REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 43 OF 2018

IN THE MATTER OF AN APPLICATION FOR

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACT

AND

IN THE MATTER OF THE FIREARMS CERTIFICATE

NO. 002754 DATED 30TH JANUARY 2018

BETWEEN

REPUBLIC.....APPLICANT

AND

THE SECRETARY OF THE

FIREARMS LICENSING BOARD.....1ST RESPONDENT

THE FIREARMS LICENSING BOARD.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE: HON. SENATOR JOHNSON MUTHAMA

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Senator Johnson Muthama (hereinafter "the Applicant") is a Kenyan citizen, and a holder of a Firearms Certificate No. 002754, which was revoked by a letter dated 30th January 2018 by the Secretary of the Firearms Licensing Board, the 1st Respondent herein. The said 1st Respondent is a member of the secretariat of Firearms Licensing Board, which is a statutory body created under the provisions of section 3(1) of the Firearms Act and the 2nd Respondent herein. The 3rd Respondent is the Attorney General, a Constitutional Office sued in its capacity as the principal legal advisor to the Government of Kenya.

2. The Applicant has moved this Court through a Notice of Motion dated 9th February 2018 seeking the followings orders:

> **a. An order of Prohibition directed against the Respondents and /or officers/personnel working under them from revoking the Ex-Parte Applicant's Firearms Certificate No.002754**

b. An Order of Certiorari to bring into this court for the purposes of quashing the 1st Respondent's letter of Revocation of Firearms Certificate No.002754 dated 3oth January 2018.

c. Costs of and incidental to the application be provided for;

d. Such further and other reliefs that this Court may deem just and expedient to grant.

3. The application is supported by a statement of facts dated 2nd February 2018, and a verifying affidavit sworn on the same date by Senator Johnstone Muthama. The Applicant states therein that his Firearms Certificate no.002754 was withdrawn by the 1st Respondent and revoked by the 1st Respondent on grounds that are baseless, without merit and biased, and in contravention of the provisions of the Firearms Act and the Fair Administrative Action Act.

4. The Applicant in this regard averred that he was issued with Firearms Certificate No. 00274 by the 2nd Respondent on 22nd May 1990, and has never had an incident nor convicted of an offence under the Penal Code. However, that on 1st February 2018, the 1st Respondent caused to be delivered to his office the impugned letter dated 30th January 2018 revoking the said Firearms Certificate, a copy of which he annexed, and that he was required to hand over the said Firearms Certificate on 1st February 2018.

5. It was the Applicant's case that the grounds upon which a firearms certificate can be revoked are to be found in section 5(7) of the Firearms Act, which when read with section 7(2) (a)(v) of the Fair Administrative action Act cannot be invoked without the Applicant being afforded an opportunity to be heard and defend himself. Further, that the 1st Respondent's service of the letter on him was done with malice as it afforded him no opportunity to object, as provided for in section (8) of the Firearms Act.

6. Therefore, that the actions of the Respondents are arbitrary and *ultra vires* the Firearms Act, and the Applicant's fundamental rights as enshrined in the Constitution have been breached. Lastly, that this Court has the jurisdiction to protect the same as allowed under the provisions of section 9(4) of the Fair Administrative Act.

The Response

7. Samuel Kimaru, the Secretary to the Firearms Licensing Board (the 1st Respondent herein) filed a replying affidavit sworn on 12th February 2018 in opposition to the application. He stated that the Applicant was a holder of the Firearm Certificate No.002754 that was issued on 27th July 2017 by the Chief Licensing Officer. Further, that on the basis of the certificate the Applicant purchased various firearms whose details were provided by the 1st Respondent in the affidavit.

8. The 1st Respondent admitted that he served the Applicant with a Notice of Revocation of Firearm Certificate No 1125 on 30th January 2018. Further, that the revocation of the said Firearm Certificate was done pursuant to the provisions of section 3(5)(b) and section 5(7) of the Firearm Act.

9. According to the 1st Respondent, firearms licenses are subject to the provisions of the Firearms Act, which regulates the licensing, manufacture, importation, sale, repair, storage, possession and use of firearms, ammunition, airguns and destructive devises. It was his case that the applicant ought to have first recourse to the statutory remedy provided under the firearm Act before seeking relief from the court.

10. Lastly, the 1st Respondent implored this Court not to exercise its discretion in favour of the Applicant, who has professed openly to be a member of National Resistance Movement , which has been proscribed as an organised criminal group at the time of the institution of the application.

The Determination

11. The application was canvased by way of written submissions which were highlighted in court at a hearing held on 16th July 2018. The Applicant's advocates on record, Khaminwa & Khaminwa Advocates, filed initial submissions dated 8th March 2018, and supplementary submissions dated 19th April 2018. Munene Wanjohi, a state counsel in the Attorney General's chambers, filed submissions dated 6th April 2018 on behalf of the Respondents. During the hearing, learned senior counsel Dr. John Khaminwa SC made oral submissions for the Applicant, while learned counsel Mr. Munene submitted for the Respondents.

12. The Applicant in his submissions set out the parameters of judicial review, and cited various judicial authorities in this regard including the decisions in **Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No 185 of 2001, Pastoli vs Kabale District Local Government Council And Other (2008),2 E.A 300** and **Republic vs Kenya National Examination Council ex-parte Geoffrey Gathenji & 9 Others, Court of Appeal No 266 of 1996** .

13. It was contended that the revocation of the Applicant's Firearm Certificate in the impugned letter was a violation of the Applicant's rights as provided for in the Constitution and the Fair Administrative Act and the Firearms Act. Further, that the impugned letter was in complete violation of section 5(8) of the Firearms Act, as the Applicant was never accorded time to know why the licences were revoked despite being in possession of the same from since May 1990.

14. It was also the Applicant's submission that he was not afforded an opportunity to be heard, and he relied on the case of **Onyango Oloo vs Attorney General (1986-1989) E.A 456** and **Republic vs The Honourable the Chief Justice of Kenya & others Ex parte Moijo Ole Keiwua, Nairobi HCMA No 1298 of 2004,**for the holding that the principle of natural justice applies where ordinary people would reasonably expect those making decisions that will affect others will act fairly.

15. Lastly, reliance was also placed on Article 47 of the Constitution and the Applicant submitted that it codifies every person's right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair, which is re-echoed in section 4 of the Fair Administrative Act

16. The Respondents on the other hand submitted that the application should be dismissed as the Applicant did not exhaust the dispute resolution mechanism provided for under section 23 of the Firearms Act, and the provisions of section 9(2) and (3) of the Fair Administrative Action Act . They relied on the case of **Republic vs Commissioner of Domestic Taxes Exparte I & M Bank Limited (2007) e KLR** in this respect.

17. I have considered the arguments and submissions made and find that four issues arise for determination. The first issue is whether the Applicant's application is competently before this Court. If the first issue is found in the affirmative, the second issue for determination is whether the Respondents acted *ultra vires* their powers under the Firearms Act in revoking the Applicant's Firearms Certificate, while the third issue is whether the Respondents acted fairly in revoking the Applicant's Firearms Certificate. The last issue is whether the Applicant is entitled to the remedies he seeks.

18. On the first issue, the Respondent has urged that the application should be dismissed on account of the Applicant's failure to exhaust the avenues of dispute resolution remedies provided under section 23 of the Firearms Act and as required by section 9(2) and (3) of the Fair Administrative Action Act, and his failure to apply for exemption from the said provisions. It was also argued that this Court should not usurp the mandate of other Government agencies, as it is not in the business of either issuing or revoking firearms licenses.

19. The Applicant in response submitted that he approached this Court since it has inherent jurisdiction to hear matters relating to infringement of human rights, and that he could not exercise his right of appeal as no reasons had been given as to why his Firearms Certificate had been revoked. Therefore, that this matter touched on the unconstitutional, illegal and unprocedural decision of the 1st Respondent, and the internal dispute resolution mechanism would therefore only be prejudicial to the ex-parte Applicant as there was no justification for withdrawing the Applicant's firearm. Furthermore, that the Applicant's right to security of his person is affected and is paramount.

20. Dr. Khaminwa SC urged in this respect that the Applicant was exempted by these exceptional circumstances from exhausting the internal dispute resolution mechanism as allowed by section 9(4) of the Fair Administrative Action Act. Dr Khaminwa SC also submitted that this Court addressed its mind to these considerations at the time of granting leave to commence judicial review proceedings. Reliance was also placed on the decision in **Republic vs Commissioner of Lands ex parte Lake Flowers Ltd Nairobi HCMISC Application No 1235 of 1998** for the position that availability of other remedies is no bar to the granting of judicial review relief.

21. In light of the arguments put forward by the Respondent, it is apt at this stage of the judgment to clarify what the role of this Court is in these application. The first aspect of this role is that of this Court's jurisdiction, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, which invoke this Court's jurisdiction under Article 165(6) of the Constitution to intervene and protect the rights of the affected party.

22. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the 1st Respondent'sdecision.

23. For such a decision to be amenable to judicial review, it must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. It thus goes without saying that where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of the Court. In the present case, the 1st Respondent's decision clearly affects the Applicant's rights to the security of his person, and it is the duty of the Court to ensure that the exercise of such powers is legal, rational and compliant with the principles of natural justice.

24. The rationale for the Court powers in this regard was explained by Justice J. B. Ojwang (as he then was) in **Leonard Sitamze vs The Minister For Home Affairs & 2 Others Nairobi High Court Misc. Civil Application No. 430 of 2004** as follows:

> **"Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi–judicial. They are potentially inimical to the fundamental human rights of the individual and in civilised society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty."**

25. On the arguments by the Respondents as regards this Court's interference with the duties bestowed on other agencies of government, this issue was addressed in the landmark decision by the United Kingdom's House of Lords in **Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374**, where it was held that it is no longer constitutionally appropriate to deny the Court supervisory jurisdiction over a governmental decision, merely because the legal authority for that decision rested on prerogative rather than statutory powers. Rather, that the Courts intervention should be governed by whether or not in the particular case the subject matter of the prerogative power is justiciable.

28. In the present application the Applicant is challenging the exercise of the 1st Respondent's statutory powers under the Firearms Act, and in particular alleging that his rights to fair administrative action have been infringed in the exercise of that power. This is thus a function and power that is not only amenable to judicial review, but is also justiciable, and therefore within the jurisdiction of this Court.

27. He second aspect of this Court's role that needs to be established at the the outset, is that of judicial review and the reach and purpose of the same. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

28. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited, (2008) eKLR,** the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

29. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

30. Having cleared the air about this Court's role in this application, I will now address the argument by the Respondents about exhaustion of internal dispute resolution mechanisms, and in particular that the Applicant ought to have appealed the decision of the 1st Respondent to the Minister as provided for under section 23 of the Firearms Act, which states as follows:

> "**(1) Any person aggrieved by a refusal of a licensing officer to grant him a firearm certificate under section 5 or to vary or renew a firearm certificate, or by the revocation of a firearm certificate, or by a refusal of a licensing officer to grant him a permit under subsection (12) of section 7, or by the revocation of such a permit, or by a refusal of a licensing officer to grant him a permit under subsection (13) of section 7 or to renew such a permit, or by the revocation of such a permit, or by the**
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> **refusal of a licensing officer to register him as a firearms dealer, or by the removal of his name from the register of firearms dealers by a licensing officer, or by the refusal of a licensing officer to enter a place of business in the register of firearms dealers under section 15 or by the removal of any such place of business from the register, may appeal to the Minister, whose decision shall be final.**
>
> **(2) An appeal under this section shall be lodged within fourteen days after the date on which the appellant first received notice, whether written or oral, of the decision by which he is aggrieved.**
>
> **(3) On an appeal under this section, the Minister may either dismiss the appeal or give such directions as he may think fit to the licensing officer from whose decision the appeal has been lodged, as respects the firearm certificate, permit or register which is the subject of the appeal."**

31. The Respondent also relied on section 9(2) (3) and (4) of the Fair Administrative Action Act which provide as follows:

> **"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

32. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act and under Article 159(2)(c) of the Constitution, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. However, the Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstances.

33. I find in this regard that at the time of granting leave to commence judicial review proceedings, this Court (Odunga J.) did address the exceptional circumstances submitted on by Dr. Khaminwa SC in its ruling on 2nd February 2018 as follows:

"This court has in the past decisions emphasized the necessity of complying with this one process and the rule of law in cases of this nature and has in fact held that such decisions ought not to be taken as an avenue of hitting back at those whose views are perceived not to toe the system.

The court has further held that before such decisions are made the constitutional provisions in particular Article 47 as read with the provision of Section 4 of the Fair Administrative Action Act must be strictly adhered to.

The allegations raised in this application once again are a grave indictment on the part of the executive arm of the government as to whether the Constitutional provisions and the principles therein are being adhered to.

If true they would no doubt be a basis for grant of judicial review orders. Consequently I am satisfied that the Applicant has established a *prima facie* case for the purposes of leave which I hereby grant in terms of prayer 2(a)and (b) of the Summons.

Let the Substantive Motion be filed and served within 10 days."

34. This Court therefore did allow the Applicant to by-pass the procedure set out in section 23 of the Firearms Act in granting the said leave. In addition, a five-judge bench of this Court held as follows in **Mohammed Ali Baadi and Others vs The Attorney General and 11 Others, (2018) eKLR** as to when an alternative dispute resolution mechanism may not be appropriate :

"94 While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (*See The Speaker of National Assembly vs James Njenga Karume*41), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara vs Gambia*42 it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

95. In the case of *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya43* after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:

[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake."

See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)44"*

35. This Court in this regard notes, as evidenced by the 1st Respondent's replying affidavit, that the impugned decision was taken at a time of heightened political tension, with the Applicant being alleged to be a member of an organization proscribed by the very Minister to whom he was supposed to appeal under section 23 of the Firearms Act. Therefore, taking into consideration the prevailing circumstance under which the impugned decision was made, an appeal as envisioned under section 23 of the Firearms Act would not have been an effective remedy, and the Applicant is accordingly exempted from the procedure set out in in the said section. This application is thus properly before this Court.

36. Before embarking on the remaining issues for determination, it is necessary to reiterate the grounds for judicial review as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

37. I will now address the second issue for determination, which concerns the ground of illegality of the 1st Respondents decision, as evidenced in the letter dated 30th January 2018. The question to be answered in this regard is whether, in light of the scope of powers and duties given to the 1st and 2nd Respondents under the Firearms Act, they incorrectly interpreted a statutory provision as giving them power, or purported to exercise a power they did not possess in revoking the Applicant's Firearms Certificate.

38. The contents of the impugned letter dated 30th January 2019 are not disputed by the Respondents, and read as follows:

“30th January 2018

Hon. Johnson Nduya Muthama

P.O. Box 58511-00200

NAIROBI.

RE: REVOCATION OF FIREARM CERTIFICATE NO. 002754

I wish to notify you in accordance with the Provisions of the Firearms Act, Cap, 114 Laws of Kenya that your Firearm Certificate No. 002754 issued to you on 27th July, 2017 is with effect from the date of this notice, revoked as the Firearms Licensing Board is satisfied that the revocation is warranted under Section 3(5) (b) and Section 5(7) of the above mentioned Act for reasons that you are unfit to be entrusted with a firearm anymore.

Following the revocation, I require you to surrender immediately to me the said Firearm Certificate.

I would also remind you that in view of this revocation, you are now illegally in possession of the following firearms, Rifle. 22 S/No.53000, Pistol S/No. 552116, Shotgun S/No. MV 06540F and all ammunition thereof.

The said Firearms and ammunition alongside the certificate should be surrendered latest by 1st February, 2018.

(SAMUEL C. KIMARU) OGW

SECRETARY, FIREARMS LICENSING BOARD”

39. The 1st Respondent therefore relied on section 3(5) and section 5(7) of the Firearms Act in the said letter, for his decision to revoke the Firearms Certificate. Section 3(5) in this regard provides for the functions of the 2nd Respondent as follows:

“**(5) The functions of the Board shall be to—**

(a) certify suitability of applicants and periodically assess proficiency of firearms holders;

(b) issue, cancel, terminate or vary any licence or permit issued under this Act;

(c) register civilians firearm holders, dealers and manufacturers of firearms under this Act;

(d) register, supervise, and control all shooting ranges that are registered under this Act;

(e) establish, maintain and monitor a centralized record management system under this Act;

(f) perform such other functions as the Cabinet Secretary may prescribe from time to time.”

40. Section 5(7) on the other hand provides for the circumstances when a Firearms Certificate may be revoked as follows:

“**(7) A firearm certificate may be revoked by a licensing officer if—**

(a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfit to be entrusted with a firearm; or

(b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate."

41. It is evident from the provisions of section 5(7) that while the Respondent has power to revoke a Firearms Certificate, there is a statutory pre-condition to the exercise of that power, which is that the Respondent can only revoke after being satisfied that the holder is prohibited under the Act, or has failed to comply with a notice requiring the delivery of the firearm certificate.

42. In this respect where there is existence of a statutory precondition as to the exercise of a power, this Court as a judicial review Court will interfere with that exercise, if the challenge is as to whether or not the precondition was satisfied, and/or that there was a wrong finding made by the public body in this regard. Such a factual precondition is what is also known as a precedent fact, and the Court in judicial review proceedings will interrogate a conclusion made as to the existence or otherwise of such a precedent fact.

43. For example, in **R v Secretary of State for the Home Department, ex parte Khawaja** [**1984] AC 74**, the House of Lords held that the question whether the applicants were "illegal immigrants" was a question of fact that had to be positively proved by the Home Secretary before he could use the power to expel them. The power depended on them being "illegal immigrants" and any error in relation to that fact took the Home Secretary outside his jurisdiction to expel them.

44. In the present application, the 1st Respondent indicated in the impugned letter that the Applicant had been found "**unfit to be entrusted with a firearm anymore**" . However, no basis or applicable provisions of the Act under which the Applicant had been found to have committed an offence or irregularity were provided by the 1st Respondent to support this conclusion. It is notable in this regard that section 5(7) requires the 1st Respondent to be satisfied about the existence of these circumstances.

45. In addition, the impugned letter also served as a notice to the Applicant, who was required to surrender his firearm immediately, and no evidence was given of any prior notice having been issued to him contrary to the express provisions of section 5(7). There was thus an obviously wrong exercise of powers in section 5(7) of the Firearms Act by the 1st Respondent, and the decision in the impugned letter of 30th January 2018 was both procedurally and substantively *ultra vires* the Firearms Act and illegal.

46. On the third issue on the fairness of the 1st Respondent's decision, the requirements of natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

47. These principles are restated in **Halsbury's Laws of England Fourth Edition Vol. 1 at** paragraph 74 as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations."**

48. Article 47 of the Constitution also now provides as follows in this regard:

> ***(*1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

49. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**
>
> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6;**
>
> **(e) notice of the right to legal representation, where applicable;**

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."

50. In the case of **David Oloo Onyango v Attorney-General [1987] eKLR** Court of Appeal observed as follows:

> **"There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice."**

51. In the present application, further to the observations made in the foregoing that the impugned letter did not bear reasons as to why the 1st Respondent was making the decision to revoke the Applicant's Firearms Certificate , no notice was given to the Applicant as required by law, thus effectively denying him an opportunity to state his case as regards the said revocation.

52. The 1st and 2nd Respondents were in this respect bound to observe the requirements of natural justice and apply the provisions of the Fair Administrative Act, and did not provide any evidence to show that these requirements and provisions were complied with before making the decision in the impugned letter. This Court therefore finds that for these reasons, there was procedural impropriety and unfairness on the part of the 1st Respondent in the making of the decision in the letter dated 30th January 2018.

53. The last issue is as regards the relief sought by the Applicant. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards judicial review orders:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done… Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

54. The Applicant has sought orders of certiorari and prohibition. I find that as the 1st and 2nd Respondents have been found to have acted *ultra vires* the Firearms Act, unprocedurally and unfairly, the Applicant is entitled to the order sought of certiorari to quash the impugned decision in the 1st Respondent's letter dated 30th January 2018.

55. On the order sought of prohibition, it cannot issue on the terms prayed, as the 1st and 2nd Respondents cannot be prohibited from undertaking their statutory powers and duties. The only action of the 1st and 2nd Respondents that can be prohibited is that of exercising the said powers and duties in contravention of the law.

56. In the premises this Court finds that the Applicant's Notice of Motion dated 9th February 2018 is merited, and accordingly orders as follows:

1. **An order of Prohibition directed against the 1st and 2nd Respondents and /or officers and personnel working under them be and is hereby issued prohibiting the said Respondents, officers and personnel from revoking the Ex-Parte Applicant's Firearms Certificate No.002754 without following due process and compliance with the applicable provisions of the Constitution and Firearms Act.**

2. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the 1st Respondent's letter of Revocation of Firearms Certificate No.002754 dated 30th January 2018.

3. The 1st and 2nd Respondents shall meet the Applicant's costs of the Notice of Motion dated 9th February 2018.

57. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE