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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BW FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of decisions of the General Officer Commanding in Northern Ireland and the Ministry of Defence discharging the applicant from the Army on grounds of security.

The background

[2] At the time of discharge in May 2002 the applicant was a full Colour Sergeant in the Royal Irish Regiment. He had served in the Army for a total period of 17 years. His most recent confidential report in November 1999 had indicated that there were no special factors which would restrict his next posting and that he was considered to be very good in almost all areas and was recommended for promotion. Towards the end of 2001 the applicant lodged a personal voluntarily release request with his commanding officer. The response was that repeated requests were made for the applicant to reconsider his request and eventually the request was withdrawn by the applicant.

[3] On 28 February 2002 the applicant attended the offices of his commanding officer Lieutenant Colonel Callow. The applicant was informed that an application for his discharge was being sought by Lt. Col. Callow on security grounds. He was not given any information about the nature of the security grounds. The applicant submitted a statement to be considered with the application to discharge. On 4 May 2002 the applicant received notice that

he would be discharged on the ground that his services were no longer required. Formal discharge was effected by the Ministry of Defence on 17 May 2002.

[4] In January 2002 the GOC was briefed by another soldier about security concerns relating to the applicant based on intelligence received from the police. On 6 February 2002 a police officer produced to the GOC the intelligence relating to the applicant. The GOC satisfied himself as to the intelligence information and concluded that the actions of the applicant as depicted in the information were not compatible with continued service in HM Forces on ground of security. The GOC arranged for the applicant's commanding officer to be made aware of the circumstances so that he could take appropriate action, that is, that the commanding officer would apply for the discharge of the applicant.

[5] Lt Col Callow, the applicant's commanding officer, received the information concerning the applicant on 26 February 2002. He conducted the interview with the applicant on 28 February 2002 as described above.

[6] Brigadier Keenan was Lieutenant Colonel Callow's superior officer. On 26 February 2002 Brigadier Keenan received information concerning the applicant and was later informed of the application for the applicant's discharge on security grounds. On 21 March 2002 Brigadier Keenan received from Lt Col Callow the application for discharge in respect of the applicant. He endorsed the application, having formed the view that the applicant's continued service was untenable on security grounds.

[7] On 4 April 2002 the GOC received the application for the applicant's discharge. It was described as an "Application for the compulsory premature discharge of a soldier". Discharge was sought under the terms of Queen's Regulation 75, paragraph 9.414. The applicant's statement was included in the application form, although of course he was unable to address the issue of the security risk as no details had been disclosed to him. The application had been made Lt Col Callow and endorsed by Brigadier Keenan and authority for discharge was then signed by the GOC.

The applicant's grounds

[8] The applicant's grounds for judicial review are –

(i) A challenge to the jurisdiction of the GOC to authorise the discharge of the applicant.

(ii) Procedural unfairness arising, first from the inability to make informed representations by reason of the non-disclosure of the security grounds, and secondly from apparent bias by the GOC in

being involved when the applicant was reported to the Army and then later in the authority to discharge.

(iii) Breach of the Human Rights Act by reference to Articles 2, 6 and 8 and Article 1 of Protocol 1 of the European Convention. .

The legislation

[9] The issue of the jurisdiction of the GOC to authorise the discharge of the applicant requires consideration of the statutory framework. The Army Act 1955 section 11 provides for the discharge of every soldier of the regular forces. Section 11(3) provides that:

> "A soldier of the regular forces shall not be discharged unless his discharge has been authorised by order of the competent military authority or by authority direct from Her Majesty; and in any case the discharge of a soldier of the regular forces shall be carried out in accordance with Queen's Regulations."

For present purposes it is necessary to consider first of all the identity of the competent military authority to authorise the discharge of the applicant and secondly the requirements of the Queen's Regulations as to the discharge. The applicant contends that the GOC was not entitled to authorise the discharge of the applicant so that section 11(3) of the 1955 Act was not satisfied as there had not been a discharge authorised by a competent military authority nor carried out in accordance with Queen's Regulations.

The competent military authority

[10] "Competent Military Authority" is defined in Section 23(1) of the 1955 Act as meaning "The Defence Council or any prescribed officer". The Defence Council was established in pursuance of the Defence (Transfer of Functions) Act 1964. "Prescribed" means prescribed by regulations made under Part I of the 1955 Act. Section 22 (in Part I) provides for regulations to be made by the Defence Council. The Defence Council, in exercise of the powers conferred by Part I of the 1955 Act, made the Army Act 1955 (Part I) (Regular Army) (Regulations) 1992. Regulation 3 of the 1992 Regulations provided that in pursuance of Section 11(3) of the 1955 Act and in addition to the Defence Council and the Army Board, the competent military authorities for the purposes of giving an order authorising the discharge of a soldier of the regular forces were (a) the Director of Manning (Army), whatever may be the reason for the soldier's discharge, and (b) in relation to discharge for a reason specified in column 1 of Schedule 1 of the Regulations, the officer

specified in column 2 of Schedule 1 in relation to that reason, and any superior officer.

[11] The relevant entry in Schedule 1 for present purposes was Item 16, which applied to the discharge of a soldier no longer required for Army service for any reason not otherwise specified. The original version of Item 16 specified the competent military authority as being the Director of Manning (Army), except where delegated to brigade commander or officer in charge of records or commanding officer.

[12] Item 16 was amended by the Army Act (1955) (Part I) (Regular Army) (Amendment) Regulations 1995 made on 17 July 1995, which substituted a new Item 16 in the 1992 Regulations to specify the competent military authority to authorise discharge as being "Director of Manning (Army) except where delegated to brigade or garrison commander or officer in charge of records or commanding officer."

[13] Item 16 was further amended by the Army Act 1955 (Part I) (Regular Army) (Amendment) Regulations 2000 which came into force on 1 February 2000 and added the GOC to the competent military authority to authorise discharge under the 1992 Regulations so as to provide "Director of Manning (Army) except where delegated to GOC or brigade or garrison commander or officer in charge of records or commanding officer."

[14] By notice dated 10 April 2000 issued by the Director of Manning (Army) under the 1992 Regulations it was provided:

> "In exercise of the authority conferred on my by Item 16, column 2, Part II, Schedule 1 to the Army Act 1955 (Part I) (Regular Army) Regulations 1992 as amended by the Army Act 1955 (Part I) (Regular Army) (Amendment) Regulations 2000, I hereby delegate to the officer for the time being holding the appointment of general officer commanding Northern Ireland the authority to act as a competent military authority for the purposes of the said Item 16, save however that this delegation is limited to cases where the reason for discharge involves security issues and does not extend to any member of the staff of the said general officer commanding."

[15] To the extent that Section 11(3) of the 1955 Act provides that a soldier with the regular forces shall not be discharged unless his discharge has been authorised by order of the competent military authority, the GOC is a competent military authority for the purpose of discharging the applicant, further to the notice of delegation dated 10 April 2000 by the Director of

Manning (Army) under the 1992 Regulations as amended by the 2000 Regulations, and the decision in relation to the applicant involves "security issues" as required by the notice of delegation. Accordingly I reject the applicant's contention that the GOC was not a competent military authority to authorise the discharge of the applicant under section 11(3) of the 1955 Act.

Queen's Regulations

[16] Further it is necessary to determine for the purposes of Section 11(3) of the 1955 Act that the discharge of the applicant has been carried out in accordance with Queen's Regulations. Section 225(1) of the 1955 Act provides that "Queen's Regulations" means the Queen's Regulations for the Army. Queen's Regulations for the Army do not constitute statutory instruments but are made by HM The Queen. Termination of service is provided for under Part VI of Queen's Regulations. Queen's Regulation 9.290 provides that there are two stages in the procedure for a soldier's discharge, namely authorisation, being the giving of authority for the discharge to be carried out, and execution, being the fixing of the date and effecting the discharge.

[17] Queen's Regulation 9.414 deals with discharge where "service no longer required". Prior to amendment in August 2003 it provided that the competent military authority to authorise discharge was the Director of Manning (Army). It was then stated that "The Army Act 1955 (Part I) (Amendment) (Regular Army) Regulations 1995, Schedule A, Part II Item 16 governs this authority, which derives from Section 11 of the Army Act 1955."

[18] It will be noted that prior to August 2003, being the period during which the applicant was discharged, Queen's Regulation 9.414 was not amended to reflect the changes made by the 2002 Regulations, and in any event was in error in referring to the 1995 Regulations rather then the 1992 Regulations as amended.

[19] By an amendment to Queen's Regulations made in August 2003 Queen's Regulation 9.414 provided that the military authority to authorise discharge is the Director of Manning (Army) or the General Officer Commanding Northern Ireland in specific cases delegated to him by the Director of Manning (Army). Queen's Regulation 9.414 retained the words quoted above referring to the 1995 Regulations. Accordingly, since August 2003 Queen's Regulation 9.414 has introduced reference to the GOC but has continued to refer to the 1995 Regulations rather than the 1992 Regulations as amended.

[20] The applicants discharge was authorised by the GOC in 2002, which was after the 2000 amendment of the 1992 Regulations added the reference to the GOC, but before the equivalent amendment of Queen's Regulations in

2003. The applicant contends that the applicant's discharge was not carried out in accordance with Queen's Regulations as prior to August 2003 the General Officer Commanding Northern Ireland was not a competent military authority to authorise discharge, as he was not identified as having that authority in Queen's Regulations. Further, the addition of the GOC as a competent military authority in August 2003, after his addition under the 2000 Regulations, confirms, says the applicant, that the amendment of the Queen's Regulations was considered necessary to establish the legal authority of the GOC. Accordingly, argues the applicant, the GOC was not a competent military authority until the necessary amendment was made to Queen's Regulations. In any event it is contended that the purported amendment of Queen's Regulations in August 2003 was ineffective, as it contained no reference to the GOC having delegated authority under the 2000 Regulations.

[21] The introduction to the Queen's Regulations provides that "They are to be interpreted reasonably and intelligently, with due regard to the interests of the service, bearing in mind that no attempt is to be made to provide for necessary and self-evidence exceptions." They are not statutory instruments. The meaning of competent military authority is determined under the 1955 Act and 1992 Regulations as amended. The GOC does not cease to be a competent military authority under the 1955 Act and the 1992 Regulations as amended by reason of his omission from Queen's Regulation 9.414 prior to August 2003. The 2000 Regulations authorising delegations to the GOC did not cease to apply by reason of their omission from Queen's Regulation 9.414. In this respect I find that the Queen's Regulations contain a restatement of the statutory provisions in relation to authorisation for discharge. That the restatement may be inaccurate does not invalidate the statutory provisions, nor do the Queen's Regulations thereby provide some alternative requirement for authorisation of discharge. There is no contention that the discharge was otherwise not in accordance with Queen's Regulations. I find that the discharge of the applicant by the authority of the GOC does not offend the requirement of Section 11(3) of the 1955 Act that the discharge be carried out in accordance with Queen's Regulations.

[22] Accordingly I reject the applicant's first ground, as the discharge of the applicant on the authority of the GOC was in accordance with the statutory requirements under section 11(3) of the 1955 Act.

The Army Board

[23] Before considering the applicant's other grounds it is necessary to examine the steps that were available to the applicant in response to the decision to discharge. Section 180 of the 1955 Act provides for redress of complaints in accordance with the procedure laid down in Queen's Regulations. Queen's Regulation J 5.204 provides for complaints in writing within three months to the complainant's commanding officer or to the next

level in the chain of command of any person implicated in the subject matter of the complaint. The complaint may be referred to the Defence Council with the approval of the complainant and any such complaint will be determined by the Army Board. Before a complaint is referred to the Army Board a copy of any submission to the Board must be given to the complainant; the complainant must be allowed to see all documents attached to the submission other than those whose disclosure would cause serious harm to the public interest; the complainant may comment on the submission in writing; the Army Board will decide whether it is necessary to hold an oral hearing; at an oral hearing the Army Board and the complainant will have the opportunity to question witnesses; the complainant may at the discretion of the Army Board be accompanied by a legal or other advisor at any oral hearing.

[24] By letter dated 2 August 2002 the applicant's solicitors made a statement of complaint under Section 180(9) of the 1955 Act. The applicant's solicitor stated that an application was being made for leave to apply for Judicial Review in respect of the applicant's discharge and proposed that the complaint should be adjourned pending the outcome of the Judicial Review proceedings. The applicant's complaint was adjourned and remains extant.

[25] The decisions of the Army Board are subject to Judicial Review. In R v Army Board of the Defence Council ex parte Anderson (1992) 1 QB 169 the applicant succeeded on an application for judicial review because of procedural improprieties in the decision-making process adopted by the Army Board. The complaint involved matters arising under the Race Relations Act 1976. Taylor LJ stated that the Army Board, as the forum of last resort dealing with an individual's fundamental statutory rights, must by its procedures achieve a high standard of fairness. He considered what the Army Board was obliged to disclose to a complainant to obtain his response. He considered whether it was sufficient to indicate the gist of any material adverse to the case or whether a complainant should be shown all the material seen by the Board. At page 189B he concluded that because of the nature of the Army Board's functions pursuant to the Race Relations Act 1976 a soldier complaining under that Act –

> "….should be shown all the material seen by the Board, apart from any documents for which public interest immunity can properly be claimed. The Board is not simply making an administrative decision requiring it to consult interested parties and hear their representations. It is a duty to adjudicate on a specific complaint of a breach of a statutory right. Except where public interest immunity is established, I see no reason why on such an adjudication the Board

should consider material withheld from the complainant".

That the Army Board is subject to Judicial Review is further illustrated by the decision of the Court of Appeal in McBride's Application (No. 2) (2003) NICA 23.

[26] The Queen's Regulations for the Army provide that the Government in command of each of the fighting services is vested in Her Majesty The Queen who has charged the Secretary of State with general responsibility for the Defence of Realm and established the Defence Council having command administration over her Armed Forces. By the Letters Patent of the Defence Council the Council are directed to set up an Army Board. The directions of the Defence Council as to the Army Board are contained in the Army Board Directions 2000. The Army Board consists of the holders for the time being of specified offices including the Secretary of State for Defence, the Minister of State for the Armed Forces, the Minister of State for Defence Procurement and other Parliamentary offices as well as military offices. The Secretary of State for Defence is Chairman of the Army Board.

[27] Accordingly the decision of the GOC to authorise the discharge of the applicant is subject to reconsideration by an Army Board that does not comprise personnel in the chain of command, and in turn that decision is subject to Judicial Review. The Army Board presents as an independent tribunal to consider the applicant's discharge; it has power to receive the information on the basis of which the applicant was discharged; it has power to disclose information to the applicant subject to public interest; it is the master of its own procedure but is obliged to conduct its proceedings in a fair manner. While there will be public interest considerations in the extent of disclosure that might be made to the applicant, there exists the opportunity to undertake an examination of the circumstances of the applicant's discharge. Brigadier Vowles of the Army Legal Services Branch confirms that the Army Board has dealt with 40 complaints against discharge since 2000. In September 2001 it dealt with a discharge on security grounds and upheld the complaint on the grounds that there was inadequate evidence to justify the discharge and that there were procedural irregularities. So the Army Board may overturn a decision to discharge on consideration of the substance of the security ground for discharge as well as the procedures adopted in the discharge process. The applicant has not completed the complaint to the Army Board to determine the extent to which his complaints about the discharge might be addressed by the Army Board.

[28] The remaining grounds have to be considered in the light of the outstanding remedy available to the applicant before the Army Board, and by way of Judicial Review of the decision of the Army Board.

Procedural unfairness

[29] The first aspect of procedural fairness relied on by the applicant is the requirement that he should have the right to know and to respond to the case against him. A central feature of the applicant's grounds has been the absence of any mechanism whereby examination of the information on the basis of which the applicant was discharged might be examined by or on behalf of the applicant or by a third party independent of the competent military authority authorising his discharge. The applicant contends that the procedures adopted were unfair in that he was unable to make informed representations because of the non-disclosure of the intelligence information. In particular Queen's Regulation 9.414C(3) provides that if a solider has not previously been subject to any formal warning he should be allowed to make representations against the application to discharge. In the present case the applicant was invited to make representations and he did so and they were included in the papers before the decision maker on the application for authority to discharge. However the applicant objects that the representations were not "informed" because of the absence of disclosure of the intelligence information. Similarly the applicant makes the general point that even without Queen's Regulation 9.414C(3) the applicant should have been entitled to make informed representations.

[30] The applicant is entitled to have his discharge considered by the Army Board. As procedures before the Army Board have not been examined it is not possible to determine the extent to which there may be disclosure of information to the applicant so as to enable him to make informed representations and otherwise to achieve overall fairness. There is a remedy available to the applicant that has the capacity to address the procedural matters of which he complains. For this reason I propose to make no order on this aspect of procedural fairness.

[31] However the applicant contends that one method of achieving fairness would be to introduce special advocate procedures whereby the intelligence information affecting the applicant would be disclosed to a special advocate but not to the applicant. Reference was made to the statutory examples of special advocate procedures under Section 91 of the Northern Ireland Act 1998 (appeals against certificates by the Secretary of State in discrimination claims to Tribunals established under the Act); Section 42 of the Fair Employment (Northern Ireland) Act 1976 (in Fair Employment Tribunals); section 5 of the Terrorism Act 2000 (the Proscribed Organisations Appeals Commission); schedule 2 of the Northern Ireland (Sentences) Act 1998 (the Sentence Commissioners); schedule 2 of the Life Sentences (Northern Ireland) Order 2001 (the Life Sentence Review Commissioners); Section 6 of the Special Immigration Appeals Commission Act 1997 (the Special Immigration Appeals Commission). All these examples are statutory schemes. Were the Court to find in a particular instance that the procedures adopted by a

decision making authority were not fair procedures it would be for that decision making authority and not the Court to devise fair procedures. Special advocate procedures may be a method of achieving fairness in the circumstances of a particular case if adopted by the decision-making authority. The means by which the Army Board seeks to achieve fairness when hearing a complaint from a soldier discharged on security grounds is a matter to be determined by the Army Board and will not be the subject of prior direction by the Court.

Apparent bias

[32] The applicant relies on the appearance of bias in the decision-making as a second aspect of procedural fairness. This apparent bias is said to arise because the GOC initiated the application to discharge the applicant and then authorised the discharge. As appears from the affidavit of the GOC he received a police briefing on 6 February 2002. As a result the GOC states –
"I had no doubt in my mind that the applicant's actions depicted in the information were not compatible with continued service in Her Majesty's Forces on grounds of security. I confirmed with my staff that the applicant's commanding officer would be made aware of the relevant facts so that he could take appropriate action."
This led to the applicant's commanding officer making the application to discharge the applicant.

[33] On 4 April 2002 the GOC received the application from the applicant's commanding officer for the discharge of the applicant on security grounds. The applicant's statement was included in the application. The GOC authorised the applicant's discharge. While the GOC considered the applicant's representations contained in his statement it must be the case that those representations were as nought because the GOC had concluded in February 2002 that in effect the applicant should be discharged.

[34] The test to be applied in relation to the alleged appearance of bias has been redefined by Lord Bingham in Porter v Magill (2002) 1 All ER 465 at paragraph 102 and 103. The Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision maker was biased. This is not a claim of actual bias but of apparent bias, which arises where there is the appearance of partiality, based on an objective assessment of the circumstances. It is an application of the maxim that justice must be seen to be done.

[35] There is the appearance of partiality when the decision maker has initiated the internal complaint and has then made the decision. In addition the GOC appears to have determined the outcome when initiating the

procedure. It is not contended by the respondent that there must be an indivisible authority in the present case in the sense that the person receiving the police information and initiating action must be the person who authorises the discharge. In the light of the Regulations outlined above it could not have been so contended.

[36] If the GOC is to be the competent military authority for the purpose of discharges involving security issues then on an objective assessment there is the appearance of bias if he has been the officer who received the prior briefing on the security issue that led to the initiation of the application for discharge of the soldier. If the GOC must initiate the discharge process, or be involved in the initial assessment of police reports, then on an objective assessment there is the appearance of bias if he were also the competent military authority for the purposes of authorising the decision to discharge.

[37] In the light of the finding of the appearance of bias there are grounds to quash the decision of the GOC. Judicial Review remedies are discretionary. As I have determined that the first aspect of procedural fairness should not be examined in view of the outstanding appeal to the Army Board, and as the general issue of the applicant's discharge can be subject to consideration by the Army Board and its decision may be subject to Judicial Review, I would exercise my discretion not to quash the decision of the GOC.

European Convention

[38] The applicant contends there have been breaches of the European Convention on Human Rights under Article 8 in relation to the applicant's home, private and family life and Article 1 of the First Protocol in relation to interference with pension rights. In each instance the applicant contends that the decision to discharge represents an interference with the particular right and a disproportionate response. Further and in the alternative the applicant contends that the decision to discharge was Wednesbury unreasonable. In addition the applicant contends that there has been a breach of Article 6 in relation to the right to a fair hearing.

[39] The respondent contests the applicant's contentions on the ground that discharge from military service does not engage any of the Convention rights. Assuming, without deciding, that the Articles are engaged, it is implicit in the applicant's argument that removal of security risks in relation to those engaged in military service represents a legitimate aim and the issue becomes one of proportionate means of achieving the legitimate aim. The applicant contends that the respondent has not discharged the burden of justifying the applicant's discharge. Consideration of these issues and the application of Article 6 and Wednesbury unreasonableness all include review of the extent of disclosure that might be made to the applicant of the information relied on and the opportunities available to make representations.

[40] I propose to make no order in relation to the above grounds for the same reasons as applied in relation to procedural fairness, namely that there is a procedure available to the applicant through the Army Board that has the capacity to address the applicant's concerns. That decision will be subject to Judicial Review and should that prove necessary the issues can be considered in the light of the approach adopted by the Army Board.

[41] Further the applicant relies on Article 2 in relation to the right to life arising from the alleged leaking of information about the reason for the applicant's discharge. The applicant refers to rumours circulating about his discharge on security grounds. The risks that are claimed to have arisen are also said to represent a breach of the applicant's right to respect for home and family life under Article 8 by reason of their impact on his family. It has not been established that there has been leaking of information or that the respondent can be held responsible for any alleged leaking or rumours or that they have resulted in any threat to the life of the applicant or that any threat is sufficient to engage Article 2. Nor has it been demonstrated that there has been any lack of respect for the applicant's home or family life. I reject the applicant's claims in this regard.

[42] By reason of the matters set out above I dismiss the application for Judicial Review.