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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY JEAN McBRIDE FOR JUDICIAL REVIEW (NO 2)

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Before: Carswell LCJ, Nicholson LJ and McCollum LJ

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CARSWELL LCJ

Introduction

[1] On 4 September 1992 Guardsman James Fisher and Guardsman Mark Douglas Wright were on duty in the New Lodge area of Belfast, as members of a four-man team engaged, along with other members of the Security Forces, in an anti-terrorist operation in the area. An incident occurred in the course of which Fisher and Wright both discharged shots from their rifles in Upper Meadow Street at a youth of 18 years named Peter McBride, the son of the appellant, who lived a short distance away. Two shots struck McBride in the back and caused his death.

[2] Fisher and Wright were charged with the murder of McBride and on 10 February 1995 they were both convicted by Kelly LJ, sitting without a jury, and sentenced to imprisonment for life. Their appeals to the Court of Appeal were dismissed on 21 December 1995 and they served some six years in prison before being released by order of the Secretary of State on 1 September 1998.

[3] The Army Board considered, pursuant to Queen's Regulations, whether the guardsmen should be discharged or retained in the Army. The Board decided in 1998 that they should be retained, but that decision was quashed by Kerr J on 3 September 1999 on an application for judicial review brought by the appellant. A differently constituted Army Board again considered the issue of discharge or retention and on 21 November 2000 it concluded that the

guardsmen should be retained in the Army. The appellant brought an application for judicial review of this decision, but on 17 April 2002 Kerr J dismissed the application. The appellant appealed to this court against his decision.

The Trial Judge's Findings

[4] The trial judge's findings are of importance in considering the issues, particularly since the 1998 decision of the Army Board was quashed on the ground that it did not properly appreciate the effect of those findings and adopted reasons for its decision to retain the guardsmen which were inconsistent with them. The trial judge set out the evidence and his conclusions at length in his judgment and these were carefully reviewed on the appeal to this court. I shall therefore not attempt to repeat the evidence *in extenso,* but shall set out the material findings in summary form:

(a) Guardsman Fisher was aged 24 years at the time of the incident and Guardsman Wright 21 years. Both had been in the Army for two years and some months and were on their first tour in Northern Ireland, where they had been for four months.

(b) They had left their barracks at 7.45 am on the day of the incident. The operation for which they were acting in support was a police search of the Celtic Club. The guardsmen's team was engaged in "satelliting", ie touring the surrounding streets on the look-out for terrorist attacks. They were briefed that the operation was one of high risk. There had been general warnings of the danger of coffee jar bombs being thrown, which presented a serious risk to patrolling soldiers.

(c) Shortly after 10 am Lance Sergeant Swift, the leader of the team, stopped Peter McBride as he made his way along Trainfield Street, while the other members took up position nearby. He was carrying an object which the guardsmen said in evidence they thought might be a coffee jar bomb in a plastic bag. The evidence about the appearance of this object was conflicting, but the judge found that it was in fact a grey T-shirt which the deceased had earlier collected from his sister and that he was possibly also carrying a white paper or plastic bag.

(d) Lance Sergeant Swift spent some little time speaking to McBride, and the judge found as a fact, on which he was satisfied beyond reasonable doubt, that during this time Swift searched McBride and whatever he was carrying, which each of the guardsmen saw occur.

(e) McBride suddenly snatched Swift's radio earpiece from his ear, broke away from him, jumped over a garden wall and ran off at speed down the adjoining street, still holding the object or objects which he had been carrying. Lance Sergeant Swift shouted "Grab him" and the two guardsmen set off in pursuit.

(f) McBride was able to run much faster than the soldiers and by the time he was in Upper Meadow Street he was some 80 or 90 yards ahead of them. They shouted at him to stop or they would fire, but he kept running towards the end of the street.

(g) Both soldiers fired aimed shots at McBride, Fisher firing three and Wright two rounds. The deceased was struck by two bullets in the upper back, which set up a fatal haemorrhage.

(h) McBride was not in possession of any bomb or weapon when he was shot.

(i) Fisher put forward the defence that he believed that McBride was carrying a coffee jar bomb and that he or other soldiers were in danger of being caught in a "come-on" or ambush. The judge rejected this defence and held that there was no reasonable possibility that Fisher held an honest belief that McBride carried or might have carried a bomb or that he was about to be attacked or that his life was in danger. Nor were the circumstances of his firing such as to require a split-second decision. The judge also rejected the defences of self-defence and acting in the prevention of crime.

(j) Wright claimed that he believed that McBride was carrying a bomb, but did not aver that he thought that it was a danger to anyone or that he perceived the situation as a "come-on". He put forward the defence that he only fired when he heard a shot nearby, which he believed to have been fired at him or a member of his patrol by McBride, but the judge rejected this defence. He was satisfied that there was no reasonable possibility that Wright held or may have held an honest belief that McBride fired a gun or that his life or those of his comrades were in danger or had been put in danger by the deceased. He also rejected the defences of self-defence and acting in the prevention of crime.

(k) The judge accordingly concluded that both guardsmen had used excessive and unreasonable force.

(l) They had acted in concert in the unlawful enterprise of shooting at the deceased, and it was therefore immaterial that it could not be

ascertained from which of their rifles the shots which struck him had been fired.

(m) Since Fisher and Wright had deliberately fired aimed shots at the deceased they were both guilty of his murder.

The Application to Discharge

[5] On 2 May 1995 the adjutant of the 1st Battalion of the Scots Guards made application for the guardsmen's discharge from the Army, pursuant to paragraph 9.404 of the Queen's Regulations 1975. The material parts of paragraph 9.404 are sub-paragraphs *a* to *d*, which read as follows:

> "*a* The competent military authority to authorize discharge is the brigade commander, or any brigadier or colonel commanding any garrison or force who is superior in command to the commanding officer.
>
> *b* The Army Act 1955 (Part I) (Regular Army) (Amendment) Regulations 1995, Schedule A, Part II, Item 12 governs this authority.
>
> *c* In this paragraph 'Civil Court' means a court of ordinary criminal jurisdiction wherever situated.
>
> *d* A soldier is to be discharged if he has been sentenced:
>
> (1) By a civil court or by court-martial to imprisonment (including a suspended sentence, but not a suspended committal) or to detention or to any other form of custodial sentence;
>
> (2) By a court-martial to a period of detention which on confirmation is for 12 months or more.
>
> If in the opinion of the commanding officer there are exceptional reasons that make retention of the soldier desirable then the case is to be submitted to the Director of Manning (Army) Ministry of Defence for a decision …"

Sub-paragraph *e* goes on to provide that in the case of conviction of specified serious offences, where the soldier has been awarded a lesser sentence, he may be discharged if his commanding officer considers his discharge to be in

the interests of the Service, in which case he is to refer the matter to the competent military authority for decision.

[6] The Regimental Lieutenant Colonel of the Scots Guards made his recommendation after the dismissal of their appeal to this court. He strongly recommended that both be retained in the Army, although he did not record his reasons for that recommendation. The General Officer Commanding, London District also "very strongly" recommended that the guardsmen be retained in the Army. He based this largely upon the ground that since they had executed their orders in good faith, they should properly have been charged with manslaughter and not murder. The Commander in Chief, Headquarters Land supported retention, stating in his comments that they had made a split second decision, based on their perception of events at the time, and this decision, though wrong, was an error of judgment.

The Army Board's First Decision

[7] The Army Board was convened for a hearing in June 1998. It consisted of Mr Doug Henderson MP, Minister of State for the Armed Forces, General Sir Roger Wheeler, Chief of the General Staff, Mr RT Jackling, Second Permanent Under Secretary of State, General Sir Alex Hardy, Adjutant General and Major General MA Willcocks, Assistant Chief of the General Staff. A brief was prepared for the Board by the Director of Manning (Army), in the course of which he suggested that Kelly LJ had cast doubt upon the soldiers' veracity, whereas he had categorically held that he was satisfied beyond reasonable doubt that they had manufactured a lying defence.

[8] The Board gave a written decision, in which it stated:

> "The Board members considered the papers separately and initially formed their own opinions but then, whilst maintaining open minds, proceeded to discuss the case. The Board first accepted the judgements of the Trial and Appeal Courts. Having done so it considered whether, nevertheless, there were exceptional circumstances which would justify the retention of the two Guardsmen in the Army contrary to the principle of Queen's Regulations for the Army 1975 paragraph 9.404. It took account of the following: the Army was itself responsible for the training of the Guardsmen as soldiers and for preparing them for operations and deployment to Northern Ireland, the security situation in the area of the incident at that time was tense and the Guardsmen's unit had suffered a recent fatal casualty,

> the Guardsmen had shown contrition for their action, which they had admitted was an error of judgement which they very much regret; they had paid the price for their action with a lengthy prison sentence during which time their behaviour had been exemplary; their continued loyalty to the Army and their previously unblemished military records; and finally their wish to continue serving their country. The Board concluded that these factors did amount to exceptional circumstances justifying the retention of the two Guardsmen in the Army."

[9] Peter McBride's mother, the appellant in the present case, applied for judicial review of the Board's decision and on 3 September 1999 Kerr J quashed the Board's decision, remitting the discharge application for fresh consideration and recommending that if it went back for hearing before the Army Board it should be differently constituted. The ground on which he did so was that in taking into account the guardsmen's claim that their opening fire had been an error of judgment the Board failed to understand and give proper effect to the judgment given at their trial by Kelly LJ.

The Army Board's Second Decision

[10] The Army authorities commenced to make arrangements for another hearing of the discharge application, to be decided again by the Army Board. By a letter dated 4 October 1999 to the Minister of State for the Armed Forces the Pat Finucane Centre asked on behalf of the appellant if a new Army Board had been convened and requested that verbal submissions be allowed. In further letters dated 2 and 15 November 1999 the Centre repeated that request and asked who would sit on the Board. In a letter of 15 November 1999 the Ministry of Defence stated:

> "I can now confirm that the Army Board, with members who have not been previously involved in the case, will consider afresh the continuing employment of the two Guardsmen as soon as possible. Given the exceptional nature of this case the Army Board will, as a matter of courtesy to Mrs McBride, be willing to receive a written representation from her."

[11] The appellant's solicitors Madden & Finucane then wrote on 24 November repeating the Centre's requests and seeking disclosure of all material which was to be placed before the Board when they came to make

their determination. A reply was sent on 21 December 1999 by Mr BT Burton, Head of the Adjutant General Secretariat, most of which I quote:

> "Throughout the time that the question of the discharge of Guardsmen Fisher and Wright has been under consideration, the Ministry of Defence has been sensitive to the position of Mrs McBride. For that reason, and as a personal courtesy, she has been kept informed of progress and her representations were included for the Board's consideration when it last decided the matter.
>
> It is important however, to recognise that the consideration by the Army Board of the question of discharge does not arise in the course of proceedings to which Mrs McBride is a party. The Army Board is a 'competent military authority' for the purposes of discharge under the Queen's Regulations when considering this matter. The Queen's Regulations do not provide for the formal involvement in the decision making process of someone in Mrs Bride's position. I mention this because the overall tone of your letter suggests that your approach to this matter is on the basis that Mrs McBride is a party to litigation. With respect, she is not.
>
> The composition of the Board has yet to be determined. None of those who previously sat will do so again and care will be taken by the Board to ensure that they approach the matter entirely afresh as is required by the judgement of Kerr J. We do not believe that it would be appropriate to inquire into the previous experience of Board members in dealing with discharge cases.
>
> The Army Board exceptionally will consider any representations you wish to make on behalf of Mrs McBride why the Guardsmen should be discharged. It would be helpful if you could provide a comprehensive new document, alternatively indicate which of your previous submissions you would like them to consider.
>
> I enclose a list of the documents that will be provided to the Army Board. You have all of them except the last two which are short reports from the

> Guardsmen's Commanding Officer. Given their confidential nature, we would be grateful if you would handle them accordingly. A copy of the brief to the Board will be also made available as a courtesy to facilitate any representation that Mrs McBride decides to make. Any representations received from the Guardsmen or from your client will also be put before the Army Board. In addition the statistics dealing with retention following conviction will be made available to the Board.
>
> The question of an oral hearing would be for the Board itself but I am bound to say that at present we can see no legal basis, which would entitle your client to make oral representations."

[12] On 10 January 2000 Mr Burton sent to the solicitors "as a courtesy to Mrs McBride" a copy of the brief prepared for the Army Board, together with copies of the confidential reports from their commanding officer. The brief gave the Board members directions designed to warn them against committing the error into which the previous Board had fallen and advising them to disregard the comments expressed by the chain of command which were inconsistent with the findings of the trial judge. The final portion of the brief read as follows:

> "23. If the Board conclude that exceptional reasons pointing towards retention do exist, it should go on to weigh them together in the balance against the findings of the trial judge that:
>
> a. The two Gdsm committed murder, one of the most serious crimes known to the law, in that they '*both had had sufficient time to decide whether or not to fire and, although both were aware that they had no justification for doing so, both discharged aimed shots at Mr McBride knowing he posed no threat to them*'.;
>
> b. The situation did not warrant split second reactions: *'As in the case of Fisher, the events of this early September morning did not, or could not, in my opinion, have put Wright in any panic situation or in any situation which called for split second reaction.'*
>
> c. They *'lied about critical elements of their version of events … and deliberately chose to put forward a version which they both knew to be untrue'*;

> 24. If, having weighed the competing factors in the balance, the Board decides that exceptional reasons exist which make the Gdsms' retention in the Army desirable, the Board should reject the applications for their discharge and direct that they should continue to serve. (In this event it is also open to the Board, if it wishes, to direct that they should not serve in Northern Ireland again without the Board's leave). Otherwise the Board should grant the applications and direct the Gdsms' discharge. In either case the Board should give reasons for its decision."

[13] The commanding officer's views were prepared by Lt Col Cubitt of the 1st Battalion of the Irish Guards, to which the guardsmen had been posted. In respect of Fisher he wrote as follows:

> "Guardsman Fisher is in the Milan Platoon of 1st Battalion Irish Guards – an Armoured Infantry Battalion. In October, he completed a six month operational tour in Macedonia and Kosovo with the Battalion. The period included the intensive training in Macedonia, the initial entry into Kosovo and subsequent operations.
>
> He is a mature, pleasant and reliable soldier. He is intelligent and is skilled in his role as a Milan operator (the latter is notable given that he had not used Milan before the start of the year). He works hard both in Barracks and in the field. He gets on well with the other members of his platoon who respect him as an experienced and capable soldier.
>
> His performance in Kosovo was of a very high standard. His experience and maturity showed through and gave him an above average ability to operate sensibly in the novel and sensitive situations encountered. He was consistently competent and gave confidence to those more junior than him. He was very professional.
>
> He is an excellent Guardsman. He has leadership qualities and would make a good Lance Corporal, with the potential to progress further."

His comments on Wright were as follows:

> "Guardsman Wright is in the Mortar Platoon of 1st Battalion Irish Guards – an Armoured Infantry Battalion. In August, he completed a six month operational tour in Macedonia and Kosovo with the King's Royal Hussars Battle Group. The period included the intensive training in Macedonia, the initial entry into Kosovo and subsequent operations.
>
> He is a mature and confident soldier. He adapted well to his new role in the Mortar Platoon. He is intelligent, professional and reliable as well as being gregarious and enthusiastic. Many of the other Guardsmen in his platoon look up to him for guidance.
>
> He performed very well in Macedonia and Kosovo. On several occasions he substituted for others in Lance Corporal posts, and showed himself to be well able to perform in a position of responsibility. He was very positive and made a significant contribution to the success of his platoon.
>
> He is an excellent Guardsman. He has leadership qualities and would make a good Lance Corporal, with the potential to progress further."

[14] Under cover of a letter dated 19 January 2000 Mr Burton sent the solicitors some information about numbers, to the effect that between 1989/90 and 1999/00 a total of 2002 soldiers had been discharged under QR9.404. This was subsequently supplemented to show that 37 in all had been retained in that period. It transpired, however, that this had not been reliably collected from computer statistics and that the true number retained was smaller. The final figures showed that ten soldiers had been retained since 1997 after serving sentences for various offences, mostly assault or affray. In a number of the cases there were mitigating circumstances and there is some emphasis on the potential of the soldiers concerned. In addition to these cases Rifleman Thain and Private Clegg were retained after release from prison following their conviction for murder (though Clegg was eventually acquitted on appeal).

[15] The Pat Finucane Centre sent to Mr Burton representations from the appellant and from Amnesty International, the Committee on the Administration of Justice and the Northern Ireland Human Rights Commission, all of which were in due course placed before the Army Board. By letter dated 19 April 2000 the appellant's solicitors made a number of requests, for details of the members of the Army Board who would hear the

application, for representation at the hearing and the opportunity to make oral submissions and for copies of the submissions made by Fisher and Wright. They also sent a copy of the skeleton argument submitted to Kerr J on the judicial review and asked for it to be furnished to the Board. Mr Burton replied by letter dated 4 May 2000, in the course of which he said:

> "On the question of oral submissions, it is for the Board to decide, usually at a preliminary meeting, whether to hold an oral hearing. The purpose of such a hearing, if one is considered necessary, is to receive oral evidence from witnesses and/or oral representations from the serviceman or his lawyers – see paragraph 10 of the note on Army board procedures (Brief, Flag P). The reason why, unlike the service men in this case, Mrs McBride is not entitled to make oral submissions, or to be legally represented in doing so, was explained in my letter of 21 December. For the same reason the Ministry takes the view that your client is not entitled to receive copies of the representations made to the Board by Guardsmen Fisher and Wright.
>
> In my letter of 10 January I sent you as a matter of courtesy a copy of the Board's brief and invited any representations Mrs McBride wished to make. You replied on 21 January enclosing four letters that Mrs McBride wanted the Board to consider. Those letters were disclosed as required to Guardsmen Fisher and Wright for comment and were then incorporated in the Board's brief as Flag N. No other requests or representations were submitted on behalf of Mrs McBride, despite a clear request in the 5th paragraph of my letter of 21st December for either a comprehensive new document containing Mrs McBride's representations or alternatively an indication of which of your previous submissions you wished the Board to consider, and the papers were accordingly submitted to the Board members on 7 April.
>
> You conclude your latest letter with eight paragraphs of further representations you wish the Board to consider; moreover, you ask that the Board be supplied with a copy of the entire letter and of the skeleton arguments prepared on 26 May last year for the purposes of the judicial review proceedings. I

> regret that the Ministry of December is not prepared to disrupt the Board's current deliberations of the existing papers by asking them to await the soldiers' comments on your letter and enclosure and any necessary legal advice on them from DALS. Furthermore, the Ministry is conscious that Mr Justice Kerr's judgement was given as long ago as 6 September last year, and it is important that the Board completes its reconsideration without unreasonable delay."

Mr Burton also informed the Pat Finucane Centre by letter of 25 May 2000 that he could not predict the number of times that the Board would meet, that the process was confidential to the Board and that the Army was not prepared to provide notice of the content or timing of individual meetings to anyone not invited to attend.

[16] A fresh panel of the Army Board was nominated by the Secretary of State for Defence to hear the discharge application, consisting of Mr John Spellar MP, Minister of State for the Armed Forces, General Sir Mike Jackson, Commander-in-Chief Land Forces and Major General DL Judd, the Quartermaster General. Between May and November 2000 the panel held a number of private meetings and two meetings at which the guardsmen's legal representatives were present. The Board agreed to hold an oral hearing at which their representatives should be allowed to address them. They gave permission to call witnesses as to character, but not as to fact, recording their reason that the Board was bound to accept the facts as found by the trial judge.

[17] At the hearing held on 29 August 2000 the two guardsmen were present, together with their leading and junior counsel and solicitor. The Board took evidence from both guardsmen and from Lt Col WG Cubitt, their current commanding officer and Major General Kiszley, the Regimental Colonel of the Scots Guards. It took account of the submissions which had been placed before it from the appellant and other persons and bodies supporting her objection to the guardsmen's retention in the Army. It heard detailed submissions from counsel on behalf of the guardsmen.

[18] The Board issued its decision in a written document dated 21 November 2000. It expressed its conclusion in paragraphs 17 to 20 of the document:

> "17. After further consideration and discussion, the Board concluded that there were a number of factors that might constitute exceptional reasons making

retention desirable. Before going on to discuss them in detail, the Board decided that there were no material differences between the individual circumstances of the two Guardsmen, and their cases could accordingly be properly considered as one.

18. The Board decided in the light of further discussion after the hearing and at subsequent meetings that the following factors taken together did amount to exceptional reasons:

a. Both Guardsmen were young and relatively inexperienced when the incident took place on 4 September 1992. Guardsman Fisher was born in 1968 and enlisted in December 1989. Guardsman Wright was born in 1973 and enlisted in 1990. Fisher had been in the Battalion for ten months and Wright for seven months. This was their first tour of duty in Northern Ireland and they had only been there for four months.

b. The general security situation was tense and particularly so in the New Lodge Area where the unit had suffered recent casualties including a fatality. At the team briefing on 4 September they had been advised that the situation was high risk and that there was an expectation that those associated with terrorist groups would be likely to be carrying personal weapons. Furthermore, the threat of coffee-jar bombs at the time of the offences was very real: soldiers had been maimed and, on occasion, killed by this weapon. The coffee-jar bomb was a device which was very easy to conceal until the moment of throwing. While this dangerous and volatile situation might have rightly led to heightened awareness, there was no evidence of individual or collective premeditation to commit a criminal offence.

c. The Army undertook a considerable amount of training to prepare soldiers for duty in these circumstances, and was acknowledged to be a world leader in this field. However, even with the

comprehensive training provided, it could not prepare an individual for every eventuality.

d. Guardsman Wright had expressed genuine concern for Mr McBride's children when he gave evidence before the Board. Guardsman Fisher had expressed regret for Mr McBride's death in the statement he made in May 1995, and the Board was satisfied that it, too, was genuine.

e. Neither Guardsman had any previous criminal record, either civil or military. Furthermore, their conduct in custody after conviction had been exemplary.

f. The Board was convinced that there was absolutely no danger of repetition; on the contrary, the two Guardsmen appeared to have learned a bitter and lasting lesson.

g. Guardsmen Fisher and Wright had been utterly loyal to the Army throughout the eight years of the judicial process, their imprisonment, and subsequently the Army Board process. Both very clearly wished to continue to serve their country. Their present Commanding Officer had spoken very highly of them, not least regarding the part they had played in operations in Macedonia and Kosovo in 1999. In the course of those operations the Guardsmen had been placed in situations of tension and stress where it was vital that their personal conduct was of the highest standard, and they had acquitted themselves well. It was in the Board's view clearly exceptional — indeed, unprecedented - that any soldier should successfully resume his service; that he should then be formally retained in service; that he should then see the decision quashed; and that he should then continue serving for an extended period with the possibility of removal from the Army hanging over his head pending a fresh decision. Their exemplary service since December 1998 should be seen against this background.

19. Having carefully balanced the reasons listed in paragraph 18 above against the fact that the Guardsmen had been convicted of

one of the most serious crimes known to the law, and also against:

> a. the trial judge's findings, in particular that the Guardsmen:
>
> > (1) had sufficient time to decide whether or not to fire and, although both were aware that they had no justification for doing so, both discharged aimed shots at Mr McBride knowing he posed no threat to them;
> >
> > (2) [were not] in any panic situation or in any situation which called for split second reaction;
> >
> > (3) lied about critical elements of their version of events … and deliberately chose to put forward a version which they both knew to be untrue;
>
> b. all the matters raised by and on behalf of Mrs McBride and others in the representations as to why the Guardsmen should not be allowed to remain in the Army,

the Board concluded that, taken together, the reasons listed in paragraph 18 made the Guardmen's retention desirable.

20. The Board therefore rejected the applications to discharge 24776043 Guardsman Fisher and

> 25001649 Guardsman Wright M D and directed that they should be permitted to continue their Army service. In all the circumstances the Board concluded that it would be inappropriate for the Guardsmen to serve in Northern Ireland again without the Board's leave, and further directed accordingly."

The Second Application for Judicial Review

[19] The appellant applied for judicial review of the Board's decision by proceedings commenced on 8 December 2000. She sought an order of certiorari quashing the Board's decision, an order of mandamus requiring the Ministry of Defence and the Army Board to discharge the guardsmen from the Army and a number of declarations. The Order 53 statement, as amended on 29 March 2001, based the application on a number of grounds, which may be broadly categorised as jurisdiction, procedural unfairness, breach of Convention rights, failure to take into account the correct considerations and rationality.

[20] In his reserved judgment given in writing on 17 April 2002 Kerr J dismissed the application. He found against the appellant on all of the issues argued before him. I shall deal with each of those later in this judgment, but first I must consider the questions of justiciability and standing on which we sought further argument from the parties. Kerr J considered these in the first application for judicial review brought by the appellant and held that the issue of the discharge of the guardsmen from the Army was justiciable in the courts and that the appellant had sufficient standing to entitle her to pursue the application. Neither of these questions was raised when the appeal was first argued before us, but we wished to be satisfied on them before reaching our decision and asked the parties to address them. It hardly needs to be said that even though the respondent had not sought to argue the issues it is for the court to satisfy itself on questions affecting the existence of its jurisdiction.

Justiciability

[21] Historically the administration of the affairs of the Army was a matter for the Sovereign as head of the armed forces, who had absolute power under the prerogative to direct and command it. The legal consequences of that historical position were reviewed in the judgments of the Court of Appeal in *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197, in which an English shipping company unsuccessfully sought a declaration that it was entitled to protection without payment against pirates in the China seas. Scrutton LJ said in the course of his judgment at pages 214-5:

> "Now it is clear that there is a wide margin of executive acts done by the King or his Ministers in relation to the administration of the army, which the Courts of law will not interfere with or control … The Courts have repeatedly refused to intervene in matters of pay and service … the administration of the army is in the hands of the King, who unless expressly controlled by an Act of Parliament cannot be controlled by the Courts."

Lawrence LJ said at pages 228-9:

> "It is to be noted that Parliament has never purported expressly to confer upon the Crown any powers of disposing or using the army or administering its affairs. When Parliament has given its consent to the raising and keeping of the army for the year, it leaves the Crown to exercise its prerogative powers as to the manner in which the army is to be raised and kept and in respect to the disposition and use of the army and the administration of its affairs. The manner in which these powers are exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of the Ministers of the Crown, of whom the one particularly responsible for the army was, until recently, the Secretary of State for War. By letters patent dated February 6, 1904, all the prerogative powers of the Crown in relation to the army, which had theretofore been exercised by the Secretary of State, the Commander-in-Chief and other officials, were vested in the Army Council, to whom further powers were transferred by the annual Army Act, 1909, but the Secretary of State for War remains responsible to the Crown and Parliament for all the business transacted by the Council. It is unnecessary to specify the various powers relating to the army which Parliament has thus tacitly left to the unfettered control of the Crown; it is sufficient to state that they undoubtedly include the organisation, armament, maintenance, disposition and use of the standing army in time of peace.
>
> In my opinion, therefore, the powers which the Crown exercises as to the disposition and use of the standing army in time of peace are powers vested in

> the Crown by prerogative right at common law and are not powers conferred upon the Crown by statute.
>
> However, the question whether the Crown was acting under its prerogative powers or under powers conferred upon it by statute, when acceding to the request of the plaintiff company to provide guards for its ships, is, in my opinion, not really the material question to be decided in this case. The extent of the powers exercisable by the Crown in relation to the army is, in my opinion, the same whether they are technically prerogative powers or statutory powers. If, contrary to my opinion, they are statutory powers, Parliament has not limited them in any way save by the enactments already referred to, and, except as so limited their scope must be measured by the powers which were vested in the Crown by prerogative right at the time of Charles II."

[22] Lord Reid in *Chandler v Director of Public Prosecutions* [1964] AC 763 at 791 in discussing the immunity stated as follows:

> "It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised."

It became clear from the opinions given in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 that the source of the power is not the material factor and the fact that it stemmed from the prerogative rather than statute did not determine the existence or extent of the immunity: cf also *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at paragraphs 83-6. The issue accordingly is the width in modern law of the non-justiciable power to direct, control and administer the armed forces.

[23] The reasons why the courts will not adjudicate on such matters centre round such factors as national security, the sensitive policy nature of the decisions questioned, the inability of the courts to make judgments on matters in those areas, the necessity that they should be decided by the democratic rather than the judicial organs of the State, and the distribution of resources. Foreign policy matters clearly come within this category, as was exemplified recently in *Campaign for Nuclear Disarmament v The Prime Minister* [2002] EWHC 2759 (QB). Similarly, considerations of defence policy or decisions as

to the ordering of armaments will not be justiciable. It also appears clear that decisions about the disposition of troops in the field or sending them to particular locations would not be judicially reviewed.

[24] As Scrutton LJ said in the *China Navigation* case, the courts have historically refused to intervene in questions of pay and service. It does, however, appear to require some reconsideration in modern conditions whether the appointment, promotion and discharge of members of the Armed Forces are justiciable. The issue in the present case is whether the Army Board acted within the bounds of the power conferred upon it by adopting reasons for retaining the guardsmen which qualified as exceptional reasons. Issues of this type are regularly considered by the courts in other areas, and there does not appear to me to be any obviously compelling reason why this issue should be outside its reviewing capacity. It was on such a ground that the High Court in New Zealand held in *Bradley v Attorney General* [1986] 1 NZLR 176 that a decision concerning the applicant's promotion in the Royal New Zealand Navy was judicially reviewable. In *R v Ministry of Defence, ex parte Smith* [1996] QB 517 the Divisional Court rejected a contention advanced on behalf of the Ministry of Defence that the discharge of members of the Armed Forces on the ground of their homosexuality was not justiciable. Simon Brown LJ expressed the following opinion on the issue at page 539:

> "I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview – only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue. This case does not fall into that category. True, it touches on the defence of the realm but it does not involve determining 'whether … the armed forces [should be] disposed of in a particular manner' (which Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 thought plainly unreviewable – as indeed had been held in *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197). No operational considerations are involved in this policy. Now, indeed, that the 'security implications' have disappeared, there appears little about it which the courts are not perfectly well qualified to judge for themselves."

When the case went to the Court of Appeal the issue was not argued or considered. While I would not myself be prepared to go quite so far as holding all but the rarest cases justiciable, I do conclude that the decision of

the Army Board in the present case does not fall within the exempted category which the courts regard as non-justiciable.

[25] The respondent's counsel argued on a different ground that the court should not adjudicate on the issue. It was submitted that the issue was one of private and not of public law, like other types of employment in the public service, and so should not be the subject of judicial review. I had occasion, sitting at first instance in *Re Phillips' Application* [1995] NI 322 at 331-5, to review the case-law on this topic, when considering the dismissal of a civil servant. The line of cases runs through *R v East Berkshire Health Authority, ex parte Walsh* [1985] QB 152 and *McClaren v Home Office* [1990] ICR 824 to *R v Lord Chancellor's Department, ex parte Nangle* [1992] 1 All ER 897. In setting out a series of principles relating to the classification of disputes involving public servants in *McClaren v Home Office* at pages 836-7 Woolf LJ pointed out:

> "There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is not domestic or wholly informal, its proceedings and determination can be an appropriate subject for judicial review."

In reaching my conclusion on the point in *Re Phillips' Application* I stated in a passage at page 334 which I venture to repeat:

> "For my own part I would regard it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus upon the classification of the civil servant's employment or office. It follows in my opinion from the principles which I have quoted from Woolf LJ's judgment that such classification will not be conclusive of every case. Accordingly, it does not seem to me necessary

> for the court to pursue the resolution of what may be a rather arid dispute."

In the first judicial review application in 1999, reported as *Re McBride's Application* [1999] NI 299, Kerr J dealt with this issue at page 310:

> "It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity. The present case exemplifies that proposition. The decision whether to retain the applicants in the army obviously affects them as individuals; it is also, in my opinion, a matter which affects the public interest. The public has a legitimate interest in whether those who have been convicted of murder should be allowed to continue to serve as members of the armed forces. The position would be different if the applicants were not members of a public service. The public has no legitimate interest for instance in whether an office worker should be retained in the employment of a private company. Whether an individual should be retained in an employment dedicated to the service of the public is, to my mind, self evidently a matter of public law."

I agree with his reasoning and conclusion and would reject the respondent's submission that the issue in the present case is one of private law.

Standing

[26] An applicant for judicial review must by section 18(4) of the Judicature (Northern Ireland) Act 1978 have a sufficient interest in the matter to which the application relates. In my judgment in *Re D's Application* (2003, unreported), which was the judgment of the court, I set out a number of propositions distilled from the case-law which I tentatively suggested might now be generally valid:

"(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.

(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

The case-law is usefully reviewed in Gordon, *Judicial Review: Law and Procedure,* 2nd ed, para 4-007. It is, however, far from clear what will suffice in any given case to qualify as sufficient interest.

[27] In the first judicial review Kerr J held that the appellant did have sufficient standing. The members of this court, after hearing the arguments originally presented, did not feel at all confident that they could accept that view. They were exercised by the consideration that the appellant was not affected in any respect except by a feeling of indignation that the guardsmen were not discharged, a feeling which might be shared by a proportion of other members of the public. She can justifiably say that her feelings are heightened by the immediacy of her loss and her claim to challenge the decision cannot be dismissed out of hand like those of mere busybodies. It would appear from the decisions in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552 and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte The World Development Movement Ltd* [1995] 1 All ER 611, however, that it is not necessary for the applicant to establish a material interest in the outcome of the application. I should myself be reluctant to say that a sincere concern for ensuring that public affairs are properly administered is in all cases sufficient, for in my view the principles underlying the decision in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 retain their validity. It is a significant point that if the appellant cannot challenge the decision of the Army Board it is difficult to see who could. I am not myself attracted to the idea that there is a category of unchallengeable decisions in the public sector,

as Schiemann J held in *R v Secretary of State for The Environment, ex parte Rose Theatre Trust Co* [1990] 1 QB 504, and I am inclined to agree with the criticism of that case in Gordon, *op cit*, para 4-007. Not without hesitation, accordingly, I would hold that the appellant has sufficient standing to pursue her application in this case.

Jurisdiction of the Army Board

[28] It was common case that the guardsmen's commanding officer did not express an opinion that there were exceptional reasons which made their retention desirable. It was submitted on behalf of the appellant that on the wording of QR 9.404*d* it was a condition precedent to consideration of retention that the commanding officer should have expressed his opinion in favour of that course. In the absence of such an expression of opinion the Army Board did not have jurisdiction to order the guardsmen's retention.

[29] The judge accepted at pages 53-4 of his judgment the argument advanced on behalf of the respondent. This was to the effect that a soldier's discharge from the Army must be duly authorised by the competent military authority, under section 11(3) of the Army Act 1955 and Queen's Regulations. A commanding officer is not competent to authorise discharge, but must refer the issue to the authority specified in QR 9.404*a.* The Army Board is one such body and is therefore the competent military authority. As such it can authorise not only the discharge but also the retention of the soldier.

[30] I am not myself convinced of the validity of this argument. The fact that the Army Board is an authority competent to authorise a soldier's discharge does not necessarily give it jurisdiction to authorise retention, if a condition has to be fulfilled before retention can be considered. The matter seems to me to depend on whether the reference in QR 9.404*d* to the opinion of the commanding officer is intended to operate as a condition precedent, with which it is mandatory to comply if the Army Board is to have jurisdiction to consider the question of retention. In my view it is quite clear that the requirement to have the commanding officer's opinion in favour of retention should be construed as merely directory (as to which see, eg, Bennion, *Statutory Interpretation,* 4th ed, pp 32-41). In the first place, it is provided in the preamble to Queen's Regulations that they are to be interpreted "reasonably and intelligently … bearing in mind that no attempt has been made to provide for necessary and self evident exceptions." In other words, they are not to be construed literally and with the strictness of a statute, but with more emphasis on their substance and the intention behind them. Secondly, if the appellant's construction were correct, a commanding officer would have an effective veto over the retention of a soldier whose case is supported all the way up the higher chain of command. The Army Board would then have had no authority to do anything but order his discharge,

when he had been sentenced to a term of imprisonment. These factors seem to me powerful arguments in favour of the conclusion that the requirement is directory, and I would so hold. In consequence the absence of the commanding officer's favourable opinion did not deprive the Army Board of jurisdiction to consider retention as well as discharge.

Bias

[31] During the course of the proceedings General Jackson felt that he should mention that he had at one time been brigadier in command of 39 Brigade in Northern Ireland, in case that should affect his impartiality as a member of the Army Board. He had completed his term with 39 Brigade before the guardsmen served in Northern Ireland. It was decided that he could properly continued to sit on the panel and he continued to take part in the consideration of the case and the Board's determination.

[32] It was held in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564 that the test, which was slightly modified from that adopted in *R v Gough* [1993] AC 646, is whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, that the tribunal was biased. There was no Service connection between General Jackson and the guardsmen, who had never served under his command. It might conceivably be said that because of this service he might be regarded as sympathetic to soldiers involved in incidents in Northern Ireland and so predisposed in the guardsmen's favour. No doubt this might be said with equal force of very many senior officers in the Army who had served in the Province. As against that, such officers would be well versed in the realities of patrolling in the streets of Belfast and aware that innumerable contacts occur with persons behaving suspiciously where shots are not discharged at them. They would not necessarily be sympathetic towards soldiers who had not observed the restraint and discipline shown by others in very many situations. In my opinion a fair-minded and informed observer would not regard it as being a real possibility that because of his service with 39 Brigade General Jackson was biased in favour of the guardsmen.

Breach of Convention Rights

[33] It was argued first for the appellant that by retaining the guardsmen the Ministry of Defence was in breach of Article 2(1) of the European Convention on Human Rights, which provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the

> execution of a sentence of a court following the conviction of a crime for which the penalty is provided by law."

The essence of the appellant's argument was that their retention in the Army undermined public confidence in the State's adherence to the rule of law and in preventing any appearance of collusion in or intolerance of unlawful acts. It accordingly constituted a failure to observe the wider duty to protect the lives of its citizens.

[34] It is well recognised that the substantive guarantee of the right to life must be reinforced by a set of complementary safeguards which ensure that deaths caused by State agents or bodies are properly investigated and the criminal process is properly administered against all persons responsible: see, eg, *Jordan v UK* [2001] ECHR 24746 and cf the discussion in *R (Amin) v Secretary of State for the Home Department* [2002] 4 All ER 336. In the present case the deaths were fully investigated and the criminal process set in train, and it could not be said that the State had been deficient in observing its proper responsibilities in this respect. Mr Treacy QC for the appellant submitted that the obligation goes further and extends to avoiding acts which appear to be inconsistent with adequate recognition of the wrongfulness of the guardsmen's acts. The decision of the Army Board to allow the guardsmen to remain in the Army derogated from the authority of the pronouncement of their guilt and was a violation of Article 2. He referred to several passages in paragraphs 111, 114 and 137 of *McKerr v UK* (Application no 28883/95), but in my opinion these do not touch upon the present issue, for they relate to the need to pursue sufficient and prompt investigation, which may not be satisfied by the bringing of criminal proceedings against the immediate actors.

[35] The judge dealt with the appellant's contentions in a passage at pages 39-40 of his judgment:

> "There is nothing in the jurisprudence of the Strasbourg court that supports the applicant's claim that this additional safeguard must be in place. The essence of the procedural rights implicit in Article 2 is that they support the effective implementation of domestic laws that forbid the taking of life and that, in those cases involving State agents or bodies, they ensure that those responsible for the death be made accountable for their actions. That is why an effective official investigation of the death is required. It is to ensure that those who have been guilty of the killing are detected and punished. Thus the objective of protecting life is achieved. Those who take life wrongfully are caught and brought to account. In this way others are discouraged from future misconduct that would threaten life.

> This essential purpose is not realised by inflicting on those who wrongly take life, punishment beyond that which is imposed by due process of law. The imperative of Article 2 is to protect life by taking all reasonable measures to prevent unlawful killing and, where such killing occurs, to identify and punish the perpetrators according to law. Once this has been carried out, the objective of Article 2 has been achieved. I do not consider, therefore, that Article 2 requires, as a matter of principle, that those found guilty even of the most serious offence of murder be forever debarred from serving as members of the armed forces.
>
> In any event, the decision of the Board does not, in my view, derogate from or undermine the finding of guilt that has been recorded against the guardsmen. On the contrary, the Board was at pains to emphasise that it accepted without qualification the findings of the trial judge and in paragraph 19 of its decision it expressly recorded its acceptance of the propositions that (a) the soldiers had no justification for firing; (b) that they were aware that there was no justification for opening fire; (c) that they were not operating in a "panic situation" that called for a split second decision; and (d) that they had lied about critical elements of their version of events. These statements confirm and reinforce the finding of guilt rather than detract from it."

I fully agree with this statement of the law and with the judge's conclusions there expressed. Mr Treacy suggested that the judge had misstated the appellant's argument, which was based upon the proposition that by retaining the guardsmen in the Services the Board was condoning their actions or giving some countenance to the view that they were not really guilty of murder. I do not accept this suggestion. The judge quite clearly understood the appellant's contentions, but rejected them equally clearly. He did not consider, nor do I, that it is required of the State to punish guilty persons beyond what is required by law, and took the view that the guardsmen, like other citizens, can rehabilitate themselves after paying the penalty prescribed for their offences. Nor did he consider that their retention implied any condonation, for he stressed at page 39 that the Board –

> "had made it abundantly clear that its members did not accept the exculpatory statements of the soldiers and that they accepted without qualification the findings of the trial judge."

I agree with the judge and do not consider that the appellant has established a breach of Article 2(1) of the Convention.

[36] The appellant argued in the alternative that the Ministry of Defence had been in breach of Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[37] I share the judge's difficulty in accepting the proposition that the facts at issue "fall within the ambit" of one or more of the substantive articles of the Convention (*Rasmussen v Denmark* [1984] ECHR 8777) or that the subject-matter of the disadvantage complained "constitutes one or more of the modalities of a right guaranteed" (*National Union of Belgian Police v Belgium* (1979-80) 1 EHRR 578, para 45). In the light of the Commission's decision in *Pinder v UK* [1985] 7 EHRR 564 it might be arguable that Article 14 does apply, but for the reasons set out below I do not find it necessary to reach a conclusion on that issue.

[38] The matter is in my opinion put beyond doubt when one attempts to ascertain what might constitute the discrimination. In determining the existence of discrimination one first looks for comparators, that is, persons in an analogous situation. In the present context that can only be persons who are injured or whose relatives are killed by shots discharged by soldiers. There is no evidence that the appellant has been treated differently from or less favourably than any such person, whether in Northern Ireland or any other part of the United Kingdom. She therefore cannot establish any breach of Article 14.

Procedural Impropriety

[39] The appellant submitted that the Board's procedure was flawed because of procedural unfairness in several respects specified in her skeleton argument:

> "(a) The failure to provide the appellant with the submissions that had been made on behalf of the Guardsmen;

(b) The refusal of the respondent to put the appellant's representations dated 19 April 2000 before the Army Board;

(c) The exclusion of the appellant from the oral hearings and the refusal to allow the appellant to be represented and make oral submissions at the hearing;

(d) The fact that the decisions as to material being withheld from the Board and the appellant and as to her right to make oral submissions at the hearing were made, not by the Board itself, but by the Secretariat."

[40] It is necessary to commence examination of this issue by determining whether the appellant had any rights enforceable at law to require the Board to comply with any of her requirements and, if so, the extent of those rights. As the judge correctly pointed out at page 31 of his judgment, the task which the Board was required to perform was not in the nature of an adversarial proceeding between the guardsmen and the appellant. It partook more of the nature of an investigative or inquisitorial function. This classification does not of itself suffice to determine the Board's duty or the rights of persons affected by its decision, for indisputably a duty of fairness was owed to the guardsmen, whose careers were being decided. The issue is whether any duty was owed to the appellant, who was not affected in a material sense by the eventual decision but who felt a sense of personal concern about its content.

[41] The judge referred appositely to a statement of Glidewell LJ in *R v LAUTRO, ex parte Ross* [1993] QB 17 at 50:

"I accept that very frequently a decision made which directly affects one person or body will also affect, indirectly, a number of other persons or bodies, and that the law does not require the decision-making body to give an opportunity to every person who may be affected however remotely by its decision to make representations before the decision is reached. Such a principle would be unworkable in practice. On the other hand, it is my opinion that when a decision-making body is called upon to reach a decision which arises out of the relationship between two persons or firms, only one of whom is directly under the control of the decision-making body, and it is apparent that the decision will be likely to affect the second person

> adversely, then as a general proposition the decision-making body does owe some duty of fairness to that second person, which, in appropriate circumstances, may well include a duty to allow him to make representations before reaching the decision. This will particularly be the case when the adverse effect is upon the livelihood or the ability to earn of the second person or body. "

Applying this principle, with which I agree, I consider that the appellant did not have a legal right to participate in the Board's proceedings, or, putting it another way, the Board was not under a duty to permit her to appear before it, make representations or to consult her about matters relating to the proceedings or the ultimate decision. The Ministry of Defence did, however, state in its letter of 15 November 1999 that the Army Board would as a matter of courtesy be willing to receive "a written representation" from her. I have no doubt that it was wise and humane in the circumstances of the case for the Board to take this course, but courtesy and concessions do not necessarily give rise to legal rights and one should be slow to build too much on them.

[42] I therefore consider that there was no legal obligation to permit the appellant to attend the hearings or make oral representations. Nor was the Board obliged to receive any material from her or to furnish her with any documents, unless she had a legitimate expectation that that would be done in consequence of which it can be regarded as unfair of the Board to fail or refuse to grant her request. The judge found that she did have such a legitimate expectation and I must now turn to examine his conclusions on this part of the case.

[43] The Ministry's approach has been throughout that it would, as a matter of courtesy, be willing to receive written representations from the appellant. It appears to have accepted in principle the validity of the proposition approved by the House of Lords in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. Whatever argument might be advanced against the applicability of this proposition in its full force in a case such as the present, the amount of material furnished by the Ministry amply fulfilled any such obligation.

[44] The appellant's complaint is that the Ministry of Defence did not place before the Board the further representations submitted by her solicitors under cover of their letter of 19 April 2000. The judge held that this material should have been given to the Board, declining to accept the sufficiency of the Ministry's reasons for not including it with that which had already been

furnished. It is apparent that he would have held that such failure was a breach of the appellant's legitimate expectation, but for the fact that he did not regard the material as adding anything of consequence to the documentation already sent by the appellant to the Board.

[45] I agree with the judge's conclusions on this part of the case, but I do so for somewhat differing reasons. In my opinion legitimate expectation has to be seen as a facet of the duty of procedural fairness. If a person deciding an issue has given another person reason to suppose that he will do or refrain from doing something in such circumstances that it would be unfair for him to resile from that representation, then that may vitiate the decision which he eventually makes. It is necessary to take into account in this equation such matters as the content of the representation, the circumstances in which it is made, the extent of the interest which the representee has in the decision and whether he changes his position on the strength of the representation. There has been some difference between judicial and academic expressions of opinion on the last point, that of acting on the representation and whether detriment has to be established, but it seems to me that on the proper approach to the issue that is only one factor to be taken into account, and that it is not necessary to seek a rule which applies to every case.

[46] The Ministry informed the Patrick Finucane Centre in its letter of 15 November 1999 that it would as a matter of courtesy be willing to receive a written representation from the appellant. In his letter of 21 December 1999 Mr Burton stated to her solicitors that the Army Board "exceptionally will consider any representations you wish to make on behalf of Mrs McBride whey the Guardsmen should be discharged." The Ministry sent to the appellant's solicitors in January and May 2000 the material to which I have earlier referred. I agree with the judge's view that it should have been feasible to give the Board for its consideration the documents sent by the solicitors on 19 April. I also agree that they appear to have added little or nothing of consequence to the earlier material. While I do not overlook the point made by the appellant's counsel that one should not readily assume that it would not have influenced the Board in reaching its decision, that factor is one to be taken into account in determining the fairness of the procedure. There is nothing to indicate that the appellant changed her position or incurred any detriment in consequence of acting upon the Ministry's offer to receive material from her.

[47] In determining the issue of the fairness of the procedure one might approach it either by asking whether a legitimate expectation was created or whether, if one was created, the Ministry and the Board fulfilled it to a sufficient extent. It seems to me immaterial which avenue one adopts, and that the overall question is that of fairness. When one takes the various factors into account, and asks whether the Ministry or the Army Board acted unfairly

towards the appellant, the answer is clearly in my judgment that it did not. I therefore would hold against the appellant on this issue.

Exceptional Reasons

[48] QR 9.404*d* empowers retention of a soldier if there are "exceptional reasons that make retention of the soldier desirable." In its natural meaning the phrase "exceptional reasons" is of considerable width and that width is not restricted by the wording or the context of the phrase. It seems to me capable of encompassing a variety of factors, but basically the two main strands, at least in a case such as the present, appear to be (a) mitigating factors, relating either to the offence or the offender (b) particular value to the Army of the soldier concerned. I would not accept the appellant's submission that the relevant reasons can only be those connected with the offence.

[49] The reasons set out in the Board's decision may be tabulated as follows:

(a) the youth and inexperience of the soldiers;

(b) the tense nature of the security situation in the area at the time;

(c) the fact that the soldiers' training could not prepare an individual for every eventuality;

(d) the regret expressed by the soldiers;

(e) the soldiers' clear criminal record and their exemplary behaviour in custody after conviction;

(f) the lack of danger of repetition;

(g) the soldiers' exceptional loyalty to the Army.

[50] Reasons (a) to (c) could in principle be taken into account as mitigating factors, for they are not inconsistent with the trial judge's findings. They would not have given the soldiers a defence to the charges of which they were found guilty. The soldiers could, however, have relied upon them and the trial judge could legitimately have taken them into account on penalty if he had not had to impose a mandatory sentence. Reasons (d) and (e) could likewise have been taken into account in mitigation, for what they are worth, but I feel some doubt whether they could properly be regarded as exceptional reasons for present purposes. I take the same view about reason (f), though there might be a slightly stronger argument for classifying it as an exceptional reason. Reason (g) could in my opinion be regarded as a legitimate reason, for the guardsmen's loyalty and commitment could be said to make them of

particular value as soldiers with a contribution to make to the good of the Army.

[51] I accordingly would hold that the Army Board was entitled to take account of the matters set out in reasons (a) to (c) and (g) above. I am doubtful whether (d) and (e) qualify as possible exceptional reasons, and (f) seems arguable. I consider, however, that resort to the last three reasons, if they cannot correctly be classed as exceptional, was not of such significance as to vitiate the conclusion reached by the Army Board, which had regard to the factors taken together in holding that there were exceptional reasons. I should emphasise that in so holding I am not assessing the weight of the reasons, merely their sufficiency in law to be ranked as exceptional reasons. The weight to be placed on any or all of them is a matter for the Army Board and not the court, and the court has to be careful not to stray into judging the quality of the reasons.

[52] This brings me to the final issue, that of the reasonableness or rationality of the Army Board's decision. The learned judge at pages 42 to 47 devoted considerable care to determination of the standard of judicial scrutiny which should be applied to such decisions. His conclusion, with which I agree, was that the intensity of review should depend on the context, varying with the nature of the interest involved and the type of decision that requires to be taken. Specifically, there is not a hard and fast distinction between cases turning exclusively on domestic law and those in which a Convention right is in issue, although the principle of proportionality must always come into play in the latter class. He expressed his conclusion in a passage at pages 45 to 47 which I shall set out in full:

> "The nature of the decision under challenge here, its importance to the applicant and to the guardsmen and its implications for the public at large are all factors of considerable significance in any review of the Army Board's conclusion.
>
> It is my view that the correctness of that conclusion calls for anxious and searching inquiry. Two young men convicted of murder have been permitted to continue their career in the armed forces of the country. They have been condemned by a very experienced judge as having put forward a deliberately lying defence. He decided that they did not perceive any threat to themselves or to any of their colleagues when they consciously discharged aimed shots at the retreating figure of Peter McBride. They concocted and maintained a mendacious version of events in order to provide cover for their

actions which they knew that they could not otherwise justify. These findings are damning, but do they inevitably exclude the possibility of a reasonable decision that the soldiers should be allowed to resume their army careers?

The search for an answer to this question must include, in my opinion, consideration of the fact that all soldiers who have been convicted of murder in Northern Ireland have been allowed to return to the army after serving sentences of imprisonment while all other instances of convicted soldiers being allowed to do so have involved relatively minor offences. It must also include consideration of the army's policy in relation to drugs offenders. It appears that no soldier convicted of a drugs offence, however serious, will be permitted to resume a career in the army. Regard must be had to the high probability that anyone convicted of murder could not normally hope to be recruited to any of the security services and would, as Mr Treacy pointed out, be ineligible to hold a firearms licence or even a public service licence.

These considerations, while undoubtedly militating strongly against the retention of the guardsmen, do not, in my opinion, remove the decision to allow them to resume their careers from the range of available decisions. Although they had no justification for firing and were aware of that and although they lied as to the reasons for opening fire, I cannot conclude that no reasonable decision-maker could decide that they be allowed the opportunity to resume their careers. While they were not young by army standards, the view could be taken that they were not fully mature men. Lying about the circumstances, although reprehensible, is perhaps not an unnatural reaction given the position in which they found themselves. Ultimately, the question perhaps resolves to this: should the guardsmen be forever debarred from serving in the army because of what they did. One could not, I think, dispute the validity of an opinion that they should be; equally, however, it would be difficult to deny that a contrary view was tenable. Not without misgivings, therefore, I have concluded that the decision of the Army Board cannot be condemned as unreasonable."

I agree so fully with the judge's conclusion and the terms in which it is expressed that I am content to adopt them in their entirety.

[53] For the reasons which I have given I would dismiss the appeal and affirm the judge's order refusing the appellant's application for judicial review of the Army Board's decision to retain the guardsmen in the Army. In doing so I feel that I must re-emphasise the function of the court in exercising its jurisdiction in a case of judicial review of this kind. It is not to act as an appellate tribunal or to review the substance or quality of the decision complained of. It is not the function of the court in the judicial review jurisdiction to express an opinion on those matters, and I have attempted scrupulously to refrain from doing so. As I stated in *Re Croft's Application* [1997] NI 1 at 19 –

> "The court is entrusted with the task of ensuring in its supervisory jurisdiction that the decision did not contravene any of the requirements of the law in the respects which I have discussed at length in this judgment. When it has done so, it must stand fast. It is not to go into the merits of the case any further than is required to adjudicate upon those issues of law."

That is the task upon which I have set myself in this judgment, and in fulfilment of that task I have reached the conclusion that the appellant has not established that the decision of which she complains should be set aside on any of the material legal grounds. I would therefore dismiss the appeal.