

CITATION: *Elliott Jenkins v The Commissioner of Police* [2023] NTLC 15

PARTIES: ELLIOTT JENKINS

v

THE COMMISSIONER OF POLICE

TITLE OF COURT: FIREARMS APPEAL TRIBUNAL

JURISDICTION: Firearms Act (NT)

FILE NO(s): 2022-03062-LC

DELIVERED ON: 02 August 2023

DELIVERED AT: Darwin

HEARING DATE(s): 17 July 2023

JUDGMENT OF: Commander James O'Brien, Mr Tony Orr, Chief Judge Elizabeth Morris (Chairperson)

CATCHWORDS:

ADMINISTRATIVE LAW – FIREARMS TRIBUNAL – APPEALS – Meaning of “all reasonable precautions”

Firearms Act 1997 (NT)

Yunupingu v Commissioner of Police [2009] NTMC 11

Director of Public Prosecutions (NSW) v Wilson [2004] NSWSC 911

Houlakis v R [2015] NSWDC 127

CSC v Commissioner of Police [2016] NSWCATAC 211

Clifton v the Commissioner of Police (21816497) delivered on 21 June 2018

REPRESENTATION:

Counsel:

Appellant: E Withnall

Respondent: K McLaren

Solicitors:

Appellant: Withnall Halliwell

Respondent: Solicitor for the NT

Judgment category classification:	B
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IN THE FIREARMS APPEAL TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

2022-03062-LC

BETWEEN:

ELLIOTT JENKINS

Appellants

AND:

THE COMMISSIONER OF POLICE

Respondent

REASONS FOR JUDGMENT

(02 August 2023)

THE TRIBUNAL

COMMANDER JAMES O'BRIEN

MR TONY ORR

CHIEF JUDGE ELIZABETH MORRIS (CHAIRPERSON)

INTRODUCTION

1. This is an appeal against a decision of the Commissioner of Police brought pursuant to s 51(1) of the *Firearms Act 1997* (NT) ("the Act").

BACKGROUND

2. Mr Elliott Jenkins lives in Tennant Creek. He was issued with a Firearms Licence (Category A and B Shooters licence) which was due to expire on 26 June 2029. He was also the owner of two registered firearms, a Ruger M77 .308 bolt action rifle and Howa 1500 .308 bolt action rifle. These firearms were kept in a gun safe at 192 Paterson Street, Tennant Creek. On the evening of 14 September 2022, Mr Jenkins became aware that this house had been entered unlawfully. He arrived at about 7.30 pm to find broken glass and a smashed window near his back door. He entered via his front door to see if anything was missing. After discussion with his partner, it was decided that some family members should come around to secure the residence. When they arrived Mr Jenkins had left the residence. However, after receiving a phone call advising that various items were missing, he returned to 192 Paterson Street. It was then that he discovered the two firearms were missing and he reported the matter

immediately to Police via Triple Zero. Mr Jenkins says that the keys to the gun safe was at that time in the key box where he normally kept them, and on a hook. The inference being, that the thieves had found the keys, opened the safe, removed the firearms and ammunition, locked the safe and returned the keys.

3. From the footage supplied of the attending police members' body worn cameras, the key box is clearly visible in the kitchen area of the house, on a wall at around eye-level, near the back door. It is obviously a key box, and has a trellis type cover or door, which is partially see-through, with keys visible. The box itself does not lock. It could be said to be in prime position in the kitchen/living area, immediately obvious to anyone coming into that part of the house.
4. The gun safe is some nine metres away, but in a different room behind the adjoining door. Standing at the key box, the gun safe would not be seen, and vice versa. The keys to the gun safe from the evidence, were standard gun safe keys, that is, they appear different to normal door or lock key, being slightly longer and a different shape. The gun safe keys were not labelled or marked as such in any way.
5. Mr Jenkins was in the process of moving out of the Paterson Street address and moving to a new home elsewhere in Tennant Creek. He had not lived at the address for around two weeks, but a family member had been staying there. He had also regularly attended the address to feed his dogs.
6. Further police investigation and inquiries led to the discovery of one of the firearms and some ammunition later that day. Further ammunition was discovered a few days later, but the other firearm, as of the date of this decision, has not been recovered.

DECISION AND REVOCATION

7. On 30 September 2022, Mr Jenkins was issued with a letter of revocation from the Firearms Policy and Recording Unit. Acting Senior Sergeant Ian Kennon, as a delegate of the Commissioner of Police, determined that Mr Jenkins had breached a condition of his licence under s 40(3)(d) of the *Firearms Act 1997* (NT). The letter advised that Mr Jenkins was prohibited from applying for a licence until 29 September 2024, being a period of two years.
8. The relevant part of s 40(3) states:

- (3) The Commissioner may, by written notice served on the holder of a licence, permit or certificate of registration, revoke the licence, permit or certificate:
 - (a) for any reason for which the holder would be required to be refused a licence or permit of the same kind or a certificate of registration; or
 - (b) if the holder supplied information that was false or misleading in a material particular in, or in connection with, the application for the licence, permit or certificate of registration; or
 - (c) if the holder is found guilty of an offence against a law in force in the Territory, or an offence in a State or another Territory, (whether committed before or after the granting of the licence, permit or certificate) relating to a firearm or the possession or use of a firearm or any other offence that, in the opinion of the Commissioner, makes the holder not fit to possess or use a firearm or to hold a licence, permit of the kind held or a certificate; or
 - (d) in the case of a licence or permit, if the holder contravenes a condition of the licence or permit; ...

9. It was a condition of the licence, imposed by s 13(1) of the Act, that Mr Jenkins comply with the relevant safe keeping and storage requirements under the Act. Such section requiring:

46 Storage and safe keeping requirements

- (1) A person in possession of a firearm or ammunition:
 - (a) must take all reasonable precautions to ensure that:
 - (i) it is kept safely; and
 - (ii) it is not stolen or lost; and
 - (iii) it does not come into the possession of a person who is not authorised to possess it; and
 - (b) must comply with the storage and safe keeping requirements under this Act that apply to the firearm or ammunition.

Maximum penalty: If the offender is an individual – 50 penalty units or imprisonment for 12 months.

If the offender is a body corporate – 250 penalty units.

- (2) Subsection (1)(b) does not apply in relation to a firearm if the person in possession of the firearm satisfies the Commissioner that the person has provided alternative arrangements for the storage and safe keeping of the firearm (and any ammunition) that are of a standard not less than the requirements under the Act.
- (3) The Regulations may specify the minimum standards for storage and safe keeping of firearms or classes of firearms (and ammunition).

THE APPEAL

10. Mr Jenkins filed an appeal against this decision on 16 November 2022. The grounds of appeal as per his notice are “I dispute I have breached section 30(3)(d) of the NT Firearms Act 1997”. The notice was accompanied by an unsworn statement, which further opined that he had taken reasonable steps to safeguard his firearms against theft from the gun safe and that he met every requirement of the storage and safe keeping requirements under section 46 of the Act. Further statements were later filed to support his appeal.
11. After various procedural mentions and adjournments, a hearing was commenced by the Tribunal on 14 July 2023.
12. This Tribunal, when ruling on the appeal, stands in the place of a Commissioner of Police when they rule on an application. The relevant matters are, by virtue of s 52(2), the same.

52 Powers of Tribunal

- (1) An appeal is in the nature of a rehearing.
- (2) The Tribunal has all the powers, authorities, duties, functions and discretions that the Commissioner has in relation to the decision or action the subject of the appeal.

54 Determination of appeals

- (1) The Tribunal is to determine an appeal by:
 - (a) confirming the decision or action of the Commissioner; or
 - (b) substituting its own decision for that of the Commissioner.
- (2) Where the Tribunal substitutes its decision for a decision of the Commissioner, the Commissioner is to take whatever action is necessary to give effect to the decision.
- (3) The Tribunal must publish its reasons for its decision (including if its decision is to confirm the decision or action of the Commissioner).

13. Various documents have been tendered to the Tribunal, including statement and statutory declarations of Mr Elliott Jenkins, Sergeant Marek Hutchinson-Goncz, Senior Sergeant Ian Kennon and Detective Acting Sergeant Aaron Evans. Body worn video from Officers McKay and Hill, as well as of the service of the notice of revocation was also tendered. Witnesses cross examined included the Appellant, Mr Jenkins, and Detective Sergeant Hutchinson-Goncz and Senior Sergeant Kennon. That evidence and those documents comprise the only material considered by the Tribunal in coming to our decision.

THE FIREARMS ACT - PRINCIPLES, OBJECT AND PURPOSE

14. The *Firearms Act*, Act No 2 of 1997 was enacted by the NT Parliament in concert with legislation in the other States and Territories of the Commonwealth in a national response to community concerns about the misuse of firearms.
15. As a result of this national response ownership of particularly lethal firearms, repeating shotguns and heavy calibre rifles, was banned. The number of persons licensed to possess firearms was reduced by implementing knowledge and competency requirements, restricting licences to various categories that required real and legitimate purposes for ownership, and improving the tracking and registration of each firearm itself.
16. The Act in the long title provides that it is “An Act to provide for the regulation, control and registration of firearms, and for related purposes”.
17. It is clear that the regime of restrictions and regulations means that the possession and use of firearms in the Northern Territory is a privilege not a right.¹

THE APPELLANT'S CASE

18. It is the Appellant's case the decision-maker failed to make the relevant enquiries in coming to his decision, that he had improper regard to irrelevant material, that he misapplied the standard of what constitutes “all reasonable precautions” and that ‘the penalty of revocation for the period sought is manifestly excessive given all the circumstances’.²
19. It is the Appellant's submission that he had, in fact, taken all reasonable precautions, and that any breach of his licence condition, if found, was not sufficient to form the grounds for a revocation of licence.
20. The Appellant also submitted there were public policy grounds for not revoking the licence, as licensees would not be as forthcoming with assistance to police in cases of stolen firearms.

THE RESPONDENT'S CASE

21. It is the Respondent's submission that the decision should be confirmed. The Appellant's action has demonstrated that he did not take ‘all reasonable precautions’ to ensure their “safe keeping” and the firearms and ammunition “do not come into the possession of a person who

¹ *Yunupingu v Commissioner of Police* [2009] NTMC 11 at [20].

² Outline of Appellant's submissions – filed 14 July 2023.

is not authorised to possess” them. There were reasonable precautions that the Appellant failed to take. The breaches were not temporary aberrations and were significant rather than slight departures from the statutory requirements.

ALL REASONABLE PRECAUTIONS

22. It is clear that a licensee who does not take all reasonable precautions is in breach of their licence conditions.
23. The phrase ‘all reasonable precautions’ is not defined in the Act.
24. In *Director of Public Prosecutions (NSW) v Wilson* [2004] NSWSC 911, His Honour Justice James found that “a person who possesses a firearm contravenes s 39(1)(a) if there is any reasonable precaution to ensure the safe keeping of the firearm which he fails to take.”³
25. This definition was confirmed by Deputy Chief Judge Neilson in *Houlakis v R* [2015] NSWDC 127 where His Honour found that “the appellant who possessed firearms must have taken all reasonable precautions to ensure their safekeeping, meaning that he must take every reasonable precaution to ensure the safekeeping of the firearms.”⁴
26. It is clear that the legislation requires ‘all reasonable precautions’ and not ‘all possible precautions’. This differentiation was remarked on in *CSC v Commissioner of Police* [2016] NSWCATAC 211 at 48.
27. What is a reasonable precaution must be assessed on a case-by-case basis, given all the circumstances of a particular licensee. Reasonableness imports an objective test to those facts and circumstances.

DETERMINATION OF THE TRIBUNAL

28. It is the Tribunal’s view that the placement of the gun safe keys, in the key box, in such a prominent and unlocked place, being the main living area of the house, such key box being immediately visible and accessible to anyone coming in, whether by invitation or otherwise, was not appropriate nor a reasonable precaution.
29. In coming to this conclusion we have considered the factual scenario in the decision of the Tribunal in *Clifton v the Commissioner of Police* (21816497) delivered on 21 June 2018. In that

³ *Director of Public Prosecutions (NSW) v Wilson* [2004] NSWSC 911 at para 16.

⁴ *Houlakis v R* [2015] NSWDC 127 at para 2.

case the gun safe keys were kept under tools, in a toolbox consisting of 20 drawers, being in a large locked shed at the rear of a fully locked fenced house, the shed also containing a large amount of other property. The keys were taken by someone with some knowledge of the property and the firearms, and there was evidence they had searched for an hour for them. Those licensee in those circumstances, was found to have taken all reasonable precautions.

30. There were, in our view, reasonable precautions not taken by the Appellant. These include, given that he was coming and going from the house, keeping the keys on his person. The gun safe keys could have been kept in a locked container and in a place not immediately visible to any person who entered the room. They could have been kept apart from other keys, and thus hidden from a person, either with permission or without, who may be looking through those keys. There is no evidence before the Tribunal that any of these steps were not practical or reasonable.
31. It is important to note that this determination is not made applying the same test and requirements of criminal proceedings. The burden of proof in criminal proceedings is beyond reasonable doubt and there is no similar burden in these proceedings.
32. It is a requirement of his licence, that Mr Jenkins must take all reasonable precautions to ensure the firearms and ammunition are kept safely, are not stolen or lost, nor come into possession of those who are not licensed to have them. Where a key to his regulation gun safe is kept, is, in our view, an important precaution for firearm safety. Whilst we note there are no regulations or guidelines in relation to where a key should be stored, we find it should be stored in place such that the above test is met.
33. In our view the failure of the licence condition was not a temporary one, nor was it a slight or technical departure from the statutory requirement. The Appellant's evidence was that is where he normally stored his gun safe key. Whilst is very unfortunate that Mr Jenkins was the victim of an unlawful entry to his home, with all the distress that this entails, one of the consequences of the key to the gun safe being used by the perpetrators of this offence is that one firearm is still at large in the community, in the possession of a person not authorised to so possess it.
34. We dismiss the contention of the Appellant's Counsel that by revoking the licence a message would be sent to other licensees not to be forthcoming with police in relation to investigations around stolen firearms. Any public policy argument falls clearly on the side of

the safety and security of the community through a regulated and controlled system of licensing and storage and penalties for non-compliance.

35. Having determined that the Appellant did not take all reasonable precautions, we then turn to the decision of the Commissioner in revoking the licence and imposing a period of two years until 29 September 2024.
36. The notice of revocation served on the Appellant indicated that a licence could not be applied for during a period of two years. This power of the Commissioner is contained in s 43(1)(b).

43 Refusal or revocation by Commissioner

- (1) If the Commissioner refuses to grant or revokes a licence, permit or certificate of registration, the applicant or the former holder may not apply for a licence or permit of the same type or for a certificate of registration:
 - (a) until any conditions specified in the notice of refusal or revocation are met; or
 - (b) during a period specified in the notice.

37. In relation to a revocation not attached to a finding of guilt for a criminal offence, there are no regulated periods of being unable to apply.
38. Acting Senior Sergeant Ian Kennon, in his affidavit of 30 January 2023, states;

7. In accordance with section 43 of the Act, the Appellant was advised that he is prohibited from applying for a licence until 29 September 2024 on the following basis:
 - (a) Under the Act, if a licence or permit is refuse or revoked there is a discretionary power to impose a disqualification period. If a period were not imposed, then the Appellant, upon having his licenced revoked, could re-apply for a licence immediately. To prevent this from occurring a period of disqualification is always imposed.
 - (b) The length of disqualification period varies for the reason revoked. Under the Act three periods of disqualification periods exist, two years for firearms offences, five years for offences of violence and 10 years for disqualifying offences. The timelines imposed by the FPRU utilise these timeframes as a guide to disqualification.
 - (c) There is discretion surrounding the period of disqualification imposed. In this refusal s 10(2A) of the Act provides that if Mr Jenkins had been found guilty of contravening s 46 of the Act he would be ineligible for a licence for two years from the finding of guilty.
 - (d) Given the circumstances, I felt two years is an appropriate disqualification period.

39. There is no other evidence before us that Mr Jenkins has been anything but a fit and proper person to hold such a licence. We note Mr Jenkins's cooperation with police and his immediate notification of the stolen firearms, demonstrating his understanding of the seriousness of the situation. We also note that we are not dealing with a finding of guilt following a criminal charge pursuant to the Act.
40. However, in all of the circumstances, it is the Tribunal's view that a 2 year period should be imposed before Mr Jenkins can reapply for a licence should he wish to do so. This commences on 30 September 2022.

CONCLUSIONS AND DECISION

41. It is the Tribunal's decision, after consideration of the evidence, that the following orders should be made:
 - i. The Commissioner's decision in relation to revocation is confirmed.
 - ii. The Commissioner's decision in relation to a two year period from 30 September 2022 where the Appellant may not apply for a license is confirmed.

We will hear the parties as to costs.