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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 JEAN McBRIDE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND IN THE MATTER OF A DECISION OF THE MINISTER OF STATE FOR THE ARMED FORCES

WEIR J

[1] By this application Mr Treacy QC and Ms Doherty seek leave to apply for judicial review on behalf of the intended applicant, Mrs McBride. The application is resisted by Mr Maguire on behalf of the intended 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 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 ("*McBride No.1*"). The Army Board subsequently reconsidered its decision and on 21 November 2000 again decided that the seven factors which it listed, taken together, constituted "exceptional reasons" justifying the retention of the Guardsmen in the Army.

[2] This second decision was in turn the subject of a challenge ("*McBride No.2*") which was unsuccessful before Kerr J at first instance. However, 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."

[3] However, the Court of Appeal declined to grant a mandatory order either of certiorari or mandamus such as would have compelled the Army to review its decision to retain the Guardsmen in service or discharge them. There then followed correspondence on behalf of Mrs McBride in which it was sought to have the Army review the employment status of the Guardsmen. Ultimately, 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."

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

[5] In her present Order 53 statement the intending 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.

[6] 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 Regulations earlier referred to.

(c) That since the effect of the declaration made by the Court of Appeal 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 soldiers 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.

[7] The crux of Mr Treacy's submissions was:

(1) A soldier who has been convicted by a civil court cannot be retained in the Army and must be discharged unless there are 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 those reasons articulated in their decision of 21 November 2000 were 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 Guardsmen in the Army.

(4) The terms of the Minister's letter of 10 September indicate that the Army considers that the decision by the Court of Appeal in *McBride No 2* not to make a mandatory order relieves the Army of the obligation 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.

[8] Mr Maguire resisted the grant of leave 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 for the reasons given by McCollum LJ and Nicholson LJ in the passages in their judgments to which Mr Maguire referred me. He also submitted that both Lords Justices plainly appreciated the effect of this aspect of their judgments and explained why they were not granting such relief.

[9] Mr Maguire submitted that as a matter of law a decision remains valid unless and until the Court grants a remedy which has the effect of invalidating it. He relied as authority for this proposition upon *Administrative Law* 8th Edition by Wade and Forsyth at pages 307 and 308. He referred in particular to the following passage at page 308:

> "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."

[10] Founding himself upon this passage and the two cases referred to in footnotes to support it, Mr Maguire submitted that it was a mistake to suggest that the Army had an obligation to review the decision of 21 November 2000 because, even though the reasoning that led to it had been rejected by the majority in the Court of Appeal, the refusal by that Court to order a coercive remedy meant that as a matter of law the decision remains legally effective.

[11] In reply, Mr Treacy submitted that until the Court of Appeal decision in *McBride (No 2)* was given the Army was working on the basis that there did exist exceptional reasons for their decision to retain the Guardsmen. Since the judgments were delivered it had become clear that those reasons were not exceptional reasons so that the matter must either be reconsidered or the soldiers discharged. He submitted that the letter of 10 September does not indicate that the Army had considered the reasoning of the majority for holding that the reasons were not exceptional but only that the Army had considered the reasons for declining the grant of coercive relief. His submission was that, the basis of the Army's decision to retain the Guardsmen having been undermined, under Queen's Regulations the Guardsmen must now be discharged unless the Army do reconsider the matter and can find new exceptional reasons. Thus, he submitted, the need for reconsideration arises independently of and notwithstanding the refusal of coercive relief by the Court of Appeal in *McBride (No.2)*.

[12] I am grateful to counsel for their very full skeleton arguments and their well-focused submissions. The point raised is an interesting one and not free from difficulty. I remind myself that the threshold for the grant of leave is merely whether there exists an arguable case. I have concluded that there does and I therefore propose to grant leave to apply for Judicial Review. In doing so I make it clear that I must not be thought to be expressing any view about the ultimate outcome of the application when all the evidence has been received and the matter has been fully heard.