Neutral Citation no. [2005] NIQB 54 | *Ref:* **WEIC5345**

Judgment: approved by the Court for handing down | *Delivered:* 29.06.05
(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 JEAN McBRIDE FOR JUDICIAL REVIEW

WEIR J

The Background

[1] Mr Treacy QC and Ms Doherty apply for judicial review on behalf of the applicant, Mrs McBride. The application is resisted by Mr Burnett QC and Mr Maguire on behalf of the respondent, the Minister of State for the Armed Forces ("the Minister"). Mrs McBride is the mother of Peter McBride who was shot dead by two serving soldiers, Guardsmen Wright and Fisher, ("the Guardsmen") on 4 September 1992. Those soldiers were subsequently convicted of his murder. Subsequent to their early release from prison on 1 September 1998 the Army Board decided that they should be retained in the Army. That decision was subsequently the subject of a successful challenge before Kerr J (as he then was) ("*McBride No.1*") as the result of which he quashed the decision of that Army Board. A differently constituted Army Board subsequently considered the matter afresh and on 21 November 2000 decided that the seven factors which it listed, taken together, constituted "exceptional reasons" justifying the retention of the Guardsmen in the Army ("the second decision")

[2] The second decision was in turn the subject of a challenge ("*McBride No.2*") which was unsuccessful before Kerr J at first instance. On appeal, the Court of Appeal decided, by a majority, to order 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 [sic] do not amount to exceptional reasons."

However, the Court of Appeal declined to grant a mandatory order either of certiorari or mandamus such as would have compelled the Army to again review its decision to retain the Guardsmen in service.

The reasoning of the Court of Appeal on the withholding of a mandatory order

[3] Much of the argument on behalf of Mrs McBride in the present application turned upon what it was submitted the Army should have felt constrained to do having considered the judgments of the majority. It is therefore useful to set out in full what was said by them in relation to this aspect. In the judgment of Nicholson LJ the following appears:

> "[34] My conclusions are as follows:
>
> **Paragraph 18 of the Findings of the Board**
>
> [Reasons (a) to (f) were discussed by the Lord Justice and each rejected in turn].
>
> 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.
>
> **<u>Decision and Relief</u>**
>
> [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." (emphasis supplied)

McCollum LJ framed his reasoning on the appropriate relief thus:

"[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**. (emphasis supplied)
>
> [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[sic] do not amount to exceptional reasons'."

Correspondence following the decision of the Court of Appeal

[4] Consequent to the decision of the Court of Appeal there followed correspondence by various interested parties and by solicitors on behalf of Mrs McBride in which it was sought to persuade the Army to again review the employment status of the Guardsmen. By letter of 10 September 2003, the Minister wrote to Mrs McBride's solicitors in the following terms:

> "Thank you for your letter of 4 September, which crosses with correspondence I have received from Paul O'Connor of the Pat Finucane Centre. He too has been writing on behalf of Mrs McBride.
>
> I indicated in my letter to Paul O'Connor of 7 August that the Army Board had no plans to review the employment status of the Guardsmen. That remains the position.
>
> Paul O'Connor recognised in his letter to me of 27 August that the Court of Appeal did not order a review of their employment status. That, with respect, is an accurate reading of the judgements. You are correct in stating that the Court made a declaration in the terms you identify, but it

> carefully considered whether any mandatory or quashing order should be made. Mrs McBride sought an order of mandamus requiring the Army Board to dismiss the Guardsmen, alternatively an order of certiorari quashing the decision with a direction for the matter to be reconsidered. For the reasons given by the court, it declined to grant Mrs McBride that relief.
>
> It is in those circumstances that the Army Board has no plans to revisit the question of the employment of the Guardsmen."

[5] Further letters in terms consistent with the Minister's letter were also written by the Prime Minister to Mr Mark Durcan MP on 22 October 2003 and by the Minister to Mr Durcan, Mr Gerry Kelly MLA and Mr Paul O'Connor on 7 August 2003. The Under Secretary of State for Defence, Ivor Caplin MP, wrote to Mr Gerry Kelly MLA on 30 October 2003, again to similar effect. It appears from the affidavit of Mr Peter Davis, a civil servant employed by the Ministry of Defence, sworn on 13 April 2004 that he was involved in the preparation of at least some of the ministerial responses mentioned in this paragraph and that the draft correspondence provided to the Prime Minister and Mr Caplin included an annex containing what he describes as "relevant provisions of the Judgments delivered by Lord Justices Nicholson and McCollum". That annex broadly includes the extracts that I have myself identified as the relevant passages from those judgments bearing directly on the choice between coercive as opposed to declaratory relief. However it does not include anything of the reasons of the majority of the Court of Appeal for rejecting the second decision.

[6] Both impugned decisions to retain the Guardsmen in the Army were purportedly made under Regulation 9.404.d. of Queen's Regulations ("the regulation"). The full text of the regulation appears at page 4 of the judgment of Nicholson LJ on the appeal in *McBride (No.2)* and need not be repeated here. The core of the regulation is that where a soldier has been sentenced to imprisonment he or she is to be discharged from the Army unless there are "exceptional reasons that make retention of the soldier desirable".

[7] In her present Order 53 statement as amended the applicant seeks the following relief:

(a) An order of mandamus to compel the Minister to order the dismissal of the Guardsmen from the Army.

(b) Further and in the alternative an order of mandamus to compel the Minister to review their employment status.

(c) Further and in the alternative an order of certiorari quashing the decision of the Minister refusing to discharge the Guardsmen from the Army.

(d) Further and in the alternative an order of certiorari quashing the decision of the Minister refusing to review the Guardsmens' employment status.

(e) Such further and other relief as the court may deem appropriate.

[8] The grounds upon which the relief is sought are, in summary:

(a) The declaration made by the Court of Appeal in *Re McBride (No 2)* "that taken together the reasons expressed by the Army Board for the retention in Army service of the Guardsmen in its determination of 21 November 2001 do not amount to exceptional reasons".

(b) The requirement of the Queen's Regulation earlier referred to.

(c) That since the effect of the declaration made by the Court of Appeal in *Re McBride (No2)* is that exceptional reasons did not exist for the decision of 21 November 2000 there is no longer any justification for the retention of the Guardsmen in the Army which must act either to discharge the soldiers or to review their employment status.

(d) There no longer exist legally valid "exceptional reasons" that would "make retention of the soldier[s] desirable".

(e) In these circumstances QR 9.404(d) requires that they be discharged from the Army.

(f) The Minister erred in law in considering that the decision of the Court of Appeal did not require the Army to act to discharge the soldiers or review their employment.

(g) The Minister was wrong to refuse to review the soldiers' employment in the light of the decision of the Court of Appeal.

(h) The Minister's decision was unfair, unreasonable and unlawful.

(i) In reaching his decision the Minister erred in considering only the reasons given by the Court of Appeal for declining the grant of coercive relief and failed to have "regard to the reasons of the majority of the Court for rejecting the decision of the Army Board."

Summary of the submissions on behalf of the applicant

[9] (1) A soldier who has been convicted by a civil court cannot be retained in the Army and must be discharged unless there exist "exceptional reasons "that make his or her retention desirable.

(2) The Army has twice decided that there are such exceptional reasons for the retention of the Guardsmen but the Court of Appeal has decided in *McBride (No 2)* that the reasons articulated in the second decision, that of 21 November 2000, were again not, taken together, "exceptional reasons" within the meaning of Queen's Regulations.

(3) It therefore followed that the Army ought, on receipt of the Court's decision, either to have forthwith discharged the Guardsmen from the Army or, alternatively, to have reconsidered their employment status so as to determine whether other "exceptional reasons" now exist that would justify the retention of either Guardsman in the Army.

(4) Mr Treacy submitted that the terms of the Minister's letter of 10 September indicate that the Army wrongly considers that the decision by the Court of Appeal in *McBride (No 2*) not to make a mandatory order relieves the Army of what he submitted was its obligation nevertheless to revisit the question of the continued retention of the Guardsmen. This, in Mr Treacy's submission, is a misapprehension of the relevant Queen's Regulation. He contended that the Army presently retains in its service two soldiers who have been sentenced to imprisonment by a civil court but with no exceptional reasons in place to justify their retention. He submitted that, regardless of the fact that the Court of Appeal decided not to make a mandatory order, the Army is independently obliged by Queen's Regulations to revisit the question as to whether exceptional reasons do now exist for the retention of either of the Guardsmen and if in either case they do not (or if the Army does not wish to revisit the question) then that soldier must be discharged.

(5) It was further submitted on behalf of the applicant that the terms of the correspondence mentioned above demonstrate that in deciding not to again review the employment status of the guardsmen the Army was motivated solely by the fact that it was not ordered to do so by the Court and had failed to take account of the entire decision of the Court. Mr Treacy pointed out that the Prime Minister and Mr Caplin both indicated in their letters that the Ministry of Defence and the Army authorities "will take into account the full implications of the judges' serious concerns in the handling of **future** retention cases."(emphasis supplied) He submitted that to use as the purported justification for not immediately taking them into account by revisiting the decision to retain the guardsmen the fact that the Court of Appeal had not granted coercive relief was indefensible and irrational. Put

shortly, if consideration of the Court's concerns will admittedly be relevant in the consideration of future potential cases it must be even more relevant to the present concrete situation so that a reconsideration of the instant case taking account of those concerns is or ought to have been inevitable.

Summary of the submissions on behalf of the Respondent

[10] Mr Burnett resisted the grant of relief on the basis that it is clear that the majority of the Court of Appeal in *McBride (No 2)* deliberately and expressly refrained from granting any form of coercive relief. He submitted that both Lords Justices plainly appreciated the practical effect of their order. This followed upon the case explicitly made by the Respondent before the Court of Appeal that, given the history of the matter, even if legal error were detected in the second decision no relief should be granted which would have any coercive effect on the Respondent. The Applicant had unsuccessfully sought to persuade the Court that if legal error were detected it should make a mandatory order compelling the dismissal of the guardsmen or, failing that, an order quashing the second decision and compelling a review of their employment status. In both these endeavours the Applicant had failed with the result that the relief granted had been limited to the declaration.

[11] Having failed to secure a coercive order from the Court of Appeal in *McBride No.2* the Applicant now seeks in these proceedings to "outflank" the Court's refusal there of coercive relief by asking this court now to do what that Court declined to do. The regulation required a decision to be made and it had been made. It did not require the decision to be reviewed and nor had the Court so required. Nor had the Court declared the decision to be of no effect. It was submitted that as a matter of law a decision remains valid unless and until a Court grants a remedy which has the effect of invalidating it. He relied as authority for this proposition upon *Administrative Law* 9th Edition by Wade and Forsyth at pages 301 and 308. He referred in particular to the following passage at page 302:

> "Similarly with remedies withheld in discretion: the court may hold that an attack on the validity of some act or order succeeds, but that no remedy should be granted. The court then says, in effect, that the act is void but must be accepted as valid."

Founding himself upon this passage and the two authorities referred to in footnotes to support it, Mr Burnett submitted that it was a mistake to suggest that the Army had an obligation to review the second decision because, even though the reasoning that led to it had been rejected by the majority of the Court of Appeal, the refusal by that Court to order a coercive remedy in relation to the decision meant that as a matter of law it remains effective.

[12] Dealing with Mr Treacy's submission that in deciding whether the question of whether to retain the guardsmen should be revisited the Ministry had focussed purely upon the absence of an order of the Court compelling it to do so and had failed to consider the whole of the judgments, Mr Burnett drew attention to a number of passages in the correspondence earlier referred to which in his submission demonstrated that the judgments had been considered in their entirety.

(1) 7 August 2003 – the Minister to Mr Durcan:

> "We have studied the ruling of the Court of Appeal Northern Ireland very carefully"

(2) 22 October 2003 - Prime Minister to Mr Durcan and

(3) 30 October 2003 - Mr Caplin to Mr Kelly:

> "They [the Ministry of Defence and the Army Authorities] will take into account the full implications of the judges' serious concerns in the handling of future retention cases."

[13] Mr Burnett submitted that it is impossible to characterise as irrational a decision not to revisit yet again the retention of the guardsmen when that was the outcome that McCollum L.J. expressly intended to secure by ordering declaratory as opposed to coercive relief. Finally he submitted that this court should in any event in its discretion refuse coercive relief on the same basis as it was refused by the Court of Appeal.

Decision

[14] As earlier noted, the majority of the Court of Appeal decided that, taken together, the reasons expressed by the Army Board for its second decision to retain the guardsmen in the Army did not amount to the "exceptional reasons" required by the regulation in order to make the retention of a soldier sentenced to imprisonment desirable. When in 1999 Kerr J reached the conclusion in *McBride (No 1*) that the first decision of the Board could not stand he quashed the decision so that the Guardsmen's application to be retained in the army had to be considered afresh. When in relation to that fresh decision the majority of the Court of Appeal in *McBride (No 2)* reached the conclusion that it did in relation to the absence of "exceptional reasons" they then considered whether to grant coercive relief and decided not to do so. It is clear from the plain language employed by McCollum LJ that by deciding on the grant of a declaration in relation to that second decision rather than, as Kerr J had done in *McBride (No 1*), upon the making of

an order of certiorari, his intended result, for the reasons that he gave, was that the Army Authorities should be under no legal compulsion to take any further action in relation to the retention of the Guardsmen.

[15] Similarly, Nicholson LJ stated (although he did not articulate his reasons) that a mandatory order "would not be appropriate" and was "prepared to agree" to the making of the declaratory order and "to let the army 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." It is therefore apparent that he too had considered and rejected the making of an order that would compel the Army to again revisit the decision to retain the Guardsmen and was willing to leave it to the Army "to take such course as it sees fit having regard to the reasons of the majority of the Court for rejecting the [second decision]".

[16] The difference of emphasis between these two judicial approaches appears to me to be that McCollum LJ, so far from suggesting that the Army should decide whether to revisit the decision by reference to any observations to be found in the judgments of the Court, positively considered that the uncertainty surrounding the retention of the Guardsmen had gone on long enough and that the Court ought not to, by granting a coercive order, cause it to be further prolonged " since it would cause a reopening of the Army Board's consideration of the case…" Nicholson LJ on the other hand, whilst he implicitly felt that the Army ought not to be obliged by order of the Court to re-visit the decision, left it open to it to do so or not as it saw fit having regard to the majority's reasons and expressed no personal preference one way or the other.

[17] In the event the Army Board accepted Nicholson LJ's invitation to take such course as it saw fit and decided not to revisit the decision. It seems to me that two questions arise from that decision. The first is whether before reaching it they read and understood the entirety of what the majority of the Court of Appeal had said in their judgments or whether they confined themselves to a consideration of those portions of the judgments dealing with the relief to be ordered and decided that, because they were not obliged by the Court to revisit the decision to retain the Guardsmen, they need do nothing further? There are certainly some indications from the terms of the letter from the Minister to the Applicant's solicitors set out at [4] above and in other similar letters that the latter was the approach and there may be apparent support for that in the fact that, as I noted at [5] above, the annex to the briefing paper provided to the Prime Minister and Mr Caplin by Mr Davis containing what he described as "relevant provisions of the Judgments" in fact contained nothing of the criticisms of the second decision by the majority of the Court of Appeal but were entirely restricted to the passages dealing with the relief which they gave and the reasons for it. Mr Davis does not say what material was provided to the Minister.

[18] However, the passages from the letter of 22 October 2003 from the Prime Minister to Mr Durcan and of 30 October 2003 from Mr Caplin to Mr Kelly set out at [11] above both state that the Ministry of Defence and the Army authorities have studied in detail the "declarations" which were made by two of the three judges and will take into account the full implications of the judges' serious concerns in the handling of future retention cases. True it is that those concerns were of course not expressed in the declaration but rather in the body of the judgments. However it is plain that the Judges' concerns could not have been appreciated so that their implications could be taken account of for the future had the entirety of the judgments not been studied by the Army Authorities. Whether or not the details (though clearly not the fact) of the Judges' criticisms were kept from the Prime Minister or Mr Caplin in the briefing provided by Mr Davis is not directly relevant since neither of them was the decision taker. I therefore conclude that the Army authorities did study the entirety of the judgments of the majority before deciding that the second decision should not be revisited notwithstanding that the reason for not revisiting it was that they correctly understood from the judgments and order of the majority that they were not obliged to do so.

[19] The second question is whether there was, given the terms of the judgments of the majority and of their order, any obligation to revisit the retention of the Guardsmen? The purported "exceptional reasons" taken together that had grounded the second decision had been held by the majority not to be such. The foundation for the second decision was thereby demolished but the decision itself was, quite deliberately, not struck down. What then was its status? As is clear from the passage from *Wade and Forsyth* at page 302 referred to above, a finding that a decision is not valid does not, of itself, cause that decision to cease to have effect. In another passage at page 301 the following is stated:

> "Such an absolute result depends, however, upon the willingness of the court to grant the necessary legal remedies.
>
> The court may hold that the act or order is invalid, but may refuse relief to the applicant because of his lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason . In any such case the "void" order remains effective and must be accepted as if it was valid."

In my judgment that is the effect produced in this case by the nature and terms of the order of the majority in relation to the second decision and the

consequent decision of the Army authorities, made as I find in the light of the entirety of the judgments and not merely those sections relating to remedy, not to further review the employment status of the Guardsmen. The second decision to retain them in service therefore remains effective even though the majority found that there is no basis for it. I consider that Mr Burnett was correct in his submission that the present proceedings are an impermissible attempt to circumvent the effect of the order of the majority. Accordingly I refuse the relief sought.