Neutral Citation Number: [2010] IEHC 285

THE HIGH COURT

JUDICIAL REVIEW

2010 87 JR

BETWEEN

PATRICK HERLIHY

APPLICANT

AND

DISTRICT JUDGE DAVID RIORDAN

RESPONDENT

AND

MICHAEL A. FINN

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 9th day of July, 2010

The applicant is a sixty year old engineer, range design consultant and firearms instructor who resides in Carrigaline, Co. Cork. For many years he has been deeply involved in the recreational sport of target shooting. He holds a numbers of senior posts in the management, administration, development and planning of target shooting events and has represented Ireland as an individual competitor and as captain of successful Irish international target shooting teams. He was formerly a member of the Defence Forces. His involvement in target shooting for over forty years has been without accident or incident and he is regarded by all parties herein as a man of impeccable character and integrity.

The applicant has an established history as the holder of firearms under licence. In August, 2009 he submitted completed application forms in respect of certain firearms which were lawfully held by him pursuant to certificates which had been issued and which were valid until the end of July, 2009. The firearms in question included two Sig Sauer 9mm pistols and four Smith and Wesson .357 revolvers.

In submitting his application the applicant believed he complied in full with the various considerations specified under s. 4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006) and also included the shooting itinerary for 2008-10 which identified the events for which the firearms were required.

The notice party herein is a Chief Superintendent of An Garda Síochána in the Cork W.R. Division and is the "issuing person" under the Firearms Acts for that division.

Following the submission of the said application forms, the applicant was invited to attend a meeting with the notice party. This meeting took place on the 29th October, 2009. During this meeting the applicant set out in particular detail the events for which he required the identified firearms. However, subsequent to the meeting in question, the applicant was issued with a letter of refusal dated 30th October, 2009 identifying various grounds upon which the notice party relied to refuse his application for certificates for the firearms in question. Those factors included public safety, good order of the community, proliferation of firearms generally, calibre of firearm, ammunition type, lethal effect or danger, velocity of the ammunition, size and shape of the firearm and the use to which the firearm might be put.

As the refusal impacted upon the applicant's professional and sporting activities and his ability to continue participation in the sport of target shooting, the applicant appealed to the District Court pursuant to s. 15A of the Firearms Act 1925 as inserted by s. 43 of the Criminal Justice Act 2006. That appeal came on for hearing before the respondent on the 16th November, 2009 at Cork District Court. The applicant attended with one Denis Linehan to give evidence in support of his appeal. The appeal was opposed by the notice party who also called Detective Inspector Kevin Brooks from the Garda Ballistic Section as a witness. During the course of the hearing a full booklet of the applicant's qualifications, achievements and experience was handed into court.

Having heard the evidence, the respondent adjourned the case for written submissions and heard further oral submissions based thereon when he resumed the hearing of the case on the 30th November, 2009.

In giving his decision on that date, the respondent indicated that he considered himself to have an unfettered discretion or to be "at large" in relation to the application for firearms certificates and that he, the respondent, should refuse a restrictive firearms certificate if of the view that it should not be granted. The respondent also considered it relevant that the firearms in respect of which certificate were sought were prohibited under new legislation in the case of new applicants. The respondent further based his decision on the calibre of the firearms in question and their "lethality".

In consequence of the respondent's decision, the applicant was obliged to surrender the firearms in question to a firearms dealer pending a resolution of the matter. He contends that he is now unable to lawfully possess and use those firearms which has serious implications for his property rights in the firearms and "undermines in a radical fashion" his ability to earn his livelihood.

Against that background, the applicant brought the present judicial review proceedings seeking an order of *certiorari* to quash the decision of the respondent made on the 30th November, 2009 refusing to grant firearms certificates and an order remitting the application for the said certificates in respect of the said firearms for further consideration by the District Court in accordance with law.

LEGISLATIVE BACKGROUND

Section 4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006) provides as follows:-

> "4.—(1) An issuing person shall not grant a firearm certificate unless he or she is satisfied that the applicant complies with the conditions referred to in subsection (2) and will continue to comply with them during the currency of the certificate.
>
> (2) The conditions subject to which a firearm certificate may be granted are that, in the opinion of the issuing person, the applicant—
>
> (a) has a good reason for requiring the firearm in respect of which the certificate is applied for,
>
> (b) can be permitted to possess, use and carry the firearm and ammunition without danger to the public safety or security or the peace,
>
> (c) is not a person declared by this Act to be disentitled to hold a firearm certificate,
>
> (d) has provided secure accommodation for the firearm and ammunition at the place where it is to be kept,
>
> (e) where the firearm is a rifle or pistol to be used for target shooting, is a member of an authorised rifle or pistol club,
>
> (f) has complied with subsection (3),
>
> (g) complies with such other conditions (if any) specified in the firearm certificate, including any such conditions to be complied with before a specified date as the issuing person considers necessary in the interests of public safety or security, and
>
> (h) in case the application is for a restricted firearm certificate—
>
> (i) has a good and sufficient reason for requiring such a firearm, and
>
> (ii) has demonstrated that the firearm is the only type of weapon that is appropriate for the purpose for which it is required."

Under and by virtue of s. 27 of the Criminal Justice (Miscellaneous Provisions) Act 2009, which introduced a new section 2C into the Firearms Act 1925, the Minister for Justice, Equality and Law Reform is empowered to order the prohibition of certain types of firearms by reference to features such as calibre. Section 30 of the said Act of 2009, inserting a new section 3D into the Firearms Act, 1925, contains the following provision:-

> "3D.—
>
> (1) As and from the date of commencement of this section, no application for a firearm certificate in respect of a short firearm shall be considered by an issuing person other than for—
>
> (a) a device capable of discharging blank ammunition and to be used as a starting gun or blank firing gun;
>
> (b) a short firearm of a type specified at paragraph 4(2)(e) of the Firearms (Restricted Firearms and Ammunition) Order 2008 (S.I. No. 21 of 2008) and designed for use as so specified;
>
> (c) a short firearm for which the applicant for the firearm certificate held a firearm certificate on or before 19 November 2008.
>
> (2) Any firearm certificate in respect of a short firearm, other than one to which paragraphs (a) to (c) of subsection (1) relates, granted between 19 November 2008 and the date of commencement of this section and in force shall stand revoked.
>
> (3) For the purposes of this section, " short firearm" means a firearm either with a barrel not longer than 30 centimetres or whose overall length (excluding the length of any detachable component) does not exceed 60 centimetres."

The firearms in question in this case are short firearms but are firearms in respect of which the applicant held firearms certificate on or before the 19th November, 2008 and are therefore not prohibited firearms. Accordingly, applications for firearms certificates in respect of those firearms fall to be determined by reference to the test set out in s. 4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006) only.

Leaving to one side the changes effected by the Criminal Justice (Miscellaneous Provisions) Act 2009, it is clear that the statutory test which an applicant is required to meet under the substituted s. 4 is not hugely different from that which obtained under the original s. 4 of the Firearms Act 1925. It is equally clear that the applicant was able to satisfy his local garda superintendent prior to November, 2008 that he had a good reason for possessing each of the firearms, that he could be permitted to possess same without threat to public safety or security or peace and that he was not a disqualified person. In this regard it is worth stating that no issue has been raised in relation to the applicant's compliance with conditions of safe storage or access to authorised ranges.

The principal changes under the substituted section arise under s. 4(2)(h) under which an applicant is required to show that he has good and sufficient reason for requiring the firearm in question and has demonstrated that it is the only type of weapon that is

appropriate for the purpose for which it is required.

Given that the applicant asserts that he requires access to restricted firearms to participate in certain events, it necessarily follows that an onus lay on the applicant to adduce evidence that the only types of firearm which are appropriate for the purpose for which they are required are those firearms already licensed to the applicant.

In advancing his written application for a renewal of his certificates the applicant set out the reasons why he required the particular type of firearm in the following terms:-

> *"I use this customised target shooting revolver to compete and shoot in WA 1500 precision pistol competitions as outlined in the WA 1500 Rule Book of Centrefire Events since October, 2004. I compete locally at my clubs FRC and BR and PC, Nationally and Internationally. International venues I have travelled to are:-*
>
> *Austria, Germany, UK, Sweden and Northern Ireland, Australia, France and Belgium.*
>
> *The events that I need this particular centrefire target pistol for are as follows and are part of the WA 1500 suite of precision target shooting events.*
>
> > *(a) The sixty shot revolver event which consists of shooting a sixty round competition course of fire from a static position at paper targets.*
> >
> > *(b) This event is shot at distances, from seven metres out to fifty metres*
> >
> > *(c) For a shooter to successful at international level in the World Association 1500 competition types listed above he will require a customised, accurate, tuned pistol with fully adjustable front and rear sights set to each individual shooters firing position, grip and stance.*
> >
> > *(d) This revolver is specifically built with a slight radius- 4" and tuned to shoot .38 lead round nose bullets, specifically for 60 shot match target shooting."*

At the hearing in the District Court, Detective Inspector Brooks said the licensing authority agreed that the firearms selected by the applicant were the most suited for the particular competitions that he required them for. There was no question of the competitions being unlawful in any manner and no legislation or statutory instrument enacted in this jurisdiction has deemed such competitions unlawful. There was no challenge to the evidence tendered on behalf of the applicant that the sole purpose for which he required the licenses was to compete in such clearly identified competitions.

Detective Inspector Books gave evidence to the District Court that, while he had never attended such a competition, he was of the view that the events in question constituted "dynamic shooting". "Practical or dynamic shooting" is defined in s. 4C(4) of the Firearms Act 1925 (as inserted by s. 33 of the Criminal Justice (Miscellaneous Provisions) Act 2009) as meaning any form of activity in which firearms are used to simulate combat or combat training. Detective Inspector Brooks offered evidence of his opinion that the competitions were effectively simulated combat. This was strongly rejected by both the applicant and his witness.

Detective Inspector Brooks further contended that Olympic style target pistols in .22 inch LR calibre or .177 inch air calibre were suitable for target shooting competitions rather than the combat orientated weapon type in respect of which certificates were being sought.

This contention was vehemently rejected by the applicant who stressed that there were huge differences between WA 1500 shooting and Olympic rapid fire pistol shooting. In the latter event the shooter must shoot across targets moving from left to right or right to left at the shooters discretion. In WA 1500 civilian shooting, the activity comprises one target and one target only and the shooter never engages in traversing targets which is the essence of Olympic rapid fire pistol shooting. It is also the essence of simulated combat shooting and dynamic or practical shooting.

In delivering his judgment, the Learned District Judge adverted to a number of precedent cases, including *O'Leary v. Maher* [2008] IEHC 113 (Unreported, High Court, Clark J., 24th April 2008), *Goodison v. Sheahan* [2008] IEHC 127 (Unreported, High Court, Peart J., 2nd May 2008)and *McCarron v. Kearney*[2008] IEHC 195 (Unreported, High Court, Charleton J., 4th July 2008). He noted that Detective Inspector Brooks for the licensing authority had accepted that the guns were the appropriate guns for the competitions in which the applicant sought to participate. He noted, however, that Detective Inspector Brooks took exception to the use of the gun by the applicant. The respondent stated that, in deciding the case, he must look "conjunctively" at all the legislative provisions, including the Criminal Justice (Miscellaneous Provisions) Act of 2009, and that it was not just a matter of looking at the character of the applicant.

He also noted that the Act of 2009 had introduced further restrictions and that the legislative intent of that Act was "swingeing in its scope".

While the applicant might be in the category of prior entitlement (i.e. prior to 19th November, 2008) the respondent felt that the Court in all the circumstances had to have regard to the policy implicit in the recent legislation. He took the view that he had to read the entire legislation "conjunctively" and "look at the purpose of the legislation".

SUBMISSIONS OF THE PARTIES

Mr. Gerard Hogan, S.C., counsel for the applicant, submitted that the respondent had been in error in approaching the question of the issue of the firearms certificates on the basis that he was at large in refusing the firearms certificate and/or on the basis that it was relevant to the exercise of his discretion that such firearms were now precluded in the hands of a new applicant. He submitted that the respondent did not enjoy an unfettered discretion under the Firearms Acts and must exercise his decision-making function in accordance with the provisions which give him power to act. Accordingly, the respondent was obliged to exercise his discretion in accordance with the provisions of s.4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006) and the considerations therein enumerated. Other provisions which had no relevance or bearing on the particular decision making function could not and should not be applied. Deciding the appeal as if he was at large in how he decided the matter and as if the preclusion on these firearms in the hands of new applicants could be applied in the case of the applicant's application for renewal was an error in law. In this instance the respondent had proceeded on the basis that he was entitled to refuse to issue a firearms certificate in respect of each of the firearms, notwithstanding that they had been previously licensed on the basis of (i) the calibre of the firearms,

and/or (ii) the "lethality" of the firearms and/or (iii) the fact that the firearms are now prohibited in the hands of new applicants. He contended that none of these considerations were proper statutory considerations and were furthermore irrelevant in the context of the decision-making function of the respondent on this renewal application. The respondent was not entitled to determine on an *a priori* basis that there are certain types of firearms which he should not licence nor was he entitled to apply an inflexible policy which was tantamount to a failure to exercise his discretion. It was well established that where a statute confers a discretionary power the decision-maker must exercise that discretion properly in each individual case. In deciding this application by reference to a different statutory provision than the one which gave the decision-maker power to act, the respondent had fettered his discretion. The respondent had made this error by improperly applying s. 30 of the Criminal Justice (Miscellaneous Previsions) Act 2009 "conjunctively" with s. 4 of the Firearms Act 1925 (as substituted by s.32 of the Criminal Justice Act 2006). Counsel for the applicant further contended that the respondent had not in his decision set out any basis for holding that the applicant's stated reasons for requiring the firearms were not good reasons or how any other firearms might meet his purpose. It was difficult, it was argued, to imagine a more meritorious case than that of the applicant, but there was no indication in the decision of the respondent that he considered the merits of the applicant's application. Instead he focused entirely on the "conjunctive" interpretation of the legislation and the preclusion on the licensing of the firearms where a different class of applicant makes an application for a licence for such a firearm. The end result was one which was fundamentally at variance with reason and common sense and was in conflict with the evidence placed before the respondent.

In response, Mr. Conor Dignam B.L., counsel for the respondent and notice party, submitted that it was clear that the respondent considered the statutory test and the relevant case law. He posed for himself and answered the question whether there was good and sufficient reason for acquiring these firearms.

Following the decision of the Supreme Court in *McCarron v. Kearney* [2010] IESC 28 (Unreported, Supreme Court, 11th May, 2010), it was clear that it was within the respondent's entitlement to consider the calibre and lethality of the firearms as relevant factors when exercising his discretion.

It was further submitted that there was ample material and evidence upon which the respondent could conclude that he was not satisfied that the applicant complied with the conditions set out in s. 4 of the Firearms Act 1925 as amended. Thus it could not be said that his conclusion that the applicant did not comply with those conditions flew in the face of reason or common sense. The respondent was entitled to hold, and did hold, that the applicant did not have a sufficiently good reason for having the firearms in question.

In reply, counsel for the applicant contended that there was no evidence that the respondent had balanced or weighed the various factors when arriving at his decision. The respondent had simply adopted an approach which rendered the exception preserved by the Criminal Justice (Miscellaneous Provisions) Act 2009 irrelevant and meaningless. The applicant was not the kind of person in respect of whom a blanket prohibition was appropriate.

DECISION

It is perhaps appropriate to commence any consideration of the issues in this case by acknowledging openly and frankly that An Garda Síochána have every reason to be concerned about the availability of lethal firearms in this country and the possibility that legally held weaponry of this nature may, notwithstanding stringent security precautions, fall into the wrong hands as a result of theft or burglary. Recent tragic events, such as the shootings in Cumbria, bring it home that even a person of ostensibly good character, such as Mr. Derek Bird in the context of the Cumbria shootings, may become prone to psychiatric or psychological disturbance which can have catastrophic consequences if such a person is in possession of lethal weaponry. While there is absolutely no issue in the instant case about the character, integrity and psychological health of the present applicant, the fact nonetheless remains that the lethality of the weaponry is an entirely valid consideration for a decision maker to take into account when deciding to grant or refuse a certificate.

That lethality is an entirely appropriate consideration was made clear by the Supreme Court in *McCarron v. Kearney* [2010] IESC 28 (Unreported, Supreme Court, 11th May 2010). In that case the applicant, Mr. McCarron, had challenged the Superintendent's decision to refuse his application for a firearms certificate for a .40 Gloc pistol on the narrow ground that the reasons given by him related entirely to the nature of the firearm. Mr. McCarron had provided extensive evidence of his qualifications and training in shooting sports. He had been trained by the most accomplished sportspersons and had installed a safe and alarm system. The difference of opinion between the applicant and the Superintendent in that case concerned the type of weapon. Unlike the present applicant, Mr. McCarron participated in practical shooting and the Superintendent was willing to grant firearms certificates only for weapons of a calibre suitable for Olympic pistol style competitions. Those objections were upheld, notwithstanding that Mr. McCarron had demonstrated good reason for possessing the firearm. In the High Court, Charleton J. took the view that an individual garda superintendent retains authority over his own discretion and that authority must be respected unless there is evidence of improper conduct. He was not satisfied that the respondent had in any way fettered his discretion as to the issue of firearms certificates. Charleton J. stated at p.14:-

> *"Rather, it seems to me, that he exercised a sensible policy through an individual decision which is within the terms of legislation concerned with the public good. It is a reasonable, lawful and sensible practice for those who have to decide on applications to exercise privileges at law to have regard to a set of guiding principles."*

In noting that only s. 4(a) of the Firearms Act 1925 had been invoked by the superintendent, Fennelly J. stated as follows when delivering the judgment of the Supreme Court in that case:-

> *"Before he grants a firearms certificate section 4 requires the Superintendent to be satisfied that the person applying for a firearms certificate "has a good reason for requiring the firearm in respect of which the certificate is applied for…" I fail to understand the distinction drawn between the need to be satisfied regarding the existence of a good reason and whether there is a good reason for "requiring" the particular firearm. Both must necessarily be considered together. The Oireachtás has imposed an obligation on each Superintendent to satisfy himself of both matters. The "good reason" cannot be considered in isolation from the firearm required. I particularly fail to understand how the Superintendent can be said, in some way, to have usurped the province of the Oireachtás. The Act does not specify any particular firearm. Insofar as I understand the submission, it is that the Superintendent is limited to considering whether the applicant has put forward a "good reason". Once he has accepted that there is a good reason, apparently the Superintendent is not permitted to make any judgment as to the suitability of the proposed firearm. That interpretation would make no sense; the reason and the weapon are inseparable.*

> *I am quite satisfied that the Superintendent had power to refuse the firearms certificate in this case for the reason given, namely that he did not believe the firearm in question was a suitable weapon for target practice. No doubt Mr. McCarron was disappointed with the Superintendent's refusal of his application, particularly since other Superintendents in other areas had granted certificates for similar weapons. That is an obvious consequence of a system based on decisions of individual Superintendents each in his own district. The application for judicial review in the present case is based on the proposition that the Superintendent had no power to make the decision he did, not that it was unreasonable or discriminatory. I am satisfied that he had that power."*

The present case is clearly distinguishable from the McCarron case in a variety of respects. Firstly, the decision challenged in the instant case is not that of the garda superintendent but is instead that of the local District Court judge to whom the appeal from the refusal to grant the Certificate was brought. Secondly, relief in this case is sought on the basis that the respondent's decision was based *entirely* on the calibre of the firearms and their lethality. Thirdly, the respondent in this case adopted the position that he was obliged to interpret the firearms legislation "conjunctively" in such a way as to take into account the fact that the firearms held by the applicant are now prohibited in the case of fresh applications for certificates in respect of newly acquired firearms under s. 30 of the Criminal Justice (Miscellaneous Provisions) Act, 2009.

Neither of the decisions in *O'Leary v Maher* or *Goodison v Sheahan* were reopened to this Court or lodged with either sides Books of Authorities, notwithstanding that they were referred to in submissions to the respondent and notwithstanding that each case apparently resulted in relief being granted in favour of the applicant for a licence. I will thus refer only to para. 42 of the judgment of Clark J in the first of these cases which was set out in written submissions to the respondent and which seems to me to summarise the considerations which should apply to cases being dealt with under s.4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006):

> *"I do have a concern that at no stage was the issue of the applicant's capacity to safely use his gun addressed, instead the issue which exercised the respondent's mind at all times was the military character of ammunition which this particular calibre gun could fire. I believe that this was the wrong approach. The Firearms Act 1925 indicates that it is the applicant who must be certified as fit by the superintendent to possess or use a firearm, it is not the firearm itself which is licensed to the owner but rather the owner who is authorised to possess, use and carry the particular firearm…… The important issue is the applicant's character, the reason why he requires the particular firearm and whether that particular applicant can be permitted to possess, use and carry a firearm or ammunition without danger to the public safety or the peace."*

In *Dunne v. Donohoe* [2002] 2 I.R. 533, an assistant commissioner of An Garda Síochána issued a directive to garda district officers which required that when granting or renewing firearm certificates, district officers would have to ensure that the applicant had a secure firearms cabinet and a satisfactory level of security at his or her dwelling. The directive required that the storage facilities and security arrangements be available for inspection before a firearms certificate would issue or be renewed. The applicants sought by way of judicial review various declaratory reliefs and an order of *certiorari* quashing the directive of the second respondent. Relief was granted in the High Court and the Supreme Court dismissed the appeal, Keane C.J. stating (at p. 543):-

> *"I am satisfied that a superintendent who imposed a precondition in the case of all applications for the grant or renewal of firearm certificates that the applicant should, at the least, install a gun safe and have it available for inspection, would be acting ultra vires the provisions of the Acts of 1925 and 1964.*
>
> *That legislation empowers the superintendent to grant the firearm certificate where he is satisfied as to three matters i.e., that the person has a good reason for requiring the firearm, can be permitted to possess, use and carry it without danger to the public safety or to the peace and is not one of the persons disentitled by the statute to hold a firearm certificate. For a superintendent to add, in effect, a fourth condition, by requiring every applicant to provide a gun safe which would be available for inspection by the gardaí, would be to place the applicants in the same position as if, in the case of that particular district, the Oireachtas had so prescribed by primary or secondary legislation. Neither the Commissioner nor the district officers have been empowered by the legislature to impose such preconditions".*

I am satisfied that an error of a similar nature occurred in this case and that, in effect, the respondent attached such weight to the calibre and lethality considerations of the weaponry and to the intent of the Criminal Justice (Miscellaneous Provisions) Act, 2009 so as to override and disregard altogether the fact that the applicant was a person of the highest integrity who had held these firearms under valid certificates prior to the 19th November, 2008 in consequence whereof the firearms in question were not prohibited firearms. The applicant's application for firearms certificates in respect of these firearms accordingly fell to be determined by reference to the test set out in s.4 of the Firearms Act 1925 (as substituted by s. 32 of the Criminal Justice Act 2006) only.

As the applicant clearly complied with the housekeeping requirements of the section as substituted, the real issue falling to be determined was whether or not the applicant met the criteria elaborated in s. 4(2)(h), that is to say, had he a good a sufficient reason for requiring such a firearm and, secondly, had he demonstrated that the firearm is the only type of weapon appropriate for the purpose for which it is required.

In approaching this issue on the basis of construing those provisions conjunctively with the provisions of the Criminal Justice (Miscellaneous Provisions) Act 2009, it seems to me that the respondent fettered his discretion by effectively applying the prohibition contained in the Act of 2009, notwithstanding that the said Act created an exception in favour of this particular applicant which maintained his eligibility to apply for and obtain the certificates he requires. There is no evidence in the judgment that the respondent conducted a weighing or a balancing exercise on the merits of the applicant's case, although I do fully acknowledge and appreciate that the respondent heard a great deal of evidence and took great care to ensure that he had full written submissions from both sides before arriving at his eventual decision. Nonetheless, in my view his decision can only be taken as an *a priori* refusal which effectively overrides the applicable legislation in the case of this particular applicant. There was in my view no consideration of the subjective merits advanced by the applicant in support of his application, so that the applicant was left with a refusal related entirely to the calibre and lethality of the weapons without explanation as to why he himself was not a suitable person to whom firearms certificates could be issued.

I would therefore grant the relief sought and remit the matter back to the District Court for a further consideration of the appeal.

I stress that this judgment does not purport to make any decision on the merits of the applicants case, which must still remain entirely a matter within the discretion of the District Court judge whose statutory function it is to hear and determine the appeal.