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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

NICHOLSON LJ

Introduction

[1] This is an appeal by the mother of Peter McBride from the judgment of Kerr J delivered on 17 April 2002. No challenge to the jurisdiction of Kerr J or of this Court was made by the respondents but at the request of the Court the parties addressed us on the issues of justiciability and the standing of Mrs McBride. The learned judge held that the appellant had not made out any of the grounds challenging the decision of an Army Board to retain Guardsmen James Fisher and Mark Wright in the Army by way of judicial review, notwithstanding that they were convicted of the murder of McBride by Kelly LJ sitting without a jury in Belfast on 10 February 1995 and were sentenced to life imprisonment.

Justiciability

[2] I have read the judgment (in draft) of the Lord Chief Justice on this issue and have nothing useful to add. I respectfully agree that the decision of the Army Board is justiciable for the reasons which he has given. I also agree with Kerr J and with the Lord Chief Justice that the issue in the present case is one of public law.

Standing

[3] I was a member of the court in *Re: D's Application* (2003, unreported) and, again, I do not consider that I can add usefully to what the Lord Chief Justice has said. I consider that the appellant has sufficient standing to pursue her application and appeal.

Jurisdiction of the Army Board

[4] Despite paragraph 9.404.d. of Queen's Regulations made under the Royal Prerogative, the case for retention of Guardsmen Fisher and Wright was not submitted by their commanding officer with valid and explicit reasons to the Director of Manning (Army) Ministry of Defence for a decision. Nor, it seems, was any reasoned opinion of their commanding officer expressed at any time. But I accept the submissions made on behalf of the respondents that, nonetheless, the Army Board had jurisdiction to consider whether the guardsmen should be retained. On the true construction of paragraph 9.404 they were not inhibited from doing so, merely because of the absence of a reasoned opinion expressed by the commanding officer as that requirement was directory, not mandatory. An act of discharge is required and in any event, the guardsmen were entitled to and on the available evidence would have brought the matter before the competent military authorities by way of the redress procedure; see S180 of the Army Act 1955 as substituted by S20 of the Armed Forces Act 1996. It is unnecessary to deal with the further arguments advanced on behalf of the respondents about the construction of the Regulation. The appellant's argument against the jurisdiction of the Army Board is unmeritorious.

Bias

[5] Even more unmeritorious is the submission that General Jackson's connection with 39 Brigade created a possibility of bias. I agree respectfully with the finding of Kerr J on this issue. See pp 51-53 of his judgment.

Procedural Irregularity

[6] (a) Whilst the appellant's written representations of 19 April 2000 could have been put before the Army Board and are unlikely to have caused delay in the hearings of the Board, I am satisfied, as was Kerr J, that on analysis these submissions added nothing of substance to the points already contained in the earlier written submissions made on her behalf. Accordingly I refrain from commenting on the submission made on behalf of the respondents that she was not entitled to make them.

(b) I am satisfied that she was not entitled to be present at the oral hearing or to be represented at it, although the public interest had to be taken into account and this was a high profile and controversial case. But she was afforded the right to make written representations and for the reasons given by Kerr J I am satisfied that the Board was entitled to refuse to permit her or her representatives to be present at the hearing before the Board.

(c) I am satisfied that the appellant did not suffer any unfairness by reason of the fact that she (and her advisers) did not read or hear the representations made or the evidence presented before the Board, although much of it related to issues determined at the criminal trial.

(d) It was obviously fair that the guardsmen should be present at the hearing, to be represented and to be given rights such as 'the last word' if the Army Board saw fit to give it to them. They would have been discharged had not exceptional reasons, which in the opinion of the Army Board made it desirable to retain them, been found. That was the task which the Army Board set for itself.

Breach of the Appellant's Convention Rights

[7] I accept the argument on behalf of the respondents that the State investigated the killing in a thorough way and prosecuted those alleged to be responsible for the killing. A judge independent of the executive tried and convicted them and, on appeal, independent judges heard their appeals and upheld the convictions. The guardsmen were sentenced to life imprisonment as required by law. They served only six years as the Secretary of State released them after that period of time. There was no further obligation on the State to impose punishment beyond what was provided by statute; in 1998 the Secretary of State was entitled to release them in the exercise of his discretion.

The procedural safeguards of Article 2 were not infringed. I consider that the reasoning of Kerr J on this aspect of the case cannot be impugned. I do not take the view that the passages in the judgement of the ECCHR in *McKerr v UK* (2002) 34EHRR2 relied on by the appellant advanced the argument on her behalf which was based on breach of Article 2.

[8] I am equally sure that no right of the appellant under Article 14 (read in conjunction with Article 2) has been infringed: see *Rasmussen v Denmark (1984) ECHR8777*. Kerr J dealt with this at p.41 of his judgment.

Irrationality

[9] (a) Queen's Regulations for the Army (as revised in March 1996) governed the Army Board's decision. It was commanded "that they be strictly observed on all occasions". They were to be "interpreted reasonably and intelligently", with due regard to the interests of the Service, bearing in mind that no attempt had or has been made to provide for necessary and self-evident exceptions. Commanders at all levels were and are to ensure that any local orders or instructions that may be issued are guided and directed by the spirit and intention of these Regulations.

(b) Regulation 9.404.d. applied:-

> "A soldier is to be discharged if he has been sentenced:
>
> (i) 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;
>
> (ii) 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. 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".

9.404.l. was also applicable:-

> "The competent military authority must not delay its decision on whether or not to authorise 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".

[10] The Army Board which decided to retain the guardsmen was composed of John Spellar MP, Minister of State for the Armed Forces, General Sir Mike Jackson KCB, CBE, DSO, Commander in Chief, Land Command and Major General D L Ludd, Quartermaster General.

[11] The Board approached its task on the basis that there was a presumption that a soldier sentenced by a Civil Court to a period of imprisonment would be discharged unless there were exceptional reasons that made his retention desirable.

[12] The Board concluded on 21st November 2001 that there were exceptional reasons, making it desirable to retain the guardsmen in the Army. The reasons given were contained in paragraphs 18 and 19 of its decision:-

> "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 killing took place on 4th September 1992. Guardsmen Fisher was born in 1968 and enlisted in December 1989. Guardsmen 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 4th 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 offence 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 judicial process, their imprisonment and subsequently the Army Board process. Both very clearly wished 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 decided 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."

[13] What is desirable in the interests of the Army as they see it, however, does not necessarily coincide with what is desirable in the public interest or objectively in the interests of the Army. I do not accept that the future of the two guardsmen in the Army was a matter solely between them and the Army Board, as implicitly stated in the record of proceedings of the Army Board. See judgment of Kerr J., at p.20.

[14] Kerr J, in his first judgment delivered on 3 September 1999 in respect of an earlier decision of a differently constituted Army Board that Fisher and Wright should be retained, held that the public has a legitimate interest in regard to the decision whether those who have been convicted of murder should be allowed to continue to serve as members of the armed forces. Whether an individual should be retained in an employment dedicated to the service of the public was, in his view, self-evidently a matter of public law and amenable to judicial review. I refer back to paragraphs [2] and [3] of this judgment and the relevant paragraphs of the judgment of the Lord Chief Justice.

[15] Kerr J went on to express the opinion that the Army Board had a wide discretion as to what may be regarded as exceptional circumstances for the purposes of paragraph 9.404.d. of Queen's Regulations and stated that he was not prepared to hold that most of the reasons that the previous Board gave for disapplying paragraph 9.404.d. could not constitute exceptional reasons within the meaning of that paragraph. These reasons included the following: that the Army was itself responsible for the training of the guardsmen as soldiers 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 …; 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 their wish to continue serving their country.

[16] The exception that the learned judge took to the decision of that Board was their reference to the "error of judgment" which the guardsmen admitted and for which they expressed regret. This was inconsistent with the findings of the trial judge whose judgment was upheld on appeal. By remitting the issue whether the guardsmen should be retained in the army to a competent military authority, Kerr J was indicating that the question resolved to this: "should the guardsmen be forever debarred from serving in the Army because of what they did? One could not … dispute the validity of an opinion that they should be; equally, however, it would be difficult to deny that a contrary view was tenable".

[17] Counsel for the appellant raised a question in his written skeleton argument: was the decision reached by the Board "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it?" Per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1085] AC 374 at 410. I prefer slightly less emotional language I substitute "unreasonable" for "outrageous" and "illogicality" for "defiance of logic". Whether this is the appropriate question to ask, having regard to the comment of Lord Cooke in *R (Daly) v Home Secretary* [2001] 2AC 549 does not require discussion.

[18] I share the view of the Nathan Committee and Professor J C Smith and many judges that "Murder should be punishable with a maximum sentence of life but the judge should have the same discretion to impose lesser sentences as he has for other crimes … Murders vary as greatly in their gravity, and murderers in their dangerousness, as for any other crime":

see Smith & Hogan, Criminal Law (9th ed) at p 351. Or, in the alternative, the crime of culpable homicide should be substituted for murder and manslaughter as can be done in Scotland. Had the guardsmen committed their offences in Scotland, they could have been charged with culpable homicide.

[19] Nor should anyone ignore the fact that in 1992 and in the years from 1970 until comparatively recently soldiers in Northern Ireland have been under constant stress, tension and danger, not least when they have been patrolling the area which the guardsmen were patrolling on 4 September 1992: and postings to Northern Ireland have given rise to great anxiety on the part of their families.

[20] In *R v Clegg* Sir Brian Hutton LCJ (as he then was) said in the Court of Appeal:

> "A further observation which we wish to make is this. The trial judge found that the fourth shot fired by Private Clegg killed Karen Reilly and that he had no legal justification for firing that shot. Under the existing law, having found that Private Clegg fired that shot with intent to kill or cause grievous bodily harm, the trial judge was obliged to find Private Clegg guilty of the heinous crime of murder which carries a mandatory sentence of life imprisonment, and it was not open to the judge to find Private Clegg guilty of the lesser crime of manslaughter where the judge can sentence the accused to the period of imprisonment which he considers appropriate in all the circumstances of the crime.
>
> There is one obvious and striking difference between Private Clegg and other persons found guilty of murder. The great majority of persons found guilty of murder, whether they are terrorist or domestic murders, kill from an evil and wicked motive. But when Private Clegg set out on patrol on the night of 30 September 1990 he did so to assist in the maintenance of law and order and we have no doubt that as he commenced the patrol he had no intention of unlawfully killing or wounding anyone. However, he was suddenly faced with a car driving through an army checkpoint and, being armed with a high-velocity rifle to enable him to

> combat the threat of terrorism, he decided to fire the fourth shot from his rifle. In circumstances which cannot be justified and the firing of his fourth shot was found to be unlawful.
>
> It is right that Private Clegg should be convicted in respect of the unlawful killing of Karen Reilly and that he should receive a just punishment for committing that offence which ended a young life and caused great sorrow to her parents and relatives and friends.
>
> But this court considers, and we believe, that many other fair-minded citizens would share this view, that the law would be much fairer if it had been open to the trial judge, to have convicted Private Clegg of the lesser crime of manslaughter on the ground that he did not kill Karen Reilly from an evil motive but because, his duties as a soldier having placed him on the Glen Road armed with a high velocity rifle, he reacted wrongly to a situation which suddenly confronted him in the course of his duties. Whilst it is right that he should be convicted for the unlawful killing of Karen Reilly, we consider that a law which would permit a conviction for manslaughter would reflect more clearly the nature of the offence which he had committed".

In the light of that observation the Court of Appeal concluded that Parliament should consider making a change in the existing law.

[21] In the House of Lords [1995] 1 AC at 497 Lord Lloyd of Berwick having cited this passage, referred to the special position of a soldier in Northern Ireland as reflected in Lord Diplock's speech in *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 104 at pp 136-137:

> "There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a

> description is in my view misleading in the circumstances in which the Army is currently employed in aid of the civil power in Northern Ireland…. In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under the military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death".

Lord Lloyd proceeded:

> "I would particularly emphasise the last sentence in the above quotation. In most cases of a person acting in self-defence, or a police officer arresting an offender, three is a choice as to the degree of force to be used, even if it is a choice which has to be exercised on the spur of the moment, without time for measured reflection. But in the case of a soldier in Northern Ireland, in the circumstances in which Private Clegg found himself, there is no scope for graduated force. The only choice lay between firing a high-velocity rifle which, if aimed accurately, was almost certain to kill or injure, and doing nothing at all".

[22] Having asked the question: should the law be changed, and having set out passages from the 14th Report of the Criminal Law Revision Committee, paragraph 59 of the Law Commission's draft criminal code (1989) and the House of Lords Report of the Select Committee on Murder and Life Imprisonment (Session 1988-89) he concluded: "The reduction of what would otherwise be murder to manslaughter in a particular class of case

seems to me essentially a matter for decision by the legislature, and not by this House in its judicial capacity. For the point in issue is, in truth, part of the wider issue whether the mandatory life sentence for murder should still be maintained". (I should add that on a reference by the Criminal Cases Review Commission Clegg's conviction was quashed by the Court of Appeal in Northern Ireland.)

[23] In *R v Lichnick* (2002) UKHL 47 Lord Bingham said:

> "The sentence of life imprisonment is now the most severe penalty for which the law provides. There is ground for concern if the sentence is imposed on those who, despite the seriousness of their crimes, could be adequately punished by a determinate sentence. Indeed any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases".

[24] But the guardsmen were found guilty of murder and the trial judge made findings 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; see paragraph 19 of the decision of the Board and see the further findings of fact of the trial judge.

Accordingly they were sentenced to imprisonment for life as required by law. They were released after serving six years' imprisonment.

[25] In the case of the guardsmen it is my view that the Court is entitled to assume that the trial judge would have set a tariff of six years' imprisonment, if tried under the present

legislation and the guardsmen would have been released on licence for life, liable to be re-called for breach of the licence at any time or, if the law had been amended so as to allow for a charge of manslaughter or culpable homicide, the guardsmen would have been sentenced to twelve years' imprisonment and released after six years for good behaviour, on licence to be re-called until June 2004. They had been in custody since June 1992, were released in June 1998.

[26] In *R v Lichnick* at p 1128 c Lord Bingham said:

> "It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society's view of a crime which has been regarded with peculiar abhorrence"

At p 1128 d he said:

> "The mandatory life sentence is imposed only on those who have been proved to have taken a life or lives, as adults, with the intention of doing so or of causing serious physical injury and whose responsibility for their conduct was not found to be diminished. While, therefore, there will be those (of whom those who kill as an act of mercy, or battered wives, or those who overreact to a perceived threat my provide the best examples) who may reasonably be judged very unlikely to resort to violence again, the discussion inevitably takes place with reference to a person who is shown to have resorted to violence once, with fatal consequences to another …."

[27] In this case the Trial Judge Kelly LJ., found that the guardsmen did not overreact to a perceived threat.

[28] Kerr J held at page 19 of his judgment that there were only eight cases of true retention between 1997 and 2000 under Regulation 9.404, none of which involved a serious offence and for none of which a prison sentence longer than nine months was imposed although there was a case of a longer suspended sentence.

[29] There are two cases before 1997 which I must mention. Rifleman Thain and Private Clegg were convicted of murder in Northern Ireland and sentenced to life imprisonment. Army Boards decided that they should be retained in the Army. The decisions were not challenged by way of judicial review. They caused public outcry in Northern Ireland at the time. It may be argued that they were examples of excessive force used in face of a perceived threat: see the decision in *Clegg's* case to which I have referred earlier. This Army Board did not rely on either decision in reaching their decision in this case, nor were they relied on by the respondents. Accordingly I do not propose to discuss them further. I consider that Kerr J. was not entitled to take them into account: see p.46 of his judgment.

[30] I now propose to consider the meaning of "exceptional reasons" under paragraph 9.404d. Under the Powers of the Criminal Courts (Sentencing) Act 2000, S.109 applies to a person convicted of a serious offence when at the time that offence was committed he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence and it requires the court to impose a life sentence unless the court is of opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.

[31] In *R v Kelly* (1999) 2Cr.App.R(S)176 the then Lord Chief Justice, 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 unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered".

This was approved after the coming into force of the Human Rights Act 1998 by Lord Wolff C J in *R v Offen and other cases* (2001) 2Cr. App.R(S)565.

[32] Accordingly I am of the opinion that 'exceptional reasons' in the Queen's Regulations can apply to the offence or the offender and describe reasons which are exceptional, special, out of the ordinary course, unusual or uncommon. They do not have to be unique, unprecedented or very rare.

[33] I apply Lord Bingham's test to the reasons relied on by the Army Board as rendering it desirable to retain the guardsmen in the Army, notwithstanding that they had been sentenced to life imprisonment for murder in the circumstances described by the trial judge.

[34] My conclusions are as follows:

Paragraph 18 of the Findings of the Board

Reason (a) The "youth and relative inexperience" of the guardsmen on 4 September 1992 were not exceptional reasons. Fisher was 24 and Wright was 19. That is to say, they were both over 18. They were in the same age bracket as other guardsmen in their battalion. The amount of experience of operating in Northern Ireland - that is to say, 4 months - was not other than regularly, routinely and normally encountered. No reasonable Board could have decided that these facts were "exceptional", taking the public interest into account, including the interests of the Army from an objective perspective. I do not accept that "the view … that they were not fully mature men" could amount to an exceptional reason, as Kerr J held.

Reason (b) The tenseness of the security situation in the New Lodge area was a mitigating factor which would have been taken into account in fixing the 'tariff' if the present legislation had been in force but would not and could not have made it desirable to retain them in the Army, having regard to the fact that the circumstances which faced them on 4th September, as found by the trial judge, were not exceptional, out of the ordinary course or unusual or uncommon or

special. A young man who posed no threat to the guardsmen was running away and was "disobeying" a command to stop, after he had given his name and address to L/Sgt Swift and had been searched by him in their sight. He had no coffee-jar bomb and could not have been thought to have a coffee-jar bomb. They had heard L/Sgt Swift say 'grab him' but they had not taken from his order that they should stop McBride by shooting, if they could not grab him. This was not a case of 'excessive force': no force at all was required of them.

That there was no evidence of individual or collective premeditation to commit the offence of firing at an unarmed civilian was a mitigating factor but not exceptional, special, out of the ordinary course, unusual or uncommon. No reasonable Board, taking the public interest into account could correctly have reached the conclusion that it was desirable to retain them on this ground.

Reason (c) Whilst training could not prepare an individual for every eventuality, the event, namely the running away of an unarmed civilian who was not a suspected terrorist, required no special training and the Army was not to blame in any way for what occurred.

Reason (d) Guardsman Wright expressed genuine concern for Mr McBride and his children, having recently married and had a child, but he showed no remorse and would have done what he did if the same circumstances occurred again in Northern Ireland. His concern was not exceptional, special, out of the ordinary course, unusual or uncommon. Guardsman Fisher's expression of regret in 1995 was based on an "error of judgment". He has sought to justify what he did. Again this 'regret' was no exceptional reason, applying the relevant test.

Reason (e) Neither guardsman had any previous criminal record and this was a mitigating factor if a tariff had to be fixed. But it could not, I hope and believe, be said to be unusual or uncommon amongst a battalion of the Scots Guards. The guardsmen's' conduct in prison (or military custody) was irrelevant. It shortened their period of imprisonment but was not a mitigating factor, let alone a factor rendering it desirable to retain them in the Army.

Reason (f) It should have been apparent to the Board, if they followed the reasoning which they should have followed as a result of the findings of the Trial Judge, that if the guardsmen were faced with the same set of circumstances today, they would act as they did in 1992. Accordingly I cannot understand how this reason could be relied on.

Reason (g) The loyalty of the guardsmen to the Army until their release was understandable but no more than to be expected. Many senior army generals and others had taken up their cause, based on a misreading of the decision of the trial judge or a refusal to accept it. The Army was largely at fault for the situation in which the guardsmen presently find themselves, since in my view a decision should have been speedily taken to discharge them from the Army after the Court of Appeal had dismissed their appeal in December 1995 and before they came out of prison. However I am not prepared to say that an Army Board could not hold reason (g) to be an exceptional reason as at June 2003.

[35] The guardsmen have been Notice Parties to these proceedings and I assume that if there were any reasons which they wished to advance, they would have done so.

Decision and Relief

[36] I have decided that none of the factors at (a) to (f) which the Army Board took into account could be an "exceptional reason" but that reason (g) could be regarded as an exceptional reason making it desirable to retain the guardsmen in the Army. A mandatory order would not be appropriate.

[37] I am prepared to agree to the making of a declaratory order and allow the Army to take such course as it sees fit, having regard to the reasons of the majority of the Court for rejecting the decision of the Army Board. Accordingly, I agree to a Declaratory Order 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.

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