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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JEAN McBRIDE FOR JUDICIAL REVIEW

Before: Carswell LCJ, Nichsolson LJ and McCollum LJ

McCOLLUM LJ

[1] The applicant/appellant is the mother of Peter McBride who was shot dead by two soldiers. Guardsman James Fisher and Guardsman Mark Douglas Wright on 4 September 1992 at Upper Meadow Street, Belfast.

[2] The two soldiers to whom I shall refer by their surnames, were charged with murder and on 10 February 1995 were convicted by Kelly LJ and sentenced to life imprisonment.

[3] On 1 September 1998 they were released having served a total of six years including their period on remand between September 1992 and conviction in 1995.

[4] Queen's Regulations, a comprehensive code of administration and discipline for the Army, lays down the consequences for a soldier who has been sentenced to any term of imprisonment, and the procedures governing discharge for misconduct.

[5] In 1998 an Army Board was convened and decided that the soldiers should be retained. The appellant brought proceedings for judicial review of that decision and it was quashed on the basis that the Board had taken into account matters which it should not have.

[6] In consequence the matter went back before a differently constituted Army Board and the matter was considered anew and a decision was made on 21 November 2000 to retain the two soldiers in the Army.

[7] Once more Mrs McBride commenced judicial review proceedings as the result of which Kerr J decided that on 17 April 2003 the decision should stand.

[8] She has appealed that decision to this court and we have heard the helpful arguments of Mr Treacy QC on behalf of the appellant and Mr Burnett QC on behalf of the Army.

[9] I have had the opportunity of reading in draft the judgment of the Lord Chief Justice and adopt his comprehensive history of events and I agree with his reasoning and conclusions on the issues of bias, procedural impropriety and the application of the European Convention on Human Rights and also on the questions of justiciability and standing.

[10] However regrettably I take a different view on the question of whether the Army Board, in finding exceptional reasons, applied the proper test for retention of the two soldiers.

[11] I have also read in draft the judgment of Nicholson LJ. I agree with his views on the issue of the Army Board's findings in relation to "exceptional reasons."

[12] I propose to confine my remarks to that issue, since all of the other matters raised have been dealt with by my learned colleagues, and I have nothing to add to their observations.

[13] The relevant regulation in relation to discharge for misconduct is set out as follows in Queen's Regulations.

> "9.404 *Misconduct*
>
> 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 custody 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 with valid and explicit reasons to the Director of Manning (Army) Ministry of Defence for a decision. The case is to be forwarded through the immediate superior headquarters with copies going to the next higher headquarters when this has been so directed. Where a case to an immediate headquarters is not supported it should be sent to the next higher headquarters for further comment before being sent to the Director of Manning (Army), Ministry of Defence (M2(A)) should be informed in advance by the commanding officer of any such cases that are controversial or high profile so that, if necessary, direction can be given for the case to be staffed through the full chain of command.

….

l. The competent military authority must not delay his decision on whether or not to authorize discharge. In the case where discharge is consequent upon the sentence of a court-martial, the decision should normally be made immediately upon confirmation of the proceedings."

The decision of the Board was expressed as follows:-

"Determination

17. After further consideration and discussion, the Board concluded that there wee 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 1973 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 exception 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 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 his 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 know 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 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 Guardsmen's retention desirable.
>
> 20. The Board therefore rejected the applications to discharge 24776043 Guardsmen 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."

[14] The arbitrary nature of 9.404(d) is to be noted. The soldier may only be retained in the circumstances set out.

[15] The word "exceptional" in connection with the mitigating effect of relevant factors has been judicially considered and discussed in a number of cases.

[16] In Regina v Okinikan (CA) 1993 1 WLR at 176 Lord Taylor said in relation to the expression "exceptional circumstances" under Section 5(1) of the Criminal Justice Act 1991:

> "This court cannot lay down a definition of exceptional circumstances. They will inevitably depend on the facts of each individual case. However taken on their own or in combination good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases."

[17] In the case of R v Kelly 1999 2 CAR(S) 176 Lord Bingham said:

> "We must construe 'exceptional' as an ordinary familiar English adjective and not as a term of art. It describes a circumstance which is such as to form an exception which is out of the ordinary course or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique or precedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[18] That the arbitrary nature of paragraph 9.404(d) has been recognised by the military authorities can be illustrated by the fact that in the period from 1989/90 to 1999/00 2002 officers and men were discharged under QR9.404 while a total of 28

were retained. These figures are based on the revised numbers supplied to the Army Board.

[19] The percentage retained therefore was under 1.4% or one case in 72.

[20] Had it been intended simply to ameliorate the arbitrary effect of 9.404(d) then retention could have been permitted where "there are circumstances (or reasons) that make retention of a soldier desirable". Effectively the use of the word "exceptional" means that reasons which are commonly or frequently to be found in cases of the nature of that under consideration or in general cases are insufficient to justify retention. It must also be noted that desirability of retention is not sufficient in itself. Some significance might also be attached to the use of the plural ie "exceptional reasons".

[21] We do not know the facts or circumstances of the cases of the 2005 discharged soldiers, but it would seem extraordinary if the matters relied upon in this case were not replicated in a great number, if not the vast majority of them, with the exception of the delay in dealing with the matter.

[22] Bearing in mind the nature of judicial review, the Court will not interfere with the decision of the Army Board, if, in the circumstances of the case considered relevant by the Army Board, there are to be found reasons for retention of the soldiers which can be categorised as exceptional.

[23] The two questions to be considered by the court on this issue are therefore, (i) is any of the matters enumerated by the Board capable in itself of amounting to "exceptional reasons"? and (ii) may all or any number of them taken in combination amount to exceptional reasons?

[24] It must also be borne in mind that the reasons for retention would have to carry real weight in the context of the actual case under review; the more serious the offence the more cogent should be the reasons for retention.

[25] In this case none of the usually encountered motives of criminal actions is proved to be attributable to the soldiers, for example, individual malice, greed or personal advantage. However, the use of excessive force resulting in death, is by no means a unique event arising from the activities of security forces. Where death is caused by the use of excessive force by servants of the State, it should be a cause of great public concern. Such events diminish confidence in the maintenance of law and order and endanger the peace of the community if not treated with proper regard by the organs of state.

[26] The vast majority of soldiers who have served in Northern Ireland have acted with discipline and restraint often under considerable and deliberate provocation and under constant threat from persons difficult to identify and distinguish from law-abiding citizens. It is no compliment to them if those who have not acted with

the same degree of self-control are not treated as lawbreakers, however understanding and sympathetic one might be to the dangers and difficulties of service in Northern Ireland. The Army Board did not regard the fact of engagement in active service in Northern Ireland as being capable in itself of amounting to "exceptional reasons".

[27] If we consider the circumstances of the offence to discover whether it may be said that there were any exceptional circumstances which might provide a reason for retention of the soldiers, it appears that as against other cases of excessive force resulting in death, there is no exceptional feature which would reflect to the credit of the two soldiers involved in this case.

[28] The shooting took place in daylight, there was no confrontation and no confusion at the scene, there was no menacing crowd or mob. The lives of the soldiers were not under any risk and the judge trial rejected the proposition that they believed that there was any immediate risk to them. Nothing had occurred to justify the use of a lethal weapon.

[29] The deceased had walked along the street to encounter Lance Sergeant Swift and had correctly supplied his name and address. Apart from the alleged removal of the latter's earpiece he had committed no unlawful act.

[30] The circumstances of the shooting were not therefore such as to make the situation exceptional in a way that would be favourable to the soldiers in comparison to other cases in Northern Ireland in which a soldier might be liable to use excessive force to the extent to killing a civilian.

[31] In considering the circumstances considered relevant by the Board as together amounting to exceptional reasons, I would comment as follows:

(a) There is no evidence that 7 months or 10 months' service, or the ages of the soldiers or the length of time they had spent in Northern Ireland could be regarded as exceptional circumstances. These factors must apply to very many soldiers serving in Northern Ireland.

(b) The situation faced by the soldiers was not in any way exceptional in the Northern Ireland context and indeed could be regarded as far more favourable to restraint and self-control than other situations that have often been encountered by soldiers in Northern Ireland.

(c) There was no evidence that the training of these soldiers was exceptionally deficient in any regard and indeed in the circumstances of this particular case, it is difficult to see how any special training would have been necessary to discourage the soldiers from opening fire.

(d) The concern and regret expressed by the soldiers falls far short of true remorse, and certainly does not amount to an expression of exceptionally contrite or remorseful feelings. Moreover, if expression of remorse were to provide an exceptional reason, few soldiers sentenced to imprisonment would fail to express them.

(e) One would expect that no previous criminal record would be the norm for soldiers and not the exception.

(f) It can scarcely be the norm that soldiers are likely to repeat their offence and it is not exceptional that they should give every indication that they would not repeat it. In any case since neither admits the criminality of his actions, and since the only explanation of what they did was that it was a reaction to a sudden and unexpected situation, I find it difficult to understand what evidence could have existed to convince the Board that there was absolutely no danger of repetition. It could not be foreseen how the soldiers would react in another sudden and unexpected situation, especially if they thought it was not wrong to open fire in similar situations. A soldier who opens fire without justification could not only imperil public order but also military operations.

(g) Presumably every soldier who does not wish to be discharged following a custodial sentence, has a considerable degree of loyalty towards the Army, certainly enough to wish to be retained. In this case it appears that every consideration was shown by Army authorities to the soldiers and it can hardly be evidence of an exceptional reason for retention that the soldiers retain their loyalty to the force.

[32] Moreover it is relevant that their continued satisfactory service could not have been undertaken if the question of discharge had been dealt with in accordance with Regulation 9.404.L (supra) which provides for an immediate decision on the authorisation of discharge. It is to be noted that in the case of a Court Martial confirmation of finding and sentence precedes appeal, so it is obviously not the policy of 9.404(l) that the outcome of an appeal should be awaited.

[33] As stated in the penultimate sentence of paragraph g it is no doubt highly exceptional for a soldier to resume service after serving a sentence of imprisonment. In 98.6% of cases he would already have been discharged in accordance with the procedure required by 9.404(l).

[34] Were the issue between Fisher and Wright and the Army, therefore, they would be in a strong position to argue that the army's failure to apply 9.404(l), and their subsequent satisfactory service had created exceptional reasons making their retention desirable, giving rise to a legitimate expectation on their part that they would be permitted to remain in army service and that in justice they should be allowed to do so.

[35] However we are dealing with this case as a matter of public law considering the effect of the army's decision on the public generally. In that context the army's own failure to follow Queen's Regulations cannot provide a successful justification for a decision which, while satisfactory to the army and to Fisher and Wright is a matter of review on behalf of the public.

[36] It may be significant that their commanding officer, rather than submitting the case with valid and explicit reasons for their retention, asked for a postponement of consideration of their discharge, contrary to Q.R. 9.404.L, and that no such reasons appear to have been provided.

[37] The Board was entitled to assess the cumulative value of the factors which it took into account and it is appropriate to consider whether all the factors considered might together amount to exceptional reasons.

[38] It appears to me that all the factors relied upon would usually be present in any case in which a soldier was considered for retention following a similar incident in Northern Ireland. If any were absent it would be very difficult to make out a case that it was desirable that the soldier should be retained. I am of the view also that it is likely that they are common features of many cases in which soldiers have been sentenced to imprisonment and would be likely to have existed in many of the cases of the 2005 soldiers discharged between 1990 and 2000.

[39] Therefore, neither individually nor cumulatively, can the reasons acted upon by the Army Board amount to exceptional reasons in the context of the offence for which the soldiers were imprisoned.

[40] In view of that conclusion it is unnecessary to consider the question of "Wednesbury unreasonableness".

[41] However, quite apart from the issue of what may constitute exceptional reasons, I find it difficult to comprehend the view of the Army Board that it is desirable to retain Fisher and Wright in army service.

[42] Since a sentence of imprisonment almost invariably results in discharge it is not easy to discern any feature in this case which explain the obvious sympathy and concern which all superior officers concerned have displayed for the situation of Fisher and Wright.

[43] The murder of an innocent fellow citizen should rank as a crime of the greatest magnitude, and one would expect that soldiers who have misused the lethal weaponry with which they are equipped in order to take away a life without justification should be regarded as quite unfitted for further army service.

[44] There may be considerations of morale and discipline which make discharge of the soldiers undesirable but if so one would have expected them to have been aired at the hearing of the Army Board or openly expressed in the ruling.

[45] The question of remedy is considerably complicated by the fact that there are essentially three interests involved, that represented by Mrs McBride, that of the army and that of Fisher and Wright.

[46] The second and third are in harmony at present, but if an order of the court has the effect of requiring the army to discharge Fisher and Wright then a different and difficult situation would arise.

[47] Fisher and Wright have a substantial argument that the army's tardiness in determining the question of their discharge has materially altered their situation and has created exceptional reasons for their retention.

[48] Even if Mrs McBride has established that the decision to retain is unsustainable on the basis upon which it was made Fisher and Wright may well be in a position to maintain that their retention is justified by the circumstances which have arisen consequent on the failure by the army to observe the requirement of 9.404(l).

[49] In my view Mrs McBride and the interest she represents will not be materially affected by the remedy itself; it should therefore be sufficient to satisfy her and that section of the public that is concerned that a declaration should be made vindicating the objection to the army's decision.

[50] The circumstances of the appellant are entirely removed from those referred to by Lord Brightman in Chief Constable of North Wales Police v Evans (1982) 1 WLR 115 at 1172:

> "My Lords I must address myself later to the question of remedy. All that I would say at this moment is that it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important a matter as a pursuit of his chosen profession, has to be sent away from a court of justice empty handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory."

[51] In this case the wrong done to the appellant by the legal error of the Army Board, is essentially an injury to her feelings. It appears to me that a declaration in the appropriate form will serve to compensate for that injury. It is not apparent that any section of the public will suffer detriment if the Army Board's decision should stand.

[52] Decisions on what is best for the Army and its soldiers are best left to the Army and it would be an unwise usurpation of power if the Court were, at the behest of a person outside the Army not materially affected by the decision, to intervene by mandamus to impose a course of action on Army authorities.

[53] In the circumstances of the case certiorari would merely prolong the agony of all concerned, since it would cause a reopening of the Army Board's consideration of the case when the situation of Fisher and Wright is markedly different from it was when the decision should originally have been made.

[54] If failure to comply with Queen's Regulations were to visit a material injustice on any person then the Courts could intervene to provide a remedy for that person, and counsel for the respondent does not challenge the principle that certiorari does lie. However, in this case it appears to me that the court in its discretion should refrain from making an order of certiorari.

[55] A declaration does not impose upon the Army authorities any legal compulsion to take any further action in relation to the retention or discharge of Fisher and Wright.

[56] I would therefore allow the appeal to the extent of ordering a declaration in the following terms:

> "That, taken together, the reasons expressed by the Army Board for the retention in Army service of Guardsmen Fisher and Wright in its determination of 21 November 2001 do not amount to exceptional reasons."