



THE COURT OF APPEAL

Record Number: 2021/357JR
High Court Record Number: 2023/99

Costello J. Neutral Citation Number [2023] IECA 293
Binchy J.
O'Moore J.

BETWEEN/

TREVOR BRENNAN

APPLICANT/APPELLANT

-AND-

THE SUPERINTENDENT OF THE KILDARE DIVISION

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 7th day of December, 2023

1. The applicant, Mr. Brennan, has been involved in competitive shooting since the early 2000's. He is a member of Shamrock Gun Club and Hilltop Shooting Range. He has held firearm certificates for particular guns for some years, and in late 2020 or early 2021 he sought to licence an ISSC MK 22 Point 22 rifle with the serial number L263828 by way of what is described as an FCA 1 application. He needed this licence in order to participate in specific types of shooting events. The application for the licence was made to the respondent, Superintendent Curley. The application was refused by letter dated 25th January, 2021. There was then an extensive range of correspondence between Mr. Brennan (and,

later, his solicitor) and Superintendent Curley. Ultimately, matters were not resolved through correspondence and judicial review proceedings were commenced by the filing of an *ex parte* docket seeking leave on the 21st April, 2021. On the 26th April, 2021 the High Court (Meenan J.) directed that the application for leave to seek judicial review be made on notice to Superintendent Curley, and that a motion seeking these reliefs be made returnable to the 29th June, 2021. There was then an exchange of affidavits. Mr. Brennan's grounding affidavit was met by a replying affidavit of Superintendent Curley. Mr. Brennan filed a supplemental affidavit, and Superintendent Curley did the same. Finally, the application for leave was heard by the High Court (Ms. Justice Hyland) on the 27th April, 2023.

2. Ms. Justice Hyland granted leave to seek judicial review on a number of grounds, but refused leave on certain other grounds.

3. The appeal to this court seeks to reverse the decision of Hyland J. (in her *ex tempore* judgment) to refuse to allow Mr. Brennan to advance the following specific ground: -

“The Respondent has improperly fettered his decision making discretion by abdicating this function in (i) blindly relying on advices contained in a ballistics report or third party communications to the effect that the said firearm is prohibited under law and/or (ii) wrongly treating the application as precluded by law. In failing to consider the application on its merits and with due regard to all material, the Respondent has improperly fettered his decision making function.”

4. The reliefs which, Mr. Brennan says, would be supported by this ground are the following two orders: -

“An order of certiorari by way of an application for judicial review quashing the decision of the Respondent (first communicated by letter dated 25th January 2021

and confirmed with further reasoning by letter dated the 1st April, 2021 and confirmed with further reasoning by letter dated the 1st April, 2021) to refuse to consider an application for a firearms certificate ... on the basis that it was a prohibited firearm and unlicensable

An order of mandamus by way of an application for judicial review compelling the Respondent to consider the appellant's application for a firearms certificate ... in accordance with law."

5. In essence, the appeal turns on whether or not the learned trial judge correctly applied the principles set out by the Supreme Court in *G. v DPP* [1994] 1 IR 374, and more recently, in *O'Doherty v Minister for Health* [2022] IESC 32. Indeed, the core issue before this court can be further distilled down to the question of whether or not the trial judge had been correct in finding that, taking all of the evidence into account, the ground that Superintendent Curley had fettered his discretion was "*not arguable at all*": para. 13 of the judgment of the High Court.

6. This judgment will be arranged under the following headings: -

- (1) The facts.
- (2) The judgment of the High Court.
- (3) The arguments on appeal.
- (4) Decision.

I. The Facts

7. After Mr. Brennan applied for the licence for the Relevant Firearm, he received a letter of refusal on the 25th January, 2021. The letter was brief, and where relevant it read: -

“I referred the details of this firearm, submitted by you, to Ballistics Section Garda HQ and I received a report from Ballistics Section concluding that this firearm should be categorised as a Prohibited Firearm as defined under Statutory Instrument 420/2019.”

The letter went on to say that the firearm could not be licenced, and further noted that any person who acquires or possesses *“a Prohibited Firearm shall be guilty of an offence and shall be liable ...”* for certain penalties. Superintendent Curley, who signed the letter, asked Mr. Brennan either to return the firearm for exportation or surrender it to An Garda Síochána for destruction.

8. On the 24th February, 2021, Mr. Brennan sent an email to another garda, Garda Fitzsimons. In it, he stated: -

“There was mention of a report from ballistics I think. If I could see a copy of the report it would be great but if not clarification of exactly what the issue is would suffice.”

9. On the 3rd March, 2021 Superintendent Curley wrote to Mr. Brennan, informing him that in the absence of a court order the report from ballistics could not be released to him. Superintendent Curley also enclosed the relevant Statutory Instrument (S.I. 420/2019) and guidance notes. Superintendent Curley did not identify specifically what provisions of the Statutory Instrument, or of the guidance notes, were relevant to the decision to refuse the licence sought by Mr. Brennan.

10. Mr. Brennan then consulted solicitors who, on the 15th March, 2021 wrote a three page letter complaining about the way in which Superintendent Curley had dealt with the application made by Mr. Brennan. The letter included the following: -

“Report from Ballistics Section Garda HQ

You stated in your letter of the 25th January 2021 that you sent details of the firearm which is the subject of this application to the Ballistics Section Garda HQ and that you received a report from that Section concluding that the firearm should be categorised as a prohibited firearm as defined under S.I. 420/2019. It is incumbent upon you to disclose that report to our client for the purposes of providing him with a reasoned decision. We consider that you abdicated your statutory function to act as a persona designata and that your decision is wholly reliant on the report you received from the Ballistics Section Garda HQ. It is central and fundamental to an understanding by Mr. Brennan of what informed your thinking that we are provided with the entire ballistics report commissioned by you in respect of the firearm which was the subject of Mr. Brennan’s application. All attendant correspondence between you and the Ballistics Section Garda HQ, and vice versa, also require to be provided. Please do so within seven days failing which legal proceedings appropriate to the manner in which this firearms certificate application has been processed will be issued and prosecuted without further notice to you.”

11. On the 1st April, 2021 there were two letters sent by Superintendent Curley. The first was to Mr. Brennan, and the second was to Mr. Brennan’s solicitors.

12. With regard to the first, the following is the relevant portion: -

“I have decided that this firearm for which you sought a certificate is a prohibited weapon following due consideration.

The reason it is a prohibited weapon is because:

- *the firearm is at the very least a restricted firearm under S.I. 21/2008 by virtue of the fact that it resembles the FN SCAR family of assault rifles.*
- *That the barrel of the firearm is listed as being 420mm in length (as per the FN SCAR catalogue, at p. 25 refers) which is in breach of section 12A(6)(b) of the Firearms Act, 1990 as inserted by section 65 of the Criminal Justice Act, 2006 where it stipulates that it is an offence for a person (except for a registered firearms dealer) to possess without lawful authority or reasonable excuse (b) a rifle the barrel of which is less than 50 centimetres in length.*
- *That the rifle appears to have a folding stock, should the length of the rifle be shortened to less than 60 centimetres with the stock folded, then as a semi-automatic rifle, it becomes as prohibited firearm as defined under Statutory Instrument 420/2019.*

Having deemed this firearm a prohibited weapon, I am precluded by law namely section 2E of the Firearms Act, 1925 as amended as the issuing authority from considering your application for such firearm beyond that point.

In ordinary language I have decided the firearm of which you have sought the certificate for is an illegal firearm. Consequently I wish to advise you that I am not authorised to grant a firearm certificate for an illegal firearm.”

Mr. Brennan was informed of a right of appeal to the District Court.

13. The second letter of the 1st April, 2021, to Mr. Brennan’s solicitors, repeats certain of these conclusions. After it does so, Mr. Curley says: -

“Having considered the information provided both from the applicant, from my own analysis and with the assistance of advice from Ballistic Section, I deemed the firearm for which the application was sought to be a prohibited firearm.”

Towards the conclusion of the letter, Superintendent Curley again refuses to provide the ballistics report, or any correspondence associated with it, to Mr. Brennan or Mr. Brennan’s solicitors.

14. On the 13th April, 2021, Mr. Brennan’s solicitors wrote further to the Superintendent. They joined issue with a number of the propositions advanced by the Superintendent in his substantive letters of the 1st April. Importantly, Mr. Brennan’s solicitors stated: -

- (a) As a matter of fact the length of the rifle exceeds 60 centimetres. This was said in response to the Superintendent’s proposition that the rifle appeared to have a folding stock and if the length of the rifle was shortened to less than 60 centimetres it became a prohibited firearm as defined under the 2019 S.I.
- (b) It was the view of Mr. Brennan’s solicitors that the firearm was not a restricted firearm under the 2008 S.I. However, this was stated to be *“extraneous to Mr. Brennan’s application because his earlier statement that while a firearm may be restricted it does not render a firearm prohibited and incapable of being licensed.”* That distinction will of some importance in analysing the current appeal.

15. The letter from Mr. Brennan’s solicitors of the 13th April, 2021 was communicated by email that afternoon, and sought a response within 7 days. Superintendent Curley responded on the afternoon of the 15th April, 2021, stating that he would consider the content of the solicitor’s correspondence and would revert to them in due course on the issues raised, but could not do so within 7 days *“because at the District Office in Leixlip other commitments*

will take priority... ”. Nonetheless, Superintendent Curley undertook to attend to this issue “in a timely manner... ”.

16. In his first affidavit, Mr. Brennan swears that *“in light of time limits under the rules of court that I now have no other option but to proceed by way of an application for judicial review... ”*. Therefore, some 6 days after Superintendent Curley has said he would deal with the matter in a timely fashion the *ex parte* papers were lodged to seek judicial review of his original decision.

17. It is important to remember that, in his letter to Mr. Brennan’s solicitors of the 1st April, 2021, Superintendent Curley had said that he had come to the view that Mr. Brennan’s application was in respect of a *“prohibited firearm”* and that he had done so on consideration of the information provided by Mr. Brennan, from his *“own analysis”* and with the assistance of advice from the Ballistics Section.

18. This position was reiterated by Superintendent Curley in his affidavit replying to Mr. Brennan’s application for leave. In that affidavit, Superintendent Curley exhibited a redacted version of the ballistics report. He also states on oath (at para. 11 of his affidavit) that: -

“I say and believe that I did seek the advices of the Garda Technical Bureau in coming to the conclusions. This in no way fettered my decision making and to suggest otherwise is disingenuous.”

19. The ballistics report, exhibited by Superintendent Curley in July 2021 (and therefore seen for the first time by Mr. Brennan at that stage) reads: -

“I have a number of concerns regarding this rifle. Firstly with regard to your query, it is at the very least a restricted firearm under S.I. 21/2008 by virtue of the fact that it resembles the FM SCAR family of assault rifles.

However, having consulted the manufacturer’s literature online (the catalogue is attached, page 25 refers) I note that the barrel is listed as being 420mm in length. Under section 12A(8)(b) of the Firearms Defensive Weapons Act, 1990 as inserted by section 65 of the Criminal Justice Act, 2006:

‘12A --

(6) It is an offence for a person (except a registered firearms dealer) to possess without lawful authority or reasonable excuse ...

(b) a rifle the barrel of which is less than 50 centimetres in length.’

“The rifle appears to fall foul of this legislation as this barrel is only 42 centimetres in length according to the manufacturer’s data.

Finally I also note that the rifle appears to have a folding stock. Should the length of the rifle be shortened to less than 60 centimetres with the stock folded then as a semi-automatic rifle it becomes a ‘Prohibited Firearm’ as defined under Statutory Instrument 420/2019. I have attached the guidance notes and legal section for that S.I. for your information. The salient point is at section ‘Part D’ on the final page.”

20. There are a number of points to note about the ballistics report. Firstly, it is clear that Detective Sergeant O’Leary (who prepared the ballistics report) did not examine the relevant firearm. His information about the rifle is taken from the manufacturer’s handbook rather than examination of the weapon itself.

21. Secondly, Detective Sergeant O’Leary is careful to stipulate the provisions in respect of which the relevant firearm is restricted, or prohibited, or one in respect of which possession is unlawful. These are all different concepts under the firearms legislation.

22. This latter point is picked up by Mr. Brennan in his second and final affidavit. Mr. Brennan says (at para. 7 of his supplemental affidavit): -

“7. It is also abundantly clear that the conclusion arrived at by Detective Superintendent Curley, i.e. that the firearm was a prohibited weapon and so is one that could not be licenced by him, is not supported by the ballistics report itself.”

In that regard, Mr. Brennan relies upon the portion of the report relating to the length of the relevant firearm. On that issue, Mr. Brennan concludes (at para. 15 of his supplemental affidavit): -

“15. I say and believe that the firearm was not a prohibited firearm under the EU Directive/Irish law as it exceeds 60 centimetres in length with the stock folded. The law has been misconstrued by respondent and partly by the report.”

23. Strangely, therefore, Mr. Brennan appears to be saying that the decision of Superintendent Curley is in some way at odds with the ballistics report, notwithstanding the fact that the appellant seeks to make the case that Superintendent Curley blindly followed the ballistics report. Mr. Brennan also avers (at para. 6 of his affidavit) that *“no matter outside of the ballistics report is relied on by [Superintendent Curley] (either in correspondence or on affidavit) as supporting the conclusion that he reached.”*

24. While it is not the place for the court in applications such as this to decide a disputed question of fact, this averment on the part of Mr. Brennan is simply and plainly incorrect. As already noted, in his letter of the 1st April, 2021 to Mr. Brennan’s solicitors,

Superintendent Curley does refer to the information provided by the applicant and his own analysis, as being factors which lead to his approval of Mr Brennan's application.

25. In his replying affidavit, Superintendent Curley states that his decision is supported by the ballistics report. He goes on to say: -

"It is quite clear that Ballistics make a number of observations regarding the gun. All of these observations were taken into account when I made my decision."

These, then, were the relevant facts before the learned High Court judge when she made her decision on the application for leave. Before considering the reasons why she refused to grant leave on the grounds of fettering of discretion, it is important to note the leave actually granted by the High Court judge.

II. The Judgment of the High Court

26. The applicant was granted leave to seek judicial review for the reliefs as set out at D(i) and D(ii) - These have been set out at para. 4 of this judgment. According to the notice of appeal, these are the reliefs relevant to the ground (fettering of discretion) which is the subject matter of this appeal.

27. In addition, the grounds on which judicial review were to be sought were (in the main) allowed by the trial judge. Mr. Brennan was granted leave to seek judicial review on grounds which included each and every one of the factual grounds pleaded by him, certain of the grounds relating to constitutional justice (in particular the breach of a right of appeal), all grounds relating to an alleged failure to apply the correct statutory provision and the making of a decision *ultra vires*, and the grounds justifying the award of damages.

28. Having granted Mr. Brennan leave to seek the reliefs relevant to the current appeal, and also allowed him liberty to seek these and other reliefs on a variety of different grounds, the learned High Court judge refused leave on the relevant ground in the following terms: -

“12. The next category is in relation to a statutory discretion, abdication of statutory discretion, at paragraph 17. That argues that the respondent had improperly fettered his decision-making discretion by abdicating his functioning and blindly relying on the advices contained in a ballistics report or third party communications to the effect that the firearm was prohibited under law. It is pleaded that by treating the application as precluded by law and failing to consider the application on its merits and with due regard to all material, the respondent has improperly fettered his decision making material(sic).

13. Again that seems to me to be a ground that is not arguable at all. There is no basis as to why the applicant identifies the respondent is not permitted, or why it would be unlawful, to take material from his own expert in the Ballistics Section in An Garda Síochána. We can see that the ballistics report comes from the Garda National Technical Bureau and it is clearly drawn up after the Detective Sergeant has examined the rifle. He specifically identifies the difficulties of that particular rifle.

14. First, there is no reason given in law by the applicant as to why the respondent would not be entitled to rely on material of this nature. Second, it is not a question of fettering of his decision making. The decision has been made with reference to the specific application and the specific firearm. It has been looked at, it has been reviewed, the material has been given to the respondent and the respondent has properly relied on that material. In those circumstances I cannot see

any argument in respect of an improper fettering of discretion so I am not going to give him leave in that respect.”

29. There is one recurrent error in this section of the judgment. It is common case between the parties, and appears from the ballistics report itself, that the ballistics expert had not examined the relevant firearm. Instead, the Detective Sergeant based his analysis on what appeared to him to be the appropriate brochure. There is in fact a live issue in the proceedings as to whether or not even with the stock folded, the relevant firearm exceeds a length of 60 centimetres. However, that is in the case regardless of whether or not the fettering of discretion ground is allowed to be advanced. At para. 7 of the grounds, there is specific reference to whether the relevant firearm *“can be reduced to less than 60cm without losing functionality by means of a folding or telescoping stock or by a stock that can be removed without using tools. As a matter of fact, the firearm the subject of this application is not such a firearm and it is unclear on what basis, if any, the Respondent has concluded that it is.”*

30. At para. 13 of the grounds, and referring to the domestic and European legislation addressing the use of weapons of less than 60 centimetres in length (namely s. 2E of the Firearms Act, 1925 and/or Category A of Directive 2017/853), it is pleaded that: -

“The subject firearm does not stand prohibited under these provisions.”

31. The finding that the ballistics expert had personally examined the relevant firearm is not an error that leads anywhere in terms of the current application. If it is the case that Superintendent Curley was incorrect in finding that the relevant firearm fell foul of the 1925 Act or the 2017 Directive because of its length when folded, that is an error the consequences of which will be explored in the proceedings as they currently stand. The trial judge has already allowed this issue to be advanced. It is neither here nor there whether the mistake

about the length of the relevant firearm (if mistake it be) arose as a result of a failure to read the brochure correctly or a failure to measure the relevant firearm itself.

32. I now turn to the substance of the High Court judge's decision to refuse leave on this ground.

33. The reasons include the following: -

- (a) There was no reason why Superintendent Curley should not look for advice or guidance from a specialist ballistic section in An Garda Síochána;
- (b) there was no reason why, having taken this advice, Superintendent Curley would not be entitled to rely upon the "*material*" produced by the Ballistics Section;
- (c) there was no general fettering of discretion in as much as there was no reason to believe that the superintendent invariably followed the advice of the Ballistics Section when it was sought in respect of applications such as that made by Mr. Brennan;
- (d) In this case, there was specific advice sought in respect of the individual application made by Mr. Brennan in respect of the relevant firearm. The firearm - or, to put it more accurately, the type of firearm - had been considered by the Ballistics Section, material provided to the Superintendent (in the form of its report) and Superintendent Curley had "*properly relied on that material*"

III. Arguments of the parties

34. In their written submissions, counsel for Mr. Brennan advance the following grounds of appeal;

- (a) The High Court judge applied the incorrect test. However, it is clear from the judgment that the test advocated by Mr. Brennan was applied by the trial judge. At page 3 of her judgment, the High Court judge refers expressly to G v DPP [1994] 1 IR 374, O’Doherty v Minister for Health [2022] IESC 32 and to the “low standard” to be met by an applicant seeking leave to seek judicial review.
- (b) The High Court judge erred in stating that the officer in the Ballistics Section had examined the Relevant Firearm. For the reasons given at paragraphs 29 & 31 of this judgment, this undisputed mistake does not mean that leave should be granted on the ground that the decision maker had fettered his discretion.
- (c) The High Court judge failed to have proper regard to the facts set out on affidavit, but only to the extent that this evidence “do not collectively establish that the Respondent or any person on his behalf had ever inspected the firearm” – paragraph 15 (iii) of the written submissions. However, as already noted this argument does not support allowing Mr. Brennan to rely upon the fettering of discretion argument to support the reliefs which he seeks.
- (d) The High Court judge failed to “properly consider in light of reasoning advanced in the decision letters, that...[Superintendent Curley] had improperly fettered his decision making discretion by abdicating this function in so far as he blindly relied on advices received from the ballistics section... to the effect that the said firearm is prohibited under law” – paragraph 15 (iv) of the submissions. This is the central issue on appeal, and will be considered in the concluding section of this judgment.

(e) Mr. Brennan has “reasonable grounds for arguing that he has an arguable case...”

This appears to be a catch all submission, which adds nothing to the appeal.

(f) The High Court judge erred in “indicating that the Appellant had to prove an inevitability of an unfair trial...” This ground was not argued at the hearing of this appeal, and appears to be misplaced in the light of the trial judge’s judgment.

The submissions of Superintendent Curley broadly joined issue with the arguments put forward on behalf of Mr. Brennan.

35. Neither party addressed the Court about what a party alleging a fettering of discretion had to show in order to establish an arguable case.

IV. Decision.

36. This appeal raises the issue as to whether, on the specific facts of this application, Mr. Brennan has made out an arguable case that he is entitled to certain reliefs (which he has otherwise been allowed to claim) on the ground that Superintendent Curley fettered his discretion. In considering this, it is helpful to break down exactly what Superintendent Curley did.

37. Firstly, Superintendent Curley sought advice from the expert Ballistics Section of the Gardai. There was nothing exceptional or objectionable about this. Indeed, counsel for Mr. Brennan accepted at the appeal hearing that;

“It is the sensible thing to do...”

38. Secondly, the Superintendent accepted in the main the advice given by the Ballistics Section. If it is permissible to seek advice, and if doing so does not connote the abandonment or fettering of discretion, it is impossible to see how accepting the advice sought suggests (even on an arguable basis) that any discretion has been unlawfully fettered. Looked at this way, the central proposition advanced on behalf of Mr. Brennan – that the refusal letters mirrored the views of the Ballistics Section – is unstateable, as the trial judge found. It is telling that counsel for Mr. Brennan was unable to cite any authority in support of this submission.

39. Thirdly, even on Mr. Brennan’s analysis, the advice of the Ballistics Section was not “blindly relied on...” by Superintendent Curley. As emphasised by Mr. Brennan’s counsel, the question for Superintendent Curley was whether or not the Relevant Firearm was a “prohibited” firearm within the meaning of SI 420/2019. Superintendent Curley found that it was such a weapon. In his correspondence of the 1st of April 2021 (sent to Mr. Brennan) the Superintendent gave three reasons for this decision.

40. The first reason was that the Relevant Firearm “resembles the FN SCAR family of assault rifles.” The Ballistics Section, while identifying this resemblance, expressly refrained from describing the Relevant Firearm as “prohibited” because of this. The letter of refusal therefore differs from the advice of the Ballistics Section in this regard. The Ballistics Section felt that the firearm was “at the very least a restricted firearm...” This is not the same as saying that it is a prohibited firearm.

41. The second reason given to Mr. Brennan was that the Relevant Firearm was “prohibited” as the barrel was less than 50 cm in length. Again, the Ballistics Section had advised that possession of such a firearm was an offence but did not say that the length of the barrel rendered the Relevant Firearm a “prohibited” weapon. In this regard also, the letter giving reasons did not follow the advice of the Ballistics Section.

42. Superintendent Curley's letter giving the reasons why he had decided that the Relevant Firearm was a prohibited weapon, and therefore in his view incapable of being licensed, does not follow the views expressed by the Ballistics Section. It is therefore not the case that Superintendent Curley "blindly" followed the advice given to him, though it is certainly correct to say that (in coming to his decision) he must have taken into account the opinion of the Ballistics Section. However, the attention of this Court has not been drawn to any authority which supports the view that a party can be found to have fettered its discretion (by following advice) in circumstances where it has failed to follow the specific advice offered.

43. Fourthly, there is the evidence of Superintendent Curley that he carried out his own analysis of Mr. Brennan's application, and that the ballistics report formed only one part of his considerations. Of course, if this is accepted then it is difficult to see how Mr. Brennan can succeed in a claim that the Superintendent had blindly followed the conclusions of the ballistics officer. No argument is made that this evidence is to be disregarded, or even that it is to be treated as though it has limited evidential weight. As already noted, it is accepted that this evidence can be taken into account. However, the Court is reluctant to decide this appeal, either wholly or partially, on the basis of this evidence of Superintendent Curley. The evidence does not elaborate upon exactly what the Superintendent did, what factors he took into account, what weight he gave to the ballistics report, or precisely how he came to the specific conclusions he reached. Instead, both in the correspondence and in his affidavits, there are statements of a general nature. It is especially significant that, for the purpose a leave application, it is unlikely that Mr. Brennan would have been permitted to test this evidence by cross examination. Had this been possible, this evidence would have been of great importance. However, this appeal can be decided without recourse to this part of the affidavits.

44. I would dismiss the appeal for the reasons set out at paragraphs 37 and 38 of this judgment. Superintendent Curley was entitled to seek advice from ballistics, to rely on the advice that resulted from any such request, and the High Court was correct in so concluding. Separately, I would dismiss the appeal for the reasons set out paragraphs 39 – 42 of this judgment. On the central question of whether the Relevant Firearm was “prohibited” and given the disparity between the ballistics report and the reasons provided by Superintendent Curley, Mr. Brennan has not set up even an arguable case that the Superintendent fettered his discretion in this instance.

45. Costello and Binchy JJ agree with this judgment. The provisional view of the Court is that the Respondent should be awarded his costs of the appeal (as he has been wholly successful) but that there should be a stay on any execution of the costs order until the final determination of these proceedings by the High Court. There is no stay on the adjudication of the Respondent’s costs. If either party wishes to argue for a different costs order, he should notify the Court of Appeal Office within 14 days. In that event, the Court will give directions as to how submissions on costs will be received.