Neutral Citation no. [2007] NICA 44 | *Ref:* NICC5798

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **26/4/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY BW FOR JUDICIAL REVIEW

Before Kerr LCJ, Sir Michael Nicholson LJ and Sir John Sheil

SIR MICHAEL NICHOLSON

Introduction

[1] This is an appeal from a decision of Weatherup J dismissing an application by the appellant that challenged the legality of his discharge from the army by the General Officer Commanding in Northern Ireland (GOC) and the Ministry of Defence.

Factual background

[2] The appellant served variously in the Royal Irish Rangers, the Ulster Defence Regiment and the Royal Irish Regiment for 17 years. At the time of his discharge in May 2002, he was a Colour Sergeant serving in the Royal Irish Regiment. The last report on the appellant's service before he was discharged was prepared in November 1999. It had indicated that there were no special factors that would restrict his next posting. He was deemed to have provided very good service in almost all areas and he was recommended for promotion. Plainly, no issue about security arose at that time.

[3] Towards the end of 2001 the appellant lodged a voluntary release request with his commanding officer. He stated that he wished to obtain a discharge in order to spend more time with his family and to focus on business activities. He was repeatedly asked to reconsider his decision to leave the

army and eventually he withdrew his application saying, "the army is my life'.

[4] In January 2002 the GOC was briefed about security concerns in relation to the appellant. These concerns arose from reports that had been received from the police service. In February 2002 a senior police officer produced intelligence held by the police to the GOC. In an affidavit filed on behalf of the respondents the GOC has said that he satisfied himself as to the reliability of that intelligence. Having done so, he concluded that the actions of the appellant were not compatible with continued service in the HM Forces on the grounds of security. He formed the view that there was no alternative but to discharge the appellant from the army.

[5] The GOC then arranged for BW's commanding officer, Lieutenant Colonel Callow, to be informed of the circumstances so that he could take appropriate action. The information given to the lieutenant colonel was to the effect that the appellant was suspected of being a member of a paramilitary organisation or of associating with members of such an organisation. He has said that, having received this information, he also reached the conclusion that the appellant's continued service in the army was untenable on security grounds. He therefore decided to instigate the procedure of BW's compulsory discharge from the army.

[6] In February 2002 the appellant attended the offices of his commanding officer and was informed that an application for his discharge was being sought on security grounds. He was not given any information about the nature of the security grounds. In particular, he was not told that he was suspected of belonging to or of associating with members of a paramilitary organisation.

[7] Part 1 of the application form that was prepared to bring about the appellant's discharge described him as an 'exemplary' soldier. In Part 4 of the same form, his commanding officer stated that 'this [was] a very disappointing end to a brilliant career". Part 3 of the form was completed by the appellant himself and contained the following statements: -

> "… My disciplinary record is exemplary within the Regiment and I have no civil convictions. My colour service is to be terminated as I am deemed to be a security risk. I value my career immensely and I am willing to serve in any role that the army see me as a non security risk.
>
> I have owned a family business for the last 4 years with the army's permission and I am willing to

> stand back from this commitment if it is going to interfere with my military career.
>
> I am confused as to what I may have done to place my career in jeopardy, as I have not to my knowledge done anything to place any of my colleagues in any danger.
>
> … I am willing to take on any role and sacrifice any personal gains to continue my loyal military career…"

[8] In March 2002, Lieutenant Colonel Callow submitted the application for discharge form to his superior officer, Brigadier Keenan. Having considered this, the brigadier also formed the view that the appellant's continued service was untenable on security grounds and he endorsed the application. The GOC received the application in April 2002 and signed it, thereby signifying his agreement to the discharge. In May 2002, the appellant was given notice that he would be discharged on the ground that his services were no longer required. He was informed that he was entitled to appeal provided he did so within 24 hours. He did not appeal.

Statutory Background

The Army Act 1955

[9] The discharge of soldiers from the army is governed by the Army Act 1955. Section 11 (3) provides: -

> "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."

[10] The 'competent military authority' for discharge is defined in section 23 (1) of the 1955 Act as meaning, "[the Defence Council] or any prescribed officer". Section 23 (1) defines "prescribed" as meaning "prescribed by regulations made under Part I of the Act". Section 22 provides for regulations to be made by the Defence Council: -

> "[The Defence Council] may make such regulations as appear to them necessary or expedient for the purpose of or in connection

> with the enlistment of recruits for the regular forces and generally for carrying this Part of the Act into effect".

The Army Act 1955 (Part I) (Regular Army) Regulations 1992

[11] The Defence Council, in exercise of its powers under section 22 of the 1955 Act, made the 1992 Regulations. Regulation 3 made provision for additional competent military authorities apart from the Defence Council: -

> "3 (2) The following officers shall, in pursuance of section 11(3) of the 1955 Act and in addition to the Defence Council and Army Board, be competent military authorities for the purpose of giving an order authorising the discharge of a soldier of the regular forces –
>
> (a) the Director of Manning (Army), whatever may be the reason for the soldier's discharge;
>
> (b) in relation to discharge for a reason specified in column 1 of Part II of Schedule 1 to these Regulations, the officer specified opposite thereto in column 2 of that Part and any officer superior in command to him."

[12] Column 1 of Part II of Schedule 1 to the 1992 Regulations included 'item 16' which applied to the discharge of a soldier no longer required for army service for any reason not otherwise specified in that part of Schedule 1. This is the provision that would have been the relevant one for the appellant's discharge. In the original version of the regulations the officer specified opposite item 16 as the 'competent military authority' was the Director of Manning (Army) but it was also provided that his duties in this regard could be delegated to the brigade commander or the officer in charge of records or the commanding officer.

Army Act (1955) (Part I) (Regular Army) (Amendment) Regulations 1995

[13] A new item 16 was substituted by the 1995 Regulations. It specified the competent military authority to authorise discharge as being the "Director of Manning (Army) except where [the authority to discharge was] delegated to brigade or garrison commander or officer in charge of records or commanding officer".

Army Act (1955) (Part I) (Regular Army) (Amendment) Regulations 2000

[14] Item 16 was further amended by the 2000 Regulations. These added the GOC as a competent military authority to authorise discharge under the 1992 Regulations, as follows: -

> "Director of Manning (Army) except where delegated to GOC or brigade or garrison commander or officer in charge of records or commanding officer."

[15] By notice dated 10 April 2000 issued by the Director of Manning (Army), under the 1992 Regulations, the authority to act as the competent military authority was delegated to the GOC for the purposes of item 16. The notice was in the following terms: -

> "In exercise of the authority conferred on me 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."

The Queen's Regulations

[16] Part 6 of the Queen's Regulations (hereafter referred to as QR) provides for termination of service. QR 9.290 outlines two stages in a soldier's discharge: -

> "Part 6 – Termination of Service
> Section 1 – General Instructions
>
> 9.290
>
> a. The stages in the procedure for a soldier's transfer to the Reserve or his discharge from the Colours are:

(1) Authorisation, i.e. the giving of authority for the transfer to the Reserve or discharge to be carried out.

(2) Execution, i.e. the fixing of the date and effecting of the transfer to the Reserve or discharge."

[17] QR 9.414 makes further provision in relation to discharge. Prior to its amendment in August 2003 it was in these terms: -

"9.414 Services no longer required

(*Note*; this paragraph is to be used as authority for the discharge of a soldier who cannot or should not be transferred to the Reserve, or discharged, under any other paragraph. It will not normally be used for compassionate reasons, loss of efficiency, indebtedness, indiscipline, misconduct or medical unfitness).

a. The competent military authority to authorise discharge is the Director of Manning (Army)….

b. 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] In its amended form the relevant part of QR 9.414 is as follows: -

"9.414 Services no longer required

(*Note*; this paragraph is to be used as authority for the discharge of a soldier who cannot or should not be transferred to the Reserve, or discharged, under any other paragraph.)

a. The competent military authority to authorise discharge is the Director of Manning (Army) or …

….

> (3) General Officer Commanding Northern Ireland in specific cases delegated to him by Director of Manning (Army)."

European Convention on Human Rights

Article 1 of the First Protocol to the ECHR

[19] The convention right relied on by the appellant is Article 1 of the First Protocol to the ECHR which provides: -

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The judgment at first instance

[20] It had been argued before Weatherup J that the GOC was not a competent military authority for the purposes of the appellant's discharge. He dismissed that argument and held that the notice of delegation of 10 April 2000 was effective to invest the GOC with that authority. Counsel for the appellant had submitted that since the purported delegation had taken place before the amendment of QR, it could not be considered valid. Weatherup J rejected that submission, observing that the introduction to QR stipulated that they were 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-evident exceptions". He also found that the failure to amend QR until August 2003 could not nullify the 1955 Act and 1992 Regulations (as amended). These expressly authorised the delegation of the necessary authority to the GOC.

[21] Weatherup J considered that examination of the remaining grounds of challenge (which may be broadly categorised as procedural fairness; apparent bias on the part of GOC; and violation of the appellant's article 1 Protocol 1 and article 6 rights) must be conditioned by the availability of an appeal to the

Army Board from the GOC's decision and the possibility of a judicial review challenge to any decision taken by the Army Board on that appeal. Since the appellant was entitled to have his discharge considered by the Army Board, the judge concluded that it was not possible to determine the extent to which there might be disclosure of information to the applicant in the context of an appeal to the Board. He therefore declined to make an order on this procedural challenge because the Board had the "capacity" to provide sufficient information to the appellant to enable him to make informed representations. The judge likewise felt that any discussion about representation of the appellant's interests by a special advocate was a matter for the Army Board. Although he considered that there was an appearance of bias on the part of the GOC in that he had initiated the procedure for the appellant's discharge and had taken the final decision that he should be discharged, the judge decided that he should exercise his discretion to refuse relief on this ground, again because an appeal to the Army Board was possible. For the same reason the judge concluded that it was not necessary for him to make a finding in relation to the claim based on the appellant's convention rights.

First Argument

[22] Mr Treacy QC submitted on behalf of the appellant that the GOC did not have jurisdiction to order the discharge of the appellant. He relied on QR 9.414 (prior to its amendment in August 2003). It provided that the competent military authority to authorise discharge in a case of this sort was the Director of Manning. The Army Act 1955 by section 11(3) provided that "in any case the discharge of a soldier of the regular forces should be carried out in accordance with QR. Section 23 of the Army Act defined the competent military authority for discharge as meaning "the Defence Council or any prescribed officer" and defined "prescribed" as meaning "prescribed by regulations made under Part 1 of the Act". Section 22 provided for regulations to be made by the Defence Council and Regulation 3 of the 1992 Regulations, made under section 22, provided that the competent military authority was the Director of Manning (Army) but that his duties in this regard could be delegated. The 1995 Regulations provided also for such delegation. The 2000 Regulations provided that one of those delegated to discharge these duties was the GOC and by Notice dated 10 April 2000 issued by the Director of Manning the authority to act as the competent military authority was delegated to the GOC where the reason for discharge involved security issues. But, said Mr Treacy, these must give way to the direction contained in section 11(3) that the discharge should be carried out in accordance with QR and, until amended in 2003, QR 9.414 provided that the competent military authority to authorise discharge was the Director of Manning. Therefore the decision of the GOC (NI) to authorise the appellant's discharge was ultra vires, unlawful and void.

[23] Any purported regulations which conflicted with the effect of section 11(3) were ultra vires and void. Any regulations which provided for a procedure on discharge which was not in accordance with QRs were ultra vires and void. QRs had a separate existence from regulations under section 22. They were defined by section 225 as meaning Queen's Regulations for the Army. They contained detailed provisions as to discharge. The Defence Council could not promulgate regulations conflicting with the requirements of QRs.

[24] Weatherup J had erred in failing to consider whether the Defence Council's regulations were validly made, not least in failing to consider whether the regulations carried Part 1 of the Army Act 'into effect'. The QRs were amended in 2003 so as to delegate expressly to the GOC in Northern Ireland the power to discharge where the reason for discharge involved security issues. If QRs did not override the Army Act, this amendment would have been unnecessary.

[25] Mr Maguire in reply referred to the wording of section 11(3) of the Army Act. He drew attention to the semi-colon after the words "by order of the competent military authority or by authority direct from Her Majesty". Two separate issues were addressed by the sub-section. The first was 'the competent military authority'. The second was the procedure by which the discharge should be carried out. The latter was governed by QR. Section 23 of the Army Act defined 'competent military authority' which included any officer prescribed by regulations made under Part 1 of the Act. This was a matter controlled by the statute. That power to make regulations was exercised by the Defence Council under the statute in 1992, 1995 and 2000. In turn the 2000 Regulations empowered the Director of Manning who was the competent military authority to delegate to the GOC the power to authorise discharge and by Notice dated 10 April 2000 he delegated the authority to act as a competent military authority to the officer for the time being holding the appointment of general officer commanding Northern Ireland, limited to cases where the reason for discharge involved security issues and not extended to cover any member of the staff of the GOC.

[26] QRs were made by exercise of the Royal Prerogative and the statute 'drives out' QRs in this instance. The argument advanced by Mr Treacy involved a requirement that QR should dominate the statute and be predominant over statutory regulation. This was not the way in which the competent military authority was to be chosen. The use of the words "and in any case . . . shall be carried out in accordance with QR" was not a re-definition of the manner in which the competent military authority should be chosen. The Army Act governs the definition of 'competent military authority'. The statute specifies that it is by Regulations made by the Defence Council that the competent military authority is to be chosen. In so far as QR were, arguably inconsistent, they must be interpreted intelligibly. They were

not updated in 2000 but a defect or oversight in them cannot predominate. Weatherup J was correct in holding that the GOC had jurisdiction, he submitted.

[27] In response Mr Treacy contended that QRs were the soldiers' "bible". Defence Council Regulations were difficult to find and, despite security issues, the GOC was not involved before 2000. QRs clearly stated that it was the Director of Manning who was the competent military authority.

Our Conclusion

[28] Neither party cited authority but Bennion (4th edition) at p 193 states –

> "Vestiges of the Royal prerogative not taken away by statute still give the Crown certain primary law-making powers. Orders in Council in exercise of these powers are made only on the advice of Ministers. The powers, and instruments made under them, operate subject to provisions made by or under any Act".

At p 195 it is stated –

> "It is said that the prerogative can be statutorily curtailed only by express words or necessary intendment. However 'necessary intendment' is only another term for legal meaning . . . . The historical tendency has been for prerogative powers to be enlarged, regulated and finally superseded by Acts of Parliament . . . where it legislates comprehensively in a field occupied by the prerogative, the presumption is that Parliament intends the Act, rather than the prerogative, thereafter to apply: A-G v De Keyser's Royal Hotel [1920] AC 508. Lord Parmour said at p 567:-
>
> "where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of the Royal Prerogative right, such right can no longer be enforced."
> It goes without saying that delegated legislation also supersedes the Royal Prerogative, if not consistent with it.

[29] We can find no fault with the reasoning of Weatherup J on the issue of jurisdiction. The relevant legislation, Regulations and QRs are set out in his judgment at paras [10] to [26] and, as stated, have been reviewed by this court at paras [9] to [19].

[30] At para [21] of his judgment he said:-

> "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-evident 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 Regulations 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 validate 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."

[31] We find it unnecessary to add any gloss to his findings and adopt them as our own.

Second Argument

[32] Mr Treacy's second submission was under the heading of 'Fairness' which, to a limited extent, overlaps with his third argument about 'Bias'. He contended that a clear policy objective for the nomination of the Director of Manning (Army) for discharges under QR 9.414 was based on a reading of the paragraph. Sub-paragraphs (c) and (e) of the Rule noted:

> "(c) . . . Potential civilian employers tend to regard soldiers discharged under this paragraph with some reservation. For that reason:
>
> . . . (3) If the soldier has not previously been subject to any formal warning or a formal warning in respect of a similar matter to that for which the application for discharge is being sought (see para 9.414 e), he should be allowed to make representations against the application if he so desires. Should a soldier choose not to represent against the application, he is to signify this at Part 3 of the AFB130A".

[33] The appellant received no warning in respect of his suspected behaviour. He was not given any opportunity to make informed representations and indeed his solicitors were dissuaded in their attempts to do so, prior to the discharge decision being taken. General principles of natural justice required the opportunity to make representations mentioned in subparagraph (c)(3) to be read as a right to make informed representations, given that this right was in lieu of a formal warning and a chance to improve behaviour. Where no such right to make informed representations was given in this case, the discharge was in breach of the requirements of section 11(3) as not being in accordance with QRs.

[34] The decision was unfair on general principles, in that:

(a) the appellant was not given a chance to make proper informed representations in the matter, and was not advised of the nature of the case against him;

(b) this factor was aggravated by the draconian and swingeing nature of the penalty suffered by the appellant;

(c) this factor was further aggravated by the fact that his solicitors were dissuaded from seeking to exercise the right on his behalf;

(d) this factor was further aggravated by the lack of any other attendant safeguards designed to minimise any element of unfairness in the taking of the initial decision;

(e) the decision-maker appeared to have closed his mind to any possibility but that the appellant was to be discharged even before the appellant was given any opportunity of making representations;

(f) the decision-maker initiated the discharge procedure and then decided upon it.

[35] Weatherup J at para [29] of his judgment set out some, if not all of these grounds of complaint and did not reject any of them. At para [30] he stated that as the procedures before the Army Board had not been examined, it was not possible to determine whether there might be disclosure of information to the appellant to as to enable him to make informed representations and otherwise to achieve overall fairness. Mr Treacy argued that this concession meant that there was no means of knowing whether there was a remedy which had the capacity to redress procedural unfairness.

[36] He referred to para 12 of Brigadier Voules' affidavit sworn on 24 February 2004 in which he stated:-

> "In September 2001, in a similar case involving discharge on security grounds, the Army Board upheld the complaint on the grounds that the evidence justifying the decision to discharge was inadequate and that there were procedural irregularities in reaching that decision. The discharge was quashed . . . The security evidence supporting the original discharge was not, however, disclosed to the complainant at any stage."

[37] He also referred to para 6 of the GOC's affidavit of 25 November 2002 in which he stated:-

> "I considered whether it would be appropriate to disclose all or any of the evidence upon which the application was founded and I also considered whether it would be appropriate to hold an oral hearing in respect of the issue of discharge. I decided that as I had been provided with the intelligence on the basis that it could not be disclosed as the police judgment was that to do so would endanger a source of sources I had no option but to refuse disclosure of any of the material. In my view it followed from that that there would be no useful purpose which could be served by the holding of an oral hearing as the Applicant would not be in a position to add anything of substance to his written representation."

[38] He contended that it would be unrealistic to accept that the appellant would have obtained information about security if he had exhausted his complaint. He did not receive even the gist of the allegations against him.

[39] He referred to para 7 of the GOC's affidavit in which the GOC stated that, having considered the totality of the information and the staff advice available, he decided that the case for the appellant's discharge on grounds of security had been established beyond reasonable doubt. He also pointed to the appellant's statement at Part 3 of the Application from the Compulsory Premature Discharge of a Soldier. Without knowledge of the allegations against him what more could the appellant do?

[40] In reply Mr Maguire pointed to the fact that in the absence of prior warning the appellant was given an opportunity to make representations and did so at Part 3 of the Form. Under QRs there was no obligation to make disclosure to a soldier. The obligation was to afford him an opportunity to make representations. That he could not make informed representations did not arise from QR 9.414 or any breach of it.

[41] In so far as breach of natural justice and fairness were concerned, the rules governing such breach were fact-specific and he cited the well known passage from *ex p Doody* [1994] 1 AC 531 per Lord Mustill at p 560 in which he stated that in most cases the gist of the allegations against the person concerned would be made known to him. Mr Maguire stressed the words "in most cases". It was impossible to inform the appellant of the gist, he said. Under questioning from the Court he conceded that it would have been possible to go as far as the affidavit of David Keenan, Commander of 107 (Ulster) Brigade went, when he stated at para 2:-

> "I received information concerning the Applicant to the effect that he was suspected of being a member of a paramilitary organisation".

[42] Lt Col Callow, the appellant's commanding officer stated in his affidavit at para 2 that the appellant was suspected of associating with members or of being a member of a paramilitary organisation. This also could have been disclosed, he acknowledged.

[43] In the course of argument it was pointed out by the Court that the GOC had not questioned the assertion of the police officer who briefed him that the safety of the source or sources of intelligence about the appellant would be endangered if the gist of the allegations was disclosed to him. Mr Maguire accepted this but submitted that the appellant would not have been able to make informed representations, if told the gist of the information. He referred to the passage from Lord Mustill's speech in *Ex p Doody* at p 563 in which he said:-

> "It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Army Council in *Kanda v. Government of Malaya* [1962] AC 322, 327 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject."

Mr Maguire emphasised the words "in many instances".

[44] He pointed out that the information about the appellant had been brought to Court at first instance for inspection by Weatherup J, if he chose and was available to the Court of Appeal to determine the proportionality of the decision not to be disclosed. But it was pointed out to him that it was inappropriate for the Court to look at documents which a party or parties could not see.

[45] Mr Maguire then referred to the case of *Anna McConway* [2003] NI QB 59. In that case Kerr J stated:-

> "The suggestion that the Prison Service should have informed the applicant of the nature of the [security] information that had been received and that they should have given her the opportunity to comment on it fails to reflect the instruction that the Prison Service had been given as to the manner in which they should use the material that the police had supplied. It had been made clear that the information was extremely sensitive and required to be treated in confidence . . . I find nothing untoward about the Prison Service's treatment of the applicant on this aspect of the case."

The Court of Appeal agreed with this ruling.

[46] Mr Maguire submitted that there were significant parallels with the present case; referring to the affidavits of the GOC.

Our conclusion

[47] We consider that this aspect of the case should be examined in conjunction with the argument on bias. We are satisfied that the appellant could have been told that he was suspected of being a member of a paramilitary organisation without endangering any source. Whether he could have made any informed response appears unlikely. But he was not given the chance to do so. Arguably, as a colour-sergeant living in the area he would have received intelligence about persons suspected of being in a paramilitary organisation and, if he associated with them innocently, could have set out details of his association.

Third Argument

[48] It was submitted by Mr Treacy that there was bias or the appearance of bias involved in the decision of the GOC to initiate procedures for discharge and then to authorise the discharge. Weatherup J had found that there was bias. He referred to paragraphs [32] to [37] of his judgment. He cited a passage from De Smith, Wolff and Jowell (5th ed), Principles of Judicial Review at paras 12-006 and 12-011:-

> "The common law nevertheless disqualifies a judge, magistrate or independent arbitrator from adjudicating whenever circumstances point to a risk that he would have a bias in relation to a party or an issue before him" and
>
> "Having carefully considered the authorities, it was held [in R v. Gough [1993] AC 646] that direct pecuniary or proprietary interest always disqualified the decision-maker. Outside of that category it was held that the correct test is whether, in the circumstances of the case, the court considers that there appeared to be 'a real danger of bias'. In such a case the decision should not stand."

[49] He then referred to *R (on the application of Carroll) v. Secretary of State for the Home Department* [2005] UK HL 13 in which Lord Brown of Eaton-Under-Heywood stated at para [30]:-

> **"**The common law test for bias has been authoritatively settled by the recent decisions of this House in *Porter v. Magill* [2002] 2 AC 357 and *Lawtel v. Northern Spirit Limited* [2003] UK HL 67:-

> "The question is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal was biased."

[50] He referred to the letter written on 24 May 2002 on behalf of the GOC to the appellant's solicitors in which it was stated:-

> "It is confirmed that your client, BW, was discharged from the Army under para 9.414 . . . "Services No Longer Required" on 17 May 2002. The discharge was on grounds of security. It is Army Policy not to disclose any further information.
>
> Under section 180 [of the Army Act 1955] your client has the right to complain if he thinks he has been wronged. Any complaint should be submitted . . . within three months from the day on which the matter complained of occurred."

[51] He also referred to the affidavit of Brigadier Vowles sworn on 24 February 2004 which set out the appellant's right to complain to the Army Board about his discharge, its duty to investigate and grant any redress which appears to them necessary and which stated that a complaint on his behalf was made within the relevant time limited and had been adjourned pending the outcome of the judicial review. He argued that Weatherup J was wrong to hold that there was a remedy available to the appellant that had the capacity to address the procedural matters of which the appellant complained and was wrong to refuse to make an order in respect of procedural unfairness or bias and exercise his discretion not to quash the decision of GOC. The GOC had said that it was a waste of time to appeal.

[52] Mr Maguire argued that it was wrong to read para 4 of the GOC's first affidavit as a pre-determination of the issue of discharge. The words used were that he "had no doubt in my mind that the applicant's actions as depicted in the information were not compatible with continual service . . ." He laid stress on the words "as depicted". Any explanation would be taken into account. He referred to the affidavits of Lt/Col Callow and Cap Shirley. He contended that it was obvious that the appellant knew the reason why he was being discharged. It was difficult for the appellant to argue that no representation could have been made. An inhibition on disclosure had been placed by the police on the GOC. He relied on the letter dated 5 March 2002 from Capt Shirley to the appellant's solicitors as indicative of the fact that no decision was reached adverse to the appellant until the GOC considered the whole matter, including the representations by the appellant.

[53] Extensive information about the role of the Army Board had been supplied to the appellant. A copy of chapter 70 of QR had been sent to him. The composition of the Army Board was set out as an exhibit to the affidavit of Brigadier Vowles, among whom are included the Secretary of State for Defence and the Chief of the General Staff. It is their duty to investigate it as soon as possible and to grant any redress which appears necessary and is within their powers. The case must not be considered or judged by any officer alleged to be involved in the complaint. A copy of any submission to the Board must be given to the complainant. He 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 should be advised that he may comment on any submission in writing. The Army Board will decide whether it is necessary to hold an oral hearing. If such an oral hearing is held, both the Board and the complainant will have the opportunity to question any witnesses called. The complainant may, at the direction of the Board be accompanied by a legal or other adviser at any oral hearing. The decision of the Army Board is subject to judicial review. He referred, inter alia, to *R v. Army Board of the Defence Council, ex parte Anderson* [1992] 1 QB 169 and *Lloyd & Others v. McMahon* [1987] 1 All ER 1118. The appellant had made a complaint to the Army Board for redress and can proceed with it.

[54] In response Mr Treacy QC relied on paras 4 of the first and second affidavit of the GOC as showing bias and indicating that there was no alternative to discharge. A fair-minded observer would infer that the procedure for discharge had been initiated by the GOC; middle-ranking officers would be reluctant to contradict the GOC. He referred to ch 9 of QR. The procedural safeguards were nugatory. Weatherup J was correct in what he stated at paras 32 and 33 of his judgment. It was appropriate for someone other than the GOC to adjudicate or discharge. To proceed by way of complaint to the Army Board would mean that the bias discovered after Judicial Review proceedings had started could not be relied upon.

Our Conclusion

[55] We are satisfied that there was procedural unfairness in that the appellant could have been given relevant information about the gist of the allegations against him without endangering security and might have been able to make more meaningful representations than he did. As it was, he was denied the opportunity of making such representations. We are also satisfied, for the reasons given by Weatherup J, that there was apparent bias in that the GOC received the intelligence which led him to form the view that the appellant must be discharged, initiated the procedure which led to the discharge and acted as the competent military authority in authorising the discharge. Someone else, whether the Director of Manning or a more senior officer, should have made the decision which the GOC made.

[56] The decision of the GOC could be quashed for the reasons given above. But we are not prepared to interfere with the exercise of the discretion by Weatherup J. One may quibble with some of the reasoning advanced by him for refusing to make the orders sought. But it appears to us to be good common sense and in the interests of justice to allow the appellant's complaint to be heard by the Army Board. The appellant now knows the gist of the allegations against him and can make such representations as he sees fit. The police may well be in a better position to assess the strength of the intelligence which they received and the reliability of the source or sources. The Army Board are masters of their own procedure and are subject to Judicial Review.

[57] The Court of Appeal will always be slow to interfere with the exercise of discretion by the judge at first instance, not least when his reasons for exercising that discretion are soundly based.

[58] In view of our conclusions on the second and third arguments the fourth argument is to an extent academic. But as the Army Board is subject to judicial review we propose to set it out and give our provisional conclusion.

Fourth Argument

[60] It was submitted by Mr Treacy that the actions of the respondents had violated the appellant's rights under Article 1 of the First Protocol of the Convention which has been set out at para [19] of this judgment.

[61] In *Azines v. Cyprus*, ECHR, Appl No 56679/00 the third section of the court stated at paragraph 32:-

> "The Court notes that the right to a pension is not, as such, guaranteed by the Convention. However the Court also reiterates that, according to the case law of the Convention institutions, the right to a pension which is based on employment can in certain circumstances be assimilated to a property right."

At paragraph 33:-

> "This may be the case where special contributions have been paid."

At paragraph 34:-

> "This may also be the situation where an employer, as in the present case, has given a more general

> undertaking to pay a pension on conditions which can be considered part of the employment contract."

At paragraph 43:-

> "The Court considers that the forfeiture of the retirement benefits constituted an interference with the applicant's property right. The interference in question was neither an expropriation nor a measure to control the use of property: it therefore falls to be dealt with under the first sentence of this paragraph of Article 1. Accordingly, it must be determined whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual rights."

The Grand Chamber, however, held that the applicant did not provide the Cypriot Courts with the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. The objections by the Government of Cyprus that the relevant "effective" domestic remedy was not used were well-founded.

In *Regina v. Secretary of State for Work and Pensions (ex parte Carson*) [2005] UKHL 37 Lord Nicholls stated that he was content to assume that a claim to contributory benefits in the form of pension rights was a "possession" as the European Commission held in *Miller v. Austria* (1975) 3 DR 25, followed in *Gaygusuz v. Austria* (1977) 23 EHRR 364.

[62] Mr Treacy accepted that the rights stemming from a contribution to a pension fund, although they can be asserted under Article 1 of the First Protocol do not give under Article 1 a right to a pension of a particular amount, so long as the essence of the pension rights are not impaired. But, he argued, an interference which follows automatically on a disciplinary dismissal from an employment engages Article 1 and, also, the proportionality of the interference must be assessed: see *Romanov v. Russia* (Application No 69341/01).

[63] In reply Mr Maguire submitted that there had been no decision by the GOC or the Ministry of Defence to forfeit the appellant's pension rights. He will get what he has earned to date, namely 17/22 nds of his pension. That is acknowledged on affidavit. He will be paid in accordance with his contractual rights. Article 1 of the First Protocol is not engaged by a conditional right. There had been no forfeiture of an acquired extant right.

[64] What the appellant had lost were aspirational rights. Additional pension rights were conditional on continuation in the army. He could not

continue in the army because of his dismissal. He was entitled to work at any other job.

[65] As a matter of law serving soldiers do not possess contracts of employment and are dismissible at pleasure with or without cause: *Re Tuffnell* (1887) 3 Ch D 161 at 173 and Halsbury's Laws of England vol 2(2) on the Armed Forces at para 4. See also *Quinn v. Ministry of Defence* [1997] QB. There is no property or possession involved in the area of Crown Service as a soldier. None of the textbooks on Human Rights asserts that a loss of employment engages Article 1 of the First Protocol.

[66] If in the context of Article 1 of the First Protocol these arguments were rejected by the Court, any interference with the pension rights of the appellant was prescribed in law, pursued a legitimate aim and was proportionate.

Our provisional conclusions

[67] If the Army Board upholds the decision of the GOC and rejects the complaint of the appellant, its decision is subject to judicial review. No contingent or conditional right of the appellant to pension (which is a contributory pension) arises and Article 1 of the First Protocol is not engaged.

[68] We make no finding in relation to loss of pension rights as a result of the GOC's decision to discharge the appellant.