

**IN THE DISTRICT COURT
AT WELLINGTON**

**CIV-2017-085-000399
[2018] NZDC 2990**

BETWEEN

JENNIFER ANNE CLARK
Appellant

AND

THE COMMISSIONER OF POLICE
Respondent

Hearing: 15 February 2018

Appearances: L M Hansen and E M S Cox for the Appellant
S Carter for the Respondent

Judgment: 21 February 2018

JUDGMENT OF JUDGE W K HASTINGS

Introduction

[1] On 15 April 2017, the Commissioner of Police refused Ms Clark's application to import into New Zealand 20 military style semi-automatic rifles and 100 magazines for those rifles. Ms Clark appeals that decision.

Background

[2] Ms Clark is a licensed firearms dealer. She and her husband Paul Clark own a company called NZ Ammunition Ltd, or NZ Ammo. NZ Ammo imports firearms, ammunition, explosives and associated equipment and supplies. It supplies licensed firearms dealers, retail outlets and government departments, including the New Zealand Defence Force and the New Zealand Police. It does not have a retail shop and does not sell direct to the public.

[3] On 16 February 2017, Ms Clark applied to import from Heckler and Koch, a German arms manufacturer, 12 MR 223 model rifles, 8 MR 308 model rifles, and 100 magazines for those rifles. The rifles are military style semi-automatic weapons, or MSSAs.

[4] Ms Clark applied for a permit because it is an offence under s 16 of the Arms Act 1983 to import an MSSA without one:

16 Offence to import firearms, starting pistols, restricted airguns, or restricted weapons, or parts of firearms, starting pistols, or restricted weapons without permit

- (1) A person must not, otherwise than pursuant to a permit issued to the person by a member of the Police, bring or cause to be brought or sent into New Zealand—
 - (a) a firearm, pistol, military style semi-automatic firearm, starting pistol, restricted airgun, or restricted weapon; or
 - (b) any part of a firearm, pistol, military style semi-automatic firearm, starting pistol, or restricted weapon.
- (2) In this section “New Zealand” does not include the harbours and other territorial waters of New Zealand.
- (3) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 1 year or to a fine not exceeding \$2,000 or to both who acts in contravention of subsection (1) of this section.

[5] Section 18(1)(b) provides that a member of the Police to whom an application is made for the issue of a permit may refuse to grant the permit with respect to any of the firearms listed in that provision. The list includes an MSSA firearm. Section 18(2) requires the Commissioner to be satisfied that there are special reasons why the MSSA firearm should be allowed into New Zealand before granting the permit:

18 Issue of permits to import firearms, parts of firearms, or restricted airguns

...

- (2) Without limiting the discretion conferred by subsection (1)(b) of this section, no application for a permit for the purposes of section 16(1) of this Act in respect of—
 - (a) A pistol, military style semi-automatic firearm, restricted airgun, or restricted weapon; or

- (b) Parts of a pistol, military style semi-automatic firearm, or restricted weapon,—

shall be granted otherwise than by the Commissioner who shall first be satisfied that there are special reasons why the pistol, military style semi-automatic firearm, restricted airgun, or restricted weapon or parts to which the application relates should be allowed into New Zealand.

[6] Ms Clark stated in her application that the special reason she sought to import these MSSAs was that:

the applicant is a licensed dealer and the weapons are required for on sale to licensed dealers and E category firearms holders.

[7] The Commissioner, through his delegate Inspector [Inspector's name deleted], refused the application on the basis that the reason Ms Clark provided did not constitute a special reason. "Special reason" is not defined in the Act.

[8] The Police Operations Advisory Committee approved a policy on 17 July 2012 to define what could be included in the term "special reason" in s 18 of the Act. It states in the initial proviso:

The words "special reason" are wide, comprehensive and flexible meaning a broad range of matters may be taken into account. A special reason is a reason which sets it apart from the usual reasons which might be offered in such cases¹. Circumstances, which in one case would be special reasons, in another, might not be such.

[9] The policy then sets out possible special reasons for importing an MSSA and distinguishes between a person whose licence is endorsed as being a fit and proper person to be in possession of an MSSA under s 30B, and a person who also has a dealer's licence. The possible special reasons why the former may import an MSSA are listed as follows:

The individual applying for the permit:

- (a) seeks to possess the MSSA as part of a collection, and demonstrate that it fits with and enhances an existing collection, or
- (b) participates in an identifiable shooting discipline or sport at an incorporated sports club with rules encouraging the safe and legal use

¹ *R v Shepherd* [1968] NZLR 673.

of firearms and a range certified for the shooting activity and intends to use the MSSA in an event at that sports club, or

- (c) wishes to use the MSSA in a capacity equivalent to that described in section 29(2)(e) of the Arms Act 1983 ('theatrical purposes'), or
- (d) wishes to replace an unsafe or unserviceable MSSA or part thereof and offers a 1:1 surrender of the unsafe or unserviceable MSSA or part of the MSSA, or
- (e) requires the MSSA for occupational purposes.

[10] Subject to the initial proviso, an individual holding an E endorsement therefore prima facie fits the policy criteria defining special reasons if the MSSA is imported for collection, sporting, theatrical, replacement or occupational purposes. This does not mean however that he or she is guaranteed a permit; the Commissioner must still exercise his discretion.

[11] A dealer on the other hand prima facie fits the policy criteria if the MSSA is imported on behalf of an individual with a special reason, or to replace an unsafe or unserviceable MSSA, or for immediate export. The policy states:

The dealer is importing the ... MSSA ... as agent for an individual who has a special reason for importing that item.

or

The dealer wishes to replace an unsafe or unserviceable MSSA or part and offers a 1:1 unconditional surrender of the unsafe or unserviceable MSSA or part.

Applications from dealers for a permit to import for the purpose of immediate export will be considered when:

- The application is genuine, with no indication of subterfuge.
- A bona fide end user is identified, and a confirmed order in writing from this end user attached to the application along with a permit to import (or equivalent from the country of destination).
- The Ministry of Foreign Affairs and Trade has indicated or approved a permit to export.
- The dealer satisfies Police that they hold no stock of the firearms to which the application applies.

As is the case with individuals seeking to import an MSSA, a dealer satisfying these policy criteria is not guaranteed a permit; the Commissioner must still exercise his discretion.

[12] Ms Clark said in her “special reason” that she could only, by law, sell MSSAs to other dealers and E category licence holders. An E endorsement permits the endorsee to possess an MSSA. There are approximately 4,500 E category licence holders, and about 400 licensed dealers, in New Zealand. To obtain an E endorsement, the holder of a firearms licence must satisfy “a member of the Police” that he or she is a “fit and proper person” to be in possession of the MSSA to which the application relates, in terms of s 30B. The holding of a firearms licence does not in itself entitle a person to have an MSSA.² The application form for an E endorsement (form POL67H) sets out the following criteria by which fitness is determined:

Reasons for Possession of a MSSA firearm

In considering your fitness to possess MSSA firearms, Police will ask for your reason(s). You may advance any reason and it will be considered by the member of the Police. Common reasons are:

The individual applying for the endorsement:

1. seeks to possess the MSSA as part of a collection, and demonstrates that it fits with and enhances an existing or planned collection, or
2. participates in an identifiable shooting discipline or sport at an incorporated sports club with rules encouraging safe and legal use of firearms and a range certified for the shooting activity and intends to use the MSSA in an event at that sports club, or
3. wishes to use the MSSA in a capacity equivalent to that described in section 29(2)(e) of the Arms Act 1983 (‘theatrical purposes’), or
4. requires the MSSA for occupational purposes.

But for the “replacement” criterion in the MSSA import policy, this part of the “fit and proper person” criteria is aligned with the import criteria. E endorsement holders must additionally comply with precautionary security measures.³

² Section 20(2).

³ Section 33A.

[13] Similarly, a person wanting to be a licensed dealer must satisfy “a commissioned officer of Police” under s 5(3) that he or she is “a fit and proper person to carry on the business of a dealer in, or manufacturer for sale of, firearms, airguns, pistols, and restricted weapons”. Any person wanting to procure an MSSA must apply for a permit to procure and satisfy “a member of the Police” under s 35(2) that he or she is a licensed dealer or the holder of an E endorsement. The permit to procure remains in force for one month.⁴

[14] The “special reasons to import” policy must be interpreted in a manner consistent with the Act. The legislation will prevail over anything inconsistent in the policy. The Police must also be careful not to fetter their statutory discretion when they apply the policy in their decision-making under s 18. The issue then is whether the reason offered by the appellant, that she is a licensed dealer and that the weapons are required for on-sale to licensed dealers and E category firearms holders, is a “special reason” why these MSSAs should be allowed into New Zealand, in terms of s 18(2).

[15] The appellant provided an affidavit from Ms Clark who described her business and the application she made to import these MSSAs. Robert Andrews described in his affidavit his business as a pest control contractor and the demand for MSSAs amongst commercial and recreational hunters. He also describes his own experience of applying for an E endorsement and a permit to procure, and states that as part of that process the Police ask him why he wants to own an MSSA. Mr Clark provided an affidavit explaining why he and Ms Clark need to have stock to sell, and said that to be economic a minimum of 20 MSSAs need to be imported. He said it would be inefficient if they were required to obtain 20 pre-orders before applying for permission to import MSSAs which they were legally allowed to sell. The appellant also provided an affidavit from Quentin Macleod who describes seeing MSSAs displayed for sale at Gun City in Christchurch.

[16] The respondent provided two affidavits from [the Inspector]. In his first affidavit, [the Inspector] describes the process used to determine whether or not to

⁴ Section 35(3).

grant permission to import MSSAs, and why he refused this permit. In his second affidavit he addresses the points made by Mr Clark. [Name of Arms Officer deleted], a Hutt Valley Arms Officer with the NZ Police provided an affidavit in which he explained why he issued a permit in error to the appellant to import the MSSAs. Any issues arising from [the Arms Officer]'s actions were not pursued at the hearing.

Submissions

[17] Ms Hansen for the appellant focussed on errors she submitted were made by the Police, and on why the application satisfied the special reasons policy.

[18] With respect to errors Ms Hansen said were made by the Police, she submitted first that the Police have taken an unduly narrow approach to the interpretation of “special reason”. She submitted that their general approach is that unless one of the five special reasons set out in the policy is present, a permit to import will not be granted. She submitted that this is inconsistent with the Act which does not require the importer to have a special reason; rather, the Act requires the Commissioner to be satisfied that there is a special reason for why the MSSA should be allowed into New Zealand. She submitted that the general approach of requiring one of five reasons is also inconsistent with the initial proviso of the policy which states that a “broad range of matters may be taken in to account”.

[19] Ms Hansen submitted that [the Inspector's] statement in his affidavit at paragraph [25] that

If a dealer importing MSSAs simply as stock was to be accepted as a special reason, that [would] enable individuals who would not otherwise have been able to import MSSAs into New Zealand (because they did not have a special reason) to acquire those MSSAs by purchase from the dealer.

was incorrect. Ms Hansen submitted that a person purchasing an MSSA within New Zealand must obtain an E endorsement under s 30B in relation to that firearm, and a permit to procure under s 35. An E endorsement is required for each specific weapon.⁵ Any person buying an MSSA from a dealer therefore will be scrutinised to ascertain

⁵ *Jenner v Attorney General and another* (HC Hamilton, CIV 2008-485-2551, 3 June 2009, Andrews J at [52]).

if he or she is a fit and proper person to be in possession of an MSSA, and to show cause why she or he should own one. Ms Hansen submitted that put another way, the “fit and proper person to be in possession of an MSSA” test is the same as the Police’s “special reasons” test. She submitted that the controls on who may possess and procure MSSAs that have been imposed by the “fit and proper person to possess” test are the same as the controls imposed in identical terms by the MSSA import test.

[20] Ms Hansen submitted that the third error made by the Police is in their statement that a dealer can only have a special reason to import an MSSA if the dealer is an agent for a person who has a special reason. Ms Hansen submitted that a dealer will always effectively be an agent for a person with a special reason. The dealer is not importing the MSSAs for his or her own use but for on-sale.

[21] With respect to the existence of special reasons to allow the MSSAs into New Zealand, Ms Hansen submitted first that permitting a dealer to import MSSAs for stock and eventual on-sale promotes the safe use and control of these firearms, recognises the special status of dealers under the Act, and recognises the numerous layers of controls that already restrict who may own these firearms and how they are stored.

[22] Ms Hansen submitted that the phrase “special reasons” must be interpreted differently for dealers to recognise their special activities as sellers and manufacturers under the Act. She submitted that it is impractical to expect a dealer to have an actual purchaser of the MSSA identified prior to the import. She submitted that this is an unreasonable restriction on a licensed dealer’s business, and that the Police’s approach constitutes an effective ban on the import of MSSAs by licensed dealers for the purpose of sale, which Tipping J in *Practical Shooting Institute (NZ) Inc v Commissioner of Police*⁶ decided was unlawful.

[23] Ms Hansen submitted that permitting dealers to import MSSAs for on-sale to E category licence holders and other dealers controls the number of MSSAs brought into the country because each import application must specify the number of MSSAs sought to be imported. There is further control in the sense that on-selling can only be

⁶ [1992] 1 NZLR 709.

to persons previously vetted as fit and proper persons to hold a dealer's licence or an E endorsement and who hold a permit to procure.

[24] Finally, Ms Hansen pointed to evidence in the affidavits that there is a demand for MSSAs from commercial and recreational hunters as well as sport shooters. She submitted that MSSAs are an important and effective tool for use in pest control, and that when they wear out, replacement parts and firearms are needed.

[25] Ms Carter for the Commissioner submitted that s 18(2) sets up a presumptive prohibition with a defined exception: "no application ... shall be granted otherwise than" when the exception is fulfilled. She submitted that the existence of special reasons does not entitle the applicant to a permit; the decision remains discretionary.

[26] Ms Carter also submitted that the reasons must be "special". Such reasons are not capable of exhaustive definition, as the initial proviso states, but they must nevertheless be "unusual" and particular to the situation in issue. They must justify an exception to the presumptive prohibition. The reasons set out in the policy are guidance and are stated to be examples rather than an exhaustive list. She submitted that the opening words of s 18(2)(b): "may, in the discretion of that member of the Police, refuse to grant the permit"; mean that each case remains to be decided on its particular merits. Ms Carter submitted that the desire to stock a quantity of MSSAs for future on-sale to a limited class (E endorsement holders and dealers) cannot be a special reason justifying the grant of an import permit because there is nothing unique about such circumstances.

[27] Ms Carter submitted that to grant a permit in these circumstances would undermine the operation of s 18(2) because it would allow a dealer to sell an MSSA to anyone holding an E endorsement and a permit to procure. An E endorsement merely requires the applicant to have been assessed as a "fit and proper" person. Although the application form for an E endorsement requires the applicant to give a reason why he or she seeks to possess an MSSA as part of the fit and proper person test, it is not a legislative requirement and is for a different purpose. Ms Carter submitted that in drawing a distinction in s 18(2) between MSSAs and other firearms, Parliament intended to limit the importation of MSSAs and to restrict the ability of

those persons within New Zealand to obtain MSSAs manufactured overseas. She submitted that the appellant's interpretation of "special reasons" would defeat Parliament's intention and eliminate any practical distinction between foreign-made MSSAs and standard firearms the importation of which does not require special reasons. The police approach, Ms Carter submitted, still allows a dealer to act as an agent for buyers seeking a foreign-made MSSA, but only where there is a special reason justifying the firearm being allowed into New Zealand.

[28] Finally, Ms Carter submitted that nothing in the affidavits before the Court provided a special reason. She submitted that there continues to be a lack of specificity with respect to the special reasons why these 20 MSSAs should be allowed into New Zealand.

Discussion

[29] There was no real dispute with respect to the approach to be taken to this appeal. It is an appeal de novo. In *Fewtrell v Police*⁷, Goddard J held that the Judge hearing an appeal such as this under s 62 of the Arms Act 1983 should conduct the hearing de novo, giving "due weight" to the decision under appeal, but without applying any burden of proof. In *Chief Executive of the New Zealand Customs Service v Jury*⁸, the Court of Appeal confirmed that there is no presumption that the decision under appeal is correct, and that it is the duty of the appellate court to reach its own independent findings on the evidence.

[30] I turn now to the legislation. The provisions of the Arms Act 1983 relating to MSSAs were added in 1992 following the Aramoana incident. Introducing the amendment Bill, the Hon. John Banks, Minister of Police said⁹:

Under the existing Act Rambo-type guns can be brought into the country with the permission of a constable, and some dealers were bringing them in in lots of up to 5000. The Bill stops that. In future only the Commissioner of Police will be able to approve importation, and he will have to be absolutely satisfied that there are very special reasons for bringing in such a gun.

⁷ [1997] 1 NZLR 444 at 452-453.

⁸ [2017] NZCA 356 at [53].

⁹ 521 NZ Parl. Deb. 5718, 28 November 1991.

[31] Stripped of its hyperbole, the passage shows the then-government's intention to restrict the quantity of MSSAs being imported, to place the decision to allow such imports in the hands of the Commissioner, and to legislate the requirement of special reasons for bringing in such a gun.

[32] The resulting legislation is consistent with this intention. Parliament's intention reflected the government's intention. Section 18(2) starts with a rebuttable presumption against importation of MSSAs, requires an import application, and then vests a discretion in the Commissioner (not merely a member of the Police as is the case with applications for endorsements and procurement), to be satisfied that there are special reasons (not just reasons) why the MSSA to which the application relates should be allowed into New Zealand before granting a permit to import.

[33] In light of the strict requirements of s 18(2), I do not think the Commissioner was wrong to exercise his discretion to refuse the application to import these MSSAs, nor am I convinced that the reason offered by Ms Clark is a "special reason" why these 20 MSSAs should be allowed into New Zealand, for the following reasons.

[34] First, for the purposes of the present appeal, the Arms Act identifies four relevant activities: importing, dealing, procuring, and possessing. It requires the police to exercise a discretion with respect to each. Significantly, the discretion with respect to importing must be exercised by the Commissioner; the discretion with respect to dealers must be exercised by "a commissioned officer" in s 5(3), and the discretions with respect to possessing and procuring by "a member of the Police" in ss 30B and 35 respectively. This elevation of decision-making authority to the Commissioner indicates the special significance that importation of MSSAs carries in the legislation.

[35] Some of the criteria for exercising those discretions is formulated in similar terms, but each set of criteria is attached to separate legislated discretions, which have different purposes. Ms Hansen emphasised the point that there are already significant controls in place after an MSSA has been imported. These controls lie in who is able to possess and procure an MSSA.

[36] There is no doubt that these controls exist, and that the policy applied by the Police to exercise their discretion with respect to possession and importation is similarly worded. But the words of the legislation cannot be ignored. The discretions attached to each regulated activity are for different purposes. The discretion attached to possession requires the Police to be satisfied that the applicant is a “fit and proper” person to possess an MSSA before exercising the discretion to grant an E endorsement. The policy used to determine fitness and propriety is focused partly on the reason why an applicant wants to possess an MSSA, and that part of the policy is worded very similarly to the import policy. That policy, however, also focuses on the personal characteristics of the applicant to determine if she or he is fit and proper person. The form asks for referees, and requires the applicant to state her or his “shooting interests and activities”, the frequency with which the applicant takes part in these activities, and why a sporting firearm would not be sufficient. By way of contrast, the discretion in s 18(2) requires the Commissioner to be satisfied that there are special reasons why the MSSA “should be allowed into New Zealand”. The purpose of the inquiry is different. The inquiry is not focussed on the personal characteristics of the applicant as the s 30B inquiry is; it directs the Commissioner to turn his mind to why the MSSA should be allowed into the country. It requires not just reasons, but special reasons, to allow the MSSA into the country. The nature of the inquiry must extend beyond why the applicant wants to import the MSSA to include why it should be allowed into New Zealand, and is focussed on rebutting the presumption against importation. The appellant’s statement that she is a licensed dealer and the weapons are required for on-sale to licensed dealers and E category firearms holders” does not address the s 18(2) inquiry. The fact that the class of person to whom the MSSAs would be sold have been licensed as fit and proper persons to be dealers and to own an MSSA similarly does not address the s 18(2) inquiry.

[37] Second, and in addition to the different purposes for which the ss 30B and 18(2) discretions are exercised, the s 18(2) discretion requires “special” reasons to be considered. Requiring these MSSAs for stock and on-sale is not special; it is exactly what one would expect a dealer’s business to be.

[38] Third, with respect to the submission that “special reasons” must be interpreted in light of the “special status” given to dealers under the Act, dealers are licensed as

“fit and proper” persons “to carry on the business of a dealer in, or manufacturer for sale of, firearms, airguns, pistols, and restricted weapons”. There is no mention of importation in s 5. There is no mention of an exemption for dealers in s 18(2). Dealers, like anyone else, must make an application and satisfy the Commissioner that there are special reasons for allowing the MSSAs the subject of their application into the country. That they have been vetted as fit and proper persons to hold a dealer’s licence gives them no special or greater status to import MSSAs than anyone else, nor is their position as dealers *prima facie* relevant as a special reason why the MSSAs that are the subject of their application should be allowed into New Zealand.

[39] Fourth, to allow a dealer to import MSSAs simply because she is a licensed dealer and because they are required for on-sale to licensed dealers and E category firearms dealers, would circumvent any consideration of why the MSSAs should be allowed into the country. As indicated above, this reason is not special and does not address the s18(2) inquiry. More significantly, the MSSAs would be on-sold to persons who are fit and proper persons to possess MSSAs without any consideration by the Commissioner of why these MSSAs should have been allowed into the country in the first place. I use the past tense because the MSSAs would necessarily already be in the country if they are being on-sold. The s 18(2) inquiry would have effectively become redundant even if the dealer took it upon herself to make the inquiry. In any event, the dealer cannot act in the place of the Commissioner. The inquiry is with respect to importation and must be made before they are imported, not after importation but before on-selling.

[40] Fifth, the reason offered by the appellant does address an issue that is relevant to whether these MSSAs should be allowed into the country, which is numbers. The appellant’s argument at the hearing logically did not incorporate any limit on the numbers of MSSAs that could be the subject of an application because the argument relied on the statutory controls limiting the pool of potential buyers to those who have been licensed as fit and proper persons and who have therefore already indicated as part of that inquiry why they want MSSAs. By requiring consideration of why these MSSAs should be allowed into the country however, s 18(2) requires, at least in part, the Commissioner to consider the number of MSSAs already in the country and the number sought to be imported, against the rebuttable statutory presumption against

importing MSSAs. This is also consistent with Parliament's intention, and is reflected in the one-to-one replacement policy. The special reasons offered by a person applying to import MSSAs would need to address this issue before the Commissioner can be satisfied.

[41] Sixth, this is not an effective ban. Section 18(2) does not ban the importation of MSSAs. It makes it more difficult to import them compared with the importation of other firearms but their importation is still possible if the importer can satisfy the Commissioner that there are special reasons why they should be allowed into New Zealand. In this case, I agree with the Commissioner's determination that the appellant did not provide a special reason why these MSSAs should be allowed into New Zealand and I agree with his discretion to refuse the application as a result. The appellant was given the opportunity to provide further particulars, in particular whether these were needed to replace existing unserviceable MSSAs already in the country, or whether they had orders from customers with special reasons, but declined.¹⁰ Had special reasons been offered that satisfied the Commissioner, past practice indicates that he would have gone on to the next step of considering whether or not to grant the application. [The Inspector's] affidavit in reply shows that the Police have granted applications to import MSSAs. Between 1 July 2015 and 30 June 2017, the Police granted 26 permits to import one MSSA each, and six permits to import 2 MSSAs each, out of 42 applications.¹¹

[42] Seventh, while I accept that there is a demand for MSSAs amongst sport and recreational hunters and pest controllers,¹² I do not consider that I have enough evidence in the affidavits of Ms Clark, Mr Clark, Mr Andrews (a pest control contractor) or Mr Macleod (the holder of an E endorsed licence) to satisfy myself that there are special reasons to allow these MSSAs into New Zealand. No new special reason has been formulated or put forward by the appellant, and the evidence in the affidavits does not specifically address or particularise a special reason why these 20 MSSAs should be allowed into the country.

¹⁰ Exhibit "JAC15" appended to the Affidavit of Jennifer Anne Clark dated 12 May 2017.

¹¹ Affidavit in Reply of [the Inspector] dated 8 September 2017.

¹² Affidavit of Robert Duncan Andrews dated 24 August 2017.

Decision

[43] For these reasons, the appeal is dismissed.

W K Hastings
District Court Judge