicable in

Falkland Islands domestic law. However, the case and his judgment were some 12 years before the present constitution came into force. In the intervening period the Human Rights Act 1998 has been passed in England and a body of human rights law has been developed within English domestic law. The resulting changes cannot be ignored when the Falkland Islands courts come to construe the laws and consider matters which may affect an individual's constitutional rights and freedoms.

38. I quote from the *The Falkland Islands Constitution Order 2008*

*" 5 Existing laws*

*(1) The existing laws shall, as from the appointed day, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*

.....

*(5) For the purposes of this section "existing law" means any Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of the Falkland Islands immediately before the appointed day, but does not include any Act of Parliament of the United Kingdom or Order in Council or other instrument made under any such Act.*

39. So the FAO must be construed in accordance with the Constitution. I then turn to Chapter 1, at Annexe A

*"Fundamental rights and freedoms of the individual*

*Whereas-*

*1. (c) every person in the Falkland Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-*

*(i) life, liberty, security of the person, the enjoyment of property and the protection of the law;*

*(ii) freedom of conscience, of expression (including freedom of the press), of movement and of peaceful assembly and association;*

*(iii) protection for his or her family, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property save in the public interest and on payment of fair compensation,*

*the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid individual rights and freedoms, and to related rights and freedoms, subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

.....

6 Provisions to secure protection of law

*(10) For the determination of the existence of extent or his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law."*

40. I shall deal briefly with the right to the enjoyment of property. That the Appellants owned their firearms was not in contention. The FAAO gives everyone a civil right to own a firearm if the chief officer of police is satisfied that the criteria set by section 4(3) of the FAAO have been met. In the Falkland Islands the licence is a lifelong licence and, unless the licence is revoked, the licence holder can expect to be able to keep his gun for his lifetime if he wishes. It was not in contention that on the revocation of the firearms licences the Appellants' firearms had to be re-registered in the name of another person with a firearms licence or deposited them with the police. The effect of the revocation of a firearms licence is to deprive the licence holder of his gun and thus affect his civil rights. This point was not taken on behalf of the Appellants and for the purposes of these appeals I merely draw attention to it.
41. I am more concerned with the matter of a right to a fair hearing. It is enshrined as a constitutional right under Clause 6 (10) to a fair hearing but a fair hearing has long been held to be an essential part of natural justice. Tucker LJ in *Russell v Duke of Norfolk and others*, [1949] 1 All ER 109, said:
- "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."*
42. In *Schmidt and another v Secretary of State for Home Affairs*, [1969] 2Ch 149, at page 167 Lord Denning, M.R. said:



*"I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf."*

and, later,

*"The speeches in Ridge v. Baldwin [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."*

43. Post Human Rights Act jurisprudence on the right to a hearing can be found in *Osborn v Parole Board*; *Booth v Parole Board*; *Re Reilly's application for Judicial Review (Northern Ireland)*, [2014] 1 All ER 369.

*"[59] When the House of Lords considered in R (on the application of Smith) v Parole Board, R (on the application of West) v Parole Board [2005] 1 All ER 755, [2005] 1 WLR 350 the circumstances in which determinate sentence prisoners recalled to prison were entitled to an oral hearing before the board, it took the common law as its starting point, and considered judgments of the European court, together with judgments from a number of common law jurisdictions, in deciding what the common law required. It went on to hold that the board's review of the prisoner's case would satisfy the requirements of art 5(4) provided it was conducted in a manner that met the common law requirements of procedural fairness.*

*[60] Similarly, when the House of Lords rejected the admission of evidence obtained by torture, it did so on the basis of the common law: see A v Secretary of State for the Home Dept (No 2) [2005] UKHL 71, [2006] 1 All ER 575, [2006] 2 AC 221. Lord Bingham observed (at [51]) that English common law had regarded torture and its fruits with abhorrence for over 500 years, and concluded (at [52]) that the principles of the common law, standing alone, compelled the exclusion of third-party torture evidence. He noted that that was consistent with the convention.*

*[61] More recently, the importance of the continuing development of the common law, in areas falling within the scope of the convention guarantees, was emphasised by the Court of Appeal in Guardian News and Media Ltd v City of Westminster Magistrates' Court (US Government, interested party) [2012] EWCA Civ 420, [2012] 3 All ER 551, [2013] QB 618. The case concerned access by the press to documents referred to in court, and was decided on the basis of the common law, including authorities from other jurisdictions, rather than on the basis of art 10 of the convention. Toulson LJ, with whose reasoning the other members of the court agreed, stated (at [88]):*

*'The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.'*

.....

*[63] ..... Properly understood, convention rights do not form a discrete body of domestic law derived from the judgments of the European court. As Lord Justice-General Rodger once observed, 'it would be wrong ... to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and*

permeate the areas of our law in which they apply' (see *HM Advocate v Montgomery* 2000 SLT 122 at 127).

### **Procedural fairness at common law--three preliminary matters**

.....

[67] There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed however in *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28 at [72], [2009] 3 All ER 643 at [72], [2010] 2 AC 269, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.

[68] The first was described by Lord Hoffmann as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ('How Law Protects Dignity' [2012] CLJ 200 at 210):

'Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea--respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.'

[69] This point can be illustrated by Byles J's citation in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 195, (1863) 143 ER 414 at 420 of a dictum of Fortescue J in *R v University of Cambridge, Bentley's Case* (1723) 8 Mod 148 at 202 (see also (1723) 92 ER 370):

'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence.'

The point of the dictum, as Lord Hoffmann explained in *Secretary of State for the Home Dept v AF (No 3)* [2009] 3 All ER 643 at [72], [2010] 2 AC 269, is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making. As Byles J observed ((1863) 14 CBNS 180 at 195, (1863) 143 ER 414 at 420), the language used by Fortescue J 'is somewhat quaint, but ... has been the law from that time to the present'.

[70] This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hoffmann referred. Courts have recognised what Lord Phillips of Worth Matravers described (in *Secretary of State for the Home Dept v AF (No 3)* [2009] 3 All ER 643 at [63], [2010] 2 AC 269) as 'the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result' .....

[71] The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence

*between the actions of decision-makers and the law which should govern their actions (see eg Fuller The Morality of Law (revised edn, 1969) p 81 and Bingham The Rule of Law (2010) Ch 6).*

*[72] The third matter to be clarified concerns the cost ..... The easy assumption that it is cheaper to decide matters without having to spend time listening to what the persons affected may have to say begs a number of questions. .... procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear."*

44. The term "intemperate habits" in section 4(3) FAAO is not defined. The words carry their ordinary meaning. As an example, according to Chambers dictionary "intemperate" means lacking due restraint, given to excess of any kind, immoderate use of alcoholic liquors. "Habit" is defined as ordinary course of behaviour, tendency to perform certain actions, customs, actions taken regularly or frequently.

### *Conclusion and decision*

45. By means of this appeal each of the Appellants has been fully heard. They are not in identical situations and I have concluded that it is not appropriate to treat them as if they were. Each appeal must be considered on its merits.
46. As this is an appeal by way of re-hearing I do not have to agree with the Respondent. It is for me to make my own decision on the submissions, evidence and arguments I have heard during the appeal.
47. The First Appellant is a young man of 24 living in Stanley and with no record of convictions until the three convictions in April this year. He uses his guns for recreation, in competition shooting and occasional duck shooting. On the face of it he has a good reason for requiring a firearms licence, although I understand that he could continue to shoot with the Falkland Gun Club and at the range and in competitions even if he did not hold a firearms licence.
48. However, in addition to being satisfied that he has good reason for requiring a licence, I have to be satisfied that defence, internal security, public safety, public order and the peace will not be endangered by the grant of a licence and that he is not of intemperate habits or of unsound mind or for any other reason unfitted to hold a licence. His three convictions in April 2015 for violent offences raise the question of behaviour endangering public safety, public order and the peace. There was no suggestion that firearms were involved in the incident in any way but there

is clear evidence of irresponsible and violent behaviour and a disregard for public safety and public order. It is not appropriate behaviour for the holder of a firearms licence. There were two instances in June 2014 when his behaviour showed a lack of due restraint and immoderate use of alcohol. I am not ruling that these two instances are evidence of regular or frequent behaviour that would amount to intemperate habits but the incident at The Trough and the resultant three convictions are, in my view, sufficiently serious to come within the ambit of "any other reason unfitted to hold the licence."

49. For these reasons his firearms licence is revoked.
50. There is no bar to his re-applying for a licence in due course and I would anticipate that he will still have good reason for requiring a licence. He will have to convince the chief police officer that he is not a risk to defence, internal security, public safety, public order and the peace and that he is of temperate habits, sound mind and fit to hold a licence and following his convictions the bar will be higher than before.
51. For completeness, I record that I have no concern that the First Appellant would endanger defence or internal security if he held a firearms licence.
52. The Second Respondent is a man of 49 and keeps his guns for use on his farm or because they have been passed down the family. He has one conviction from April 2015 and past convictions for offences committed prior to the grant of his licence in 1996. He has made out a case for needing firearms on his farm and I am satisfied that he has good reason to require a licence. In fact, his licence has not been fully revoked but he is currently only permitted to hold a captive bolt humane killer which he says is not suitable for slaughtering loose animals on the farm. Evidence has also been given that the caps for the bolt gun are not available. I accept that evidence. There are, however, other criteria to meet and I have to be satisfied that the grant of a licence will not endanger defence, internal security, public safety, public order and the peace and that he is not of intemperate habits, unsound mind or for any other reason unfitted to hold a licence. It is a fact that he has recently shown violent behaviour and a disregard for public safety and public order. He has also drunk to excess.

53. I have not been persuaded that the two incidents in June 2014, resulting in one conviction, show behaviour of sufficient frequency or regularity to rule him of intemperate habits or unfitted to hold a licence. His other convictions are sufficiently long ago that I am satisfied it is appropriate to treat them as not indicating a tendency and to look upon them historic. There has not been any allegation that he has ever misused a firearm.
54. The exercise of discretion is one that requires all factors to be balanced. On balance, I am satisfied that it is appropriate to grant the Second Appellant's appeal and to reinstate his firearms licence but on new conditions that will give added protection against danger to public safety, public order and the peace and meet my concerns that when he was in Stanley in June 2014 he demonstrated irresponsible behaviour that fell short of the standard normally to be expected of the holder of a firearms licence.
55. My intention is that the conditions will permit him only to use his guns on land he farms, that he is not permitted to bring any guns within a 5 mile radius of the spire of Christ Church Cathedral, Stanley (a reference point used in the Electoral Ordinance) without the prior permission of the chief of police and that any breach of a licence condition or any conviction for an offence involving violence, disorder or alcohol will trigger revocation of the licence in full. I wish to receive submissions from the Second Appellant and the Respondent as to the exact wording of the conditions.
56. As with the First Appellant, I record that I have no concern that the Second Appellant would endanger defence or internal security.
57. There is one further matter I wish to address. There are inherent difficulties for a chief police officer in acting as an independent and impartial tribunal when his officers have brought forward allegations that have given rise to the question of a licence holder's suitability and may provide the grounds for revocation. The licence holder is protected by the right of appeal in section 4(8) of the FAAO. The appeal will cure any earlier defects in the proceedings (*Bryan v UK; R v Secretary of State for transport Environment and the regions* [2001] UKHL 23). However, I consider that to safeguard a licence holder's rights and meet the principles of natural justice from the outset the chief officer of police should always give notice

of the allegations which have given rise to his consideration of an amendment or revocation of a firearms licence and give the licence holder a reasonable opportunity to answer the allegations. Given the statutory twenty-one days (set by section 4(4) and (7) FAAO) for delivery for amendment or surrender of a licence after revocation, it would seem to me that twenty-one days in which to make representations against amendment or revocation would be a reasonable period.

Dated: 13<sup>th</sup> August 2015



Clare Faulds  
Senior Magistrate