Neutral Citation: [2016] IEHC 53

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 205 J.R.]

BETWEEN

CHRISTOPHER MAHER

APPLICANT

AND
THE MINISTER FOR DEFENCE,
THE ATTORNEY GENERAL
AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of February, 2016

Introduction
1. The applicant was at all material times a member of the Permanent Defence Forces ("PDF") holding the rank of Private. He enlisted on 21st July, 2005. On the 25th March, 2013, the applicant was subjected to a controlled random drug test ("CRDT") which he failed. After a number of hearings and appeals, by order of the 6th January, 2014, of the applicant's General Officer Commanding ("GOC"), he was discharged from the PDF.

2. The essential relief sought by the applicant herein is an order of *certiorari* quashing that decision. Various ancillary reliefs are also sought.

Chronology
3. 25th March, 2013 – the applicant was subjected to the CRDT. He was required to provide a urine sample which was divided into an "A" and "B" sample. The "A" sample was sent for analysis to an organisation in the United Kingdom called Concateno Global Drug Testing Services ("Concateno").

4. 3rd April, 2013 – Concateno's Certificate of Analysis reported that the applicant's "A" sample had tested positive for cocaine having been shown to contain a concentration of 150ng/ml benzoylecgonine. The relevant regulations provide that a reading of 150 or higher is regarded as a positive result.

5. 11th April, 2013 – the applicant was paraded before his commanding officer ("CO"), Lieutenant Colonel Kennedy, and informed of the test result and of his right to have the "B" sample tested also. He elected to have this done and the "B" sample was sent to a different expert body called EGS in the UK.

6. 17th April, 2013 – EGS reported that the "B" sample had a concentration of 179 ng/ml of benzoylecgonine.

7. 19th April, 2013 – the applicant was again paraded before his CO and informed of the "B" sample test result. He was told of his right to make a submission in relation to the matter. The CO sought an explanation from Concateno for the divergence in the test results between the "A" and "B" samples.

8. 24th April, 2013 – the applicant told the CO that he wished to make a submission and he was assigned an assisting officer, Captain Bouchier.

9. 29th April, 2013 – the applicant made a written submission to his CO saying that he had attended a house party on the night before the CRDT and he had since been informed that there were drugs at the party. He protested his innocence but said that he could not account for the test results. He said that he was willing to undergo targeted drug testing ("TDT") on a voluntary basis to prove that he is not an habitual drug user.

10. 23rd May, 2013 – the applicant made a written representation addressed to the GOC 1 Bde at Collins Barracks in Cork and copied it to the CO.

11. 28th May, 2013 – an email was sent by Mr. Allan Traynor of Concateno giving an explanation for the difference in the test results between the "A" and "B" samples.

12. 31st May, 2013 – the CO made his recommendation referring to the applicant's service record and the prior chronology. He noted the applicant's representations including the offer to undergo TDT. In this regard, the CO said the decision in relation to his retention in service subject to a TDT programme remains a matter for GOC 1 Bde. The CO concluded that the applicant's representations did not provide a credible explanation as to how he came to test positively in both the "A" and "B" samples. He considered that the only credible explanation for the applicant's positive test result for cocaine was as a direct result of his voluntary consumption of such a controlled substance. It was further the CO's opinion that the consumption of such controlled substances places serving members of the Defence Forces in the sphere of influence controlled by criminal and subversive elements that may endanger the security of the Defence Force's locations, operations, and indeed Defence Forces personnel themselves. Consequently he recommended the applicant's discharge. (It is to be noted that in the applicant's written submissions up to this point in time, no suggestion was made by him that he might have inadvertently ingested cocaine either by accident or as a result of a malicious act by a third party).

13. 4th June, 2013 – the applicant gave written notice of his intention to appeal the CO's decision to the GOC.

14. 17th July, 2013 – the GOC appointed Lieutenant Colonel McCarthy as the Appeals Officer ("AO") to conduct a full de novo hearing of the matter.

15. 31st July, 2013 – the AO commenced to interview the applicant but decided to adjourn the interview to the 9th September, 2013, to allow the applicant an opportunity to consult a solicitor and provide additional substantiation of his case.

16. The applicant notified the AO that he was instructing an expert in the matter and he requested disclosure of the laboratory file which was granted.

17. 5th September, 2013 - The applicant's expert, Mr. Matthew Atha, provided a detailed report in sworn format. In this he makes criticisms of the method of analysis of the samples and draws attention to the absence of any evidence of creatinine levels. He suggests that the test results were consistent with the applicant having taken a recreational dose of cocaine within the previous week but also could possibly arise from (a) passive exposure to crack cocaine smoke, (b) accidental exposure by touching contaminated surfaces and licking the fingers or (c) malicious exposure through spiked food or drink. He went on to say however that (a) or (b) were unlikely to have produced the test results but they could be consistent with either modest recreational use or the spiking of food or drink.

18. 19th September, 2013 – Mr. Atha's report was submitted to the AO who reverted to Concateno about the points raised by Mr. Atha. Concateno responded on the same day with a detailed report.

19. 26th September, 2013 – the Concateno response was furnished to the applicant who was told to present his final representations on 9th October, 2013.

20. 2nd October, 2013 – Mr. Atha sent an email to the applicant's solicitors regarding the Concateno response essentially accepting the explanation that had been offered with regard to all of the issues he had raised with the exception of the point regarding the absence of a creatinine test.

21. 9th October, 2013 – the applicant's interview with the AO resumed and Mr. Atha's email of 2nd October, 2013, was presented. From this the AO noted that the only outstanding issue related to creatinine level testing. The Applicant was asked to seek clarification from Mr. Atha about his concerns in this regard and the interview was then postponed to await this information. During the interview, the applicant told the AO that he had seen persons use drugs at the house party. (This appears to contradict the applicant's written statement of 29th April, 2013, in which he said that he had been informed since the party that there were drugs present). The applicant told the AO that he had failed in his attempt to elicit support from various persons that attended the party that he was the subject of malicious or accidental administration of drugs.

22. 15th November, 2013 – the applicant submitted an undated document which appears to emanate from Mr. Atha dealing with the creatinine issue and others.

23. 18th November, 2013 – the AO submitted this document and 4 questions of his own relating to the issue of the creatinine test. The questions were:

1. Was a Creatinine test conducted?

2. What was the result of this test?

3. Would an excessive concentration of Creatinine elevate the test results compared to the actual levels of DE?

4. Mr. Atha suggests that there may have been an over-reporting of the 150 ng/ml "standard" results and posits that "reporting the sample as a "positive" would represent an unsafe conclusion". Is Mr. Atha correct in his analysis?

24. 19th November 2013 – Mr. Traynor responded by email to the AO's queries saying that Creatinine tests had now been carried out and were normal but even if they had been above normal this would not affect the presence of a metabolite. If they were below normal, this could have only have led to a false negative. He said Mr. Atha's analysis was incorrect.

25. 20th November, 2013 – Mr. Traynor's response was sent to the applicant's solicitors.

26. 25th November, 2013 – the AO issued his recommendation. In this, the AO reviewed the applicant's service background and the chronology of events. He gave a résumé of the interview with the applicant on 31st July, 2013, and 9th October, 2013. He referred to the evidence of Mr. Atha and Concateno. With regard to the scientific evidence, he concluded that the conduct of the test was in accordance with best practice and no adulteration or contamination or poor procedures/processes was the cause of the positive result. He went on to say (at para. 35 (d)):

> "Therefore the final remaining outstanding issue refers to the circumstances in which the cocaine was consumed. Mr. Atha has stated that the presence of cocaine is most likely attributed to modest recreational use or spiking by a third party. The question is did Pte. Maher knowingly consume a controlled substance.
>
> (1) Serving members of the Defence Forces are aware of the Defence Forces policy on drugs/substance abuse or misuse, which clearly states that the unlawful possession, supply, or use, of a controlled drug is incompatible with membership of the Defence Forces, and that all necessary measures will be taken to maintain a drugs free society within the Defence Forces.
>
> 1. Pte. Maher indicated in Para. (1) of his submission to GOC 1 Bde (Annex J), that he was aware of the Defence Force's policy on drugs/substance abuse or misuse.
>
> 2. Knowing the position adopted by the Defence Forces and willingly socialising/consorting with individuals who possess controlled substances, as per the representations by Mr. Atha on 14th November, 2013, and stated during the 09 October, 2013, interview, raises very serious issues in relation to Pte. Maher's personal judgement and places significant doubt regarding the credibility of the argument that the presence of cocaine is most likely attributed to malicious or accidental administration.
>
> 3. Furthermore, having been afforded ample opportunity, Pte. Maher failed to provide any evidence that supported his protestations that he did not consume any prohibited substance and that he was the subject of malicious or accidental administration of controlled substances.
>
> RECOMMENDATION
>
> On examination of the representations submitted by Pte. Maher, I find that the POSITIVE A and B test results, is most likely attributed to the recreational use of a controlled drug rather than its malicious or accidental administration and as such these actions are contrary to the Defence Force's policy on drugs/substance abuse or misuse…"

27. The AO went on to recommend the applicant's discharge.

28. 6th December, 2013 – the applicant's solicitors emailed Mr. Atha advising him of the outcome of the appeal and inviting comment. Mr. Atha replied again raising the over-reporting issue that he said had not been dealt with. The applicant appealed to the GOC repeating the same arguments that had been put before the AO. (At no stage did the applicant suggest that he was taken by surprise by the AO's decision or that he had needed more time to respond. He did not bring Mr. Atha's last email to the attention of the GOC.)

29. 6th January, 2014 – the GOC 1 Bde Brigadier General Fitzgerald, rejected the appeal in the following terms:

> "Having considered all aspects of the file in this case it is my decision that Pte. Maher should be discharged from the Permanent Defence Forces. My reasons for this decision are as follows:
>
> • Pte. Maher has presented no credible explanation as to how he came to test positive for controlled substances.
>
> • Pte. Maher has failed to offer any credible evidence to explain how he could have inadvertently come into contact with or been passively or maliciously exposed to the controlled substance indicated.
>
> • I view Pte. Maher's action, in consuming a controlled substance, as being incompatible with military service. His actions pose a security threat to Defence Force's personnel and locations and bring the Defence Forces into disrepute."

30. The applicant subsequently made a further representation to the Deputy Chief of Staff in similar terms to his previous submissions. Again, no complaint was made that the recommendation of the AO had taken him by surprise nor was there any reference to Mr. Atha's email of 6th December, 2013.

31. 1st April, 2014 – the applicant was discharged from the Defence Forces.

Relevant statutory framework

32. Regulation 8 (B) of the Defence Force Regulations A7 made by the Minister for Defence pursuant to s. 26 of the Defence Act 1954, in entitled "Controlled drugs and substance abuse – compulsory random testing and targeted testing".

33. The Regulation provides (insofar as is relevant to this case):

> "8. (B) (1) A member of the Defence Forces (excluding the Army Nursing Service), may be required at any time to provide a urine specimen in the context of;
>
> a. the compulsory random drug testing and monitoring programme;
>
> b. targeted drugs testing, which may be afforded to a member of the Defence Forces pending a decision pursuant to the provisions of para. 8 (B) (2), following a positive drugs test on either a compulsory random drugs test or a targeted drugs test and at the discretion of the GOC/FOCNS and with the agreement of the individual concerned…
>
> (2) A member who, pursuant to the provisions of this paragraph,
>
> (a) having provided a urine specimen, pursuant to a compulsory random drugs test or a targeted drugs test, test positive for a controlled drug as specified in the Misuse of Drugs Act 1977 as amended and any substance, product or preparation, declared by order of the Government to be a controlled drug for the purpose of the said Act…
>
> Shall be liable - ...
>
> (ii) in the case of an enlisted person of the Permanent Defence Forces, to discharge pursuant to the provisions of paragraph 58 of Defence Force Regulations A.10…"

34. Chapter 3 of Defence Forces Administrative Instruction A7 is concerned with compulsory random drugs testing and targeted drugs testing and was revised with effect from 11th March, 2009. Section 4 of the Instruction deals with enlisted personnel/ cadets and applies to the applicant. It specifies the action to be taken following a positive test result from an "A" sample and a "B" sample. Since the applicant elected to have the "B" sample tested, paras. 326 – 7 of the Administrative Instruction applies to him:

> "326. Positive "B" sample test result
>
> Upon receipt from the admin of a positive "B" sample test result, as prescribed in Annex G, the individual shall be deemed to have a positive test result pursuant to para. 302 (j) of this Instruction. The Commanding Officer shall then proceed in accordance with para. 327 of this Instruction.
>
> 327. Action by Commanding Officer and GOC/FOC NS enlisted personnel/cadets positive test result
>
> ... Paragraph A. The Commanding Officer shall immediately parade and inform the individual that:
>
> 1. A positive test result is being promulgated to him/her. The time and date of this promulgation shall be recorded on Annex E or Annex G as appropriate…
>
> b. He/she shall inform the individual that administrative action shall be initiated which may result in discharge or withdrawal of cadetship and discharge in accordance with the provisions of DFR A7 para. 8 B (2).
>
> c. He/she shall inform the individual that he/she has seven (7) days in which he/she must indicate whether or not he/she intends to make representations to the Commanding Officer. Furthermore, should the individuals so request, the Commanding Officer shall immediately appoint an assisting Officer not below the rank of Captain, to assist with the compilation of such oral and/or written representations. In addition, the individual may have present at any time a serving member of the Defence Forces in a non-participatory capacity…
>
> e. The Commanding Officer shall consider any written representations made and any oral representations made by or on

behalf of, the individual or by the Assisting Officer on his/her behalf. The Commanding Officer will record a résumé of all oral presentations. The Commanding Officer may adjourn from time to time for any reason, including allowing the individual to call a witness at a specific time and date.

f. Within seven (7) days of the receipt of the representations from or on behalf of the individual the Commanding Officer will outline in writing each representation made to him/her. This should be done sequentially in order to consider the circumstances, which gave rise to a positive test and to ensure a full and fair hearing.

g. Having given careful consideration to the positive test result and any written or oral representation, the Commanding Officer shall;

1. recommend discharge, or

2. recommend retention in service, or

3. recommend retention in service, conditional on participation in a TDT process.

h. The Commanding Officer will;

(1) submit his/her recommendations with reasons to the GOC/FOC NS in a manner as prescribed by Annex I, together with all representations,

(2) parade the individual with the Assisting Officer present and outline to him/her whether he/she has accepted or rejected each representation and will give the reason for accepting or rejecting,

(3) confirm to the individual the nature of his/her recommendation to the GOC/FOC NS;

(4) give the individual a copy of his/her decisions and recommendation with reasons.

i. At the same time the individual will be informed that he/she, within seven days, must indicate if he/she intends to make further representations to the GOC/FOC NS. If so indicated he/she will be given a further 28 days to make such representations. The GOC/FOC NS may, on foot of an application from the individual, grant a 14 day extension to this period provided that the application for extension of the time limit is lodged within the initial 28 day period. Should the individual signify that he/she does not intend to make representations to the GOC/FOC NS or if at the expiration of the seven (7) day period, no indication has been received, the GOC/FOC NS will proceed in accordance with para. 327 (o).

j. Where representations have been made to the GOC/FOC NS, as provided for in para. 327 (i) of this Instruction, or otherwise where the GOC/FOC NS considers it prudent or appropriate, he/she will come within seven (7) days of receipt of the representations from the individual, appoint an Appeals Officer not below the rank of Lieutenant Colonel/ Commander (NS). The Appeals Officer will conduct an appeal hearing de novo.

k. The Appeals Officer will consider the positive test result and any written representations made and any oral representations made by the individual or by the Assisting Officer on his/her behalf. The Appeals Officer will record a résumé of all oral representations in order to consider the circumstances which gave rise to a positive test and to ensure a full a fair hearing. The Appeals Officer may adjourn from time to time for any reason, including allowing the individual to call a witness at a specific time and date.

l. Within seven (7) days of the receipt of the representations from or on behalf of the individual, the Appeals Officer will outline in writing each representation made to him/her and will accept or reject each representation and give reasons for same. This should be done sequentially in order to consider the circumstances that gave rise to a positive test and to ensure a full and fair hearing.

m. Having given careful consideration to the positive test results and any written or oral representation, the Appeals Officer will parade the individual with the Assisting Officer present and will outline to him/her whether he/she has accepted or rejected each representation and will give the reason for accepting or rejecting. The Appeals Officer will then confirm to the individual the nature of his/her recommendation to the GOC/FOC NS and give the individual a copy of his/her decisions and recommendation.

n. The Appeals Officer will;

1. recommend discharge, or

(2) recommend retention in service, or

(3) recommend retention in service conditional on participation in a TDT process.

o. The GOC/FOC NS, having considered the positive test result and the recommendation of the Commanding Officer and the recommendation of the Appeals Officer (where an Appeals Officer has been appointed), along with the written record of proceedings, will decide whether or not the individual is to be discharged or retained in service or may defer a decision for a period not greater than 18 months on condition that the individual agrees to submit to targeted drugs testing at any time over the designated period…

q. Where the GOC/FOC NS decides that an individual shall be discharged or otherwise, the decision of the GOC/FOC NS shall, in the first instance, be transmitted to the individual's Commanding Officer in a manner as prescribed by Annex H.

The Arguments

35. On behalf of the applicant, Mr. Maguire SC relied on three primary arguments. The first related to the applicant's offer in his submission to undergo TDT as a condition of his retention in service. There was no evidence that this issue was ever considered by the relevant decision maker. The CO in his recommendation expressly stated that it was a matter for the GOC when it was clearly

open to the CO to recommend TDT. In the case of the decisions of the AO and GOC, there was no evidence that this option was even considered or if it was, why it was rejected. In this regard, counsel relied upon *Rawson v The Minister for Defence* [2012] IESC 26 and *Mallak v The Minister for Justice, Equality and Law Reform* [2012] 3 IR 297.

36. These decisions demonstrate that it is necessary to give reasons which show that the relevant question was addressed by the decision maker. Since none were given here with regard to the possibility of TDT, the court could not know on what basis this was rejected and ought to presume it was not addressed. Counsel also relied on *Somers v The Minister for Defence* [2012] IEHC 447, another case concerning the administration of a CRDT to a member of the PDF.

37. The second issue raised by the applicant arose from the alleged failure of the respondent to afford the applicant an opportunity of responding to the email from Concateno's Mr. Traynor of 19th November, 2013, forwarded to the applicant's solicitors on Wednesday, the 20th November, 2013. The AO made his decision on Monday 25th November, 2013, at best giving the applicant two working days to consult with his expert in the UK and make a submission on the Concateno email. The applicant was given no warning that the decision was imminent and in the circumstances, this was a denial of fair procedures to the applicant.

38. The third point relied upon by the applicant was that his expert, Mr. Atha, had clearly raised two points of concern in relation to the test results. The first was regarding the creatinine level and the second the alleged over reporting issue which was of crucial importance having regard to the marginal positive test results on the A sample. The latter issue was never dealt with.

39. Mr. Boyle SC for the respondent submitted that a positive test result constituted a breach of discipline and was an utterly objective test. The issue of the applicant's character or alleged inadvertent ingestion are irrelevant considerations to the commission of the breach.

40. Even if the applicant was in a position to prove that his food or drink were spiked, the transgression would still be committed but if he established this fact to the satisfaction of the relevant decision maker, then he might, for example, be considered for retention.

41. The suggestion that neither the AO or GOC considered the possibility of TDT was simply misconceived. There were only three options and the fact that one of these was selected necessarily implied that the other two were excluded. All of the relevant decisions explicitly referred to TDT by reference to the applicant's submission and the previous decision where relevant, which were annexed to the decisions of both the AO and GOC. This case was entirely distinguishable from Rawson where different regulations applied and an extremely brief decision was given which gave no indication as to whether the mandatory consideration of the relevant regulation had been undertaken. In contrast to *Somers*, the AO's decision here was a detailed and comprehensive document which made it clear that he was extremely unlikely not to have considered all three options and the AO has sworn an uncontroverted affidavit to the effect that he did.

42. Furthermore, counsel submitted that an analysis of the reasons given in the decisions show that they could only bear on the choice of option made. With regard to the applicant's second argument, counsel said that Mr. Atha himself had made clear that all issues except the creatinine testing had been resolved to his satisfaction. That issue was addressed by Mr. Traynor who said that Mr. Atha's analysis was simply incorrect. While the applicant says he had no time to respond to Mr. Traynor's comments, his solicitors in fact could have asked for further time but failed to do so. It ought to have been anticipated that a decision could be given imminently particularly having regard to the provision in the rules for a decision to be given within seven days of the receipt of a submission. In fact the AO could have given his decision within seven days of the first interview on the 31st July, 2013.

43. Even if there was any basis for saying that the applicant was taken by surprise by the AO's decision, despite two further appeals to the GOC and Deputy Chief of Staff respectively, not only did the applicant never make any complaint about this but in fact he never brought the attention of the GOC or Deputy Chief of Staff to Mr. Atha's further email of the 6th December, 2013, when he had ample opportunity to do so. In fact the first time the respondents ever saw this email was when the proceedings were instituted. In effect, the applicant was now asking the court to review a decision on the basis of evidence never put before the decision maker.

44. On the applicant's contention that the second technical issue raised by Mr. Atha about over reporting had never been addressed, in fact this is simply wrong as the email chain demonstrates. Furthermore, Mr. Traynor has now sworn an affidavit in the proceedings clarifying the position which remains uncontradicted in the absence of any affidavit from Mr. Atha.

Discussion

45. In *Rawson*, the applicant was subjected to a CRDT and tested positive for cannabis. He claimed that he had been in a car with two other individuals who were smoking cannabis although he was not. He made a submission to the PDF authorities that his positive test was due to passive smoking. In the course of the delivering the Supreme Court's unanimous judgment, Clarke J. referred to the relevant regulation then in force in this regard (on p. 4):-

> "2.3 However, of particular relevance to the issues which arise in this case is para. 318 which provides that where it appears to a C.O. *"on foot of any representation made, that a reasonable doubt exists, that the individual…may have innocently or inadvertently ingested, inhaled or otherwise introduced the substance, he should recommend that the individual be retained in the service".*
>
> 2.4 There was no significant difference between counsel as to the overall approach required under the Regulations. Where a test is deemed to be positive then the relevant procedures which potentially lead to a discharge are commenced. The individual concerned is entitled to make representations which may include a representation, under para. 318, that there is a reasonable doubt to the effect that the individual concerned may have innocently or inadvertently ingested, inhaled or otherwise introduced the substance. It seems clear that para. 318 requires the individual who has tested positive to raise that question if he wishes it to be considered, for the paragraph speaks of the C.O. considering the matter "on foot of any representations made". However it seems equally clear that, once a representation to that effect is made by an individual whose conduct is under consideration, there is an obligation on the C.O. and, it follows, on the G.O.C. on appeal, to consider it."

He continued (at p. 6):-

> "3.2 It further follows that, in order to deal with the matter in accordance with the Regulations, it was necessary for those superior officers to consider whether a reasonable doubt existed as to whether the cannabis concerned had been innocently or inadvertently introduced. On the facts that was the only issue which those superior officers had to deal with.

> 3.3 Against that background it is next necessary to turn to the actual decisions of the superior officers concerned. As pointed out earlier, the C.O. was Lieutenant Colonel McIntyre whose recommendation for discharge of the 17th January, 2007, is in brief terms and can be set out in full. It reads as follows:-
>
> 'Pursuant to the provisions of paragraph 8 B (1) of Defence Forces Regulations, it is my recommendation, as O.C. A.C.C. that Recruit Rawson R 862639 be discharged from the Defence Forces' ".

46. In considering the issue that arose on the appeal, Clarke J. said:-

> "5.2 It is clear, therefore, that this case is not a 'reasons' case as such. Rather it is a case where it is said that the record does not suggest that those involved in the decision making process applied their mind to the right question at all rather than failed to give adequate reasons for their answer to that question.
>
> 5.3 That, in reality, is the real issue which arises on this appeal".

47. In the course of analysing the relevant legal principles, the court said (on page 11):-

> "…the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence".

48. In applying the law to the facts, Clarke J. observed: -

> "7.5 Do we really know why the C.O., or the G.O.C. on appeal, rejected Airman Rawson's case? It is possible that he was not believed. If that be so then it follows that there is a potential difficulty, as identified by the trial judge, in that further consideration was not given to the facts, including the scientific facts suggested on Airman Rawson's behalf. On the other hand it is possible, as was found by the trial judge, that the decision maker considered that Airman Rawson's defence did not, in reality, bring him within the innocent or inadvertent category at all. It certainly does not follow that passive inhalation of cannabis will always afford a defence under the innocent or inadvertent provisions of para. 318. The problem is that nothing in the record, or the evidence placed before the court on behalf of the Minister, provides any indication as to whether the basis for the decision was one or other (or indeed both) of the above or indeed some other reason altogether".

49. He concluded (at p. 18):

> "7.10 In his judgment the trial judge was constrained to engage in a hypothesis about the basis on which the relevant superior officers must, in his view, have approached the matter. In my view in so doing the learned trial judge fell into error for the reasons identified by MacMenamin J. in Clare v. Kenny. There may be cases where it is possible legitimately to infer what question was addressed by the decision-maker and what considerations were taken into account. However, to go beyond the scope of legitimate inference seems to me to be impermissible. It seems to me that the exercise engaged in by the trial judge, though entirely understandable, went beyond the boundary of legitimate inference and strayed into the hypothetical".

50. Accordingly the appeal was allowed.

51. In the present case, the applicant argues that the decision makers were each, in turn, obliged to consider TDT and give reasons for deciding not to recommend/impose it. It is said that nothing in the relevant decisions suggests that it was even considered and accordingly, as in *Rawson*, the decision makers did not apply their minds to the correct question.

52. Dealing first with the CO's decision of the 31st May, 2013, it cannot be said that he did not consider the applicant's offer to undergo TDT. He expressly referred to it. He gave clear and readily understandable reasons for coming to the conclusion that he was recommending the applicant's discharge. The applicant contends that in commenting on the applicant's TDT offer, the CO said that this remained a matter for the GOC, and this was an abdication of his responsibility to consider it. I do not view it as such. It seems to me that the CO was simply indicating that it was perfectly open to the GOC in deciding the matter to reach a different conclusion than the one he was recommending.

53. As noted above, there were only three possible outcomes following a positive drugs test. The relevant decision maker had to opt for one. In doing so, the decision maker by necessary inference considered that the other two were not appropriate. The reasons given must be assumed to underlie the choice of option. They must equally be assumed to explain why the other options were not chosen. I think it is somewhat unreal to suggest that each option had to be analysed and an explanation given as to why it was not being chosen.

54. To take an analogy, if a court passing sentence in a criminal matter gives detailed reasons for imposing a particular custodial sentence, it would seem somewhat absurd to suggest that the court should then go on to give further reasons for not imposing a suspended sentence. The one plainly excludes the other as a matter of obvious inference.

55. The applicant suggests that there is nothing evident in the decision of the AO which shows that he considered the possibility of TDT and the court should therefore assume that he did not consider it. However, that is contradicted by the terms of the recommendation itself. In the first paragraph, the AO said that he had due regard to, inter alia, the representations submitted on behalf of the applicant and he exhibits the applicant's written submission of the 29th April, 2013, in which, at paragraph h, the applicant says that he is willing undergo TDT. It cannot therefore be said that there was no evidence that it was even considered by the AO when his written recommendation says the opposite. Furthermore, the AO has sworn an affidavit in these proceedings averring that he did consider it, but deemed it inappropriate in this case.

56. In the same vein, the written decision of the GOC explicitly refers to the fact that he had regard to, inter alia¸ the recommendations of the CO, the representations made by the applicant and the recommendations made by the AO, all of which refer to TDT. Here again, it cannot be said that there was a failure to have regard to TDT as an option for the same reasons.

57. As is clear in *Rawson*, the Supreme Court was concerned with a different regime which no longer applies here. The regulations

then in force explicitly required the CO and the GOC to expressly consider, on foot of a representation made by the applicant, whether he may have innocently or inadvertently ingested inhaled or otherwise introduced the drug. As the court makes clear, the terse three line decision of the CO gave no indication of any kind as to whether he had complied with his obligation to consider innocent ingestion, the recommendation being entirely opaque in that respect. Consequently the court was left in a position where it was impossible to discern from the decision itself whether there had been any engagement by the CO with his statutory obligation to consider the issue. None of that arises here. Consequently, in my view Rawson does not assist the applicant's case.

58. The issue in *Somers* was entirely different. Although it also concerned a CRDT, in that case the AO had sought advice from the PDF Drugs Testing Team on a number of technical matters that had been raised by the applicant. He did not inform the applicant of this fact before reaching his decision. Herbert J. considered that these matters materially influenced the decision of the AO and were key elements in his conclusion, thus presenting an insuperable obstacle to the fairness of the procedures adopted. Since he had never afforded a reasonable opportunity to the applicant to respond to this information, it was clear the decision had to be quashed. The rationale for this conclusion by the court is readily understandable and to my mind of no relevance to the issues that arise in this case.

59. Turning now to the complaint that the AO did not afford the applicant an opportunity to respond to the Concateno email of the 19th November, 2013, before concluding his recommendation, it is of significance that at that stage, the applicant was represented by solicitors who were in receipt of the relevant documents and having received them, if it was felt that there was insufficient time to respond, then an application for an extension of time ought to have been made. This did not happen. I cannot accept the proposition that the AO had a duty at all times to inform the applicant that he was about to arrive at a decision. The regulations made clear that a decision was to be given within seven days of the receipt of representations and that deadline had long since passed.

60. However, even if it could be said that the decision came as a surprise to the applicant, it is remarkable that he never complained of that fact in the ensuing four months or so when a final decision was made by the Deputy Chief of Staff to reject his appeal. It is further surprising that when the AO's decision of the 25th November, 2013, was communicated to the applicant, it was not until the 6th December, 2013, that the applicant's solicitor emailed Mr. Atha with the results of the appeal and invited comment, which Mr. Atha provided an hour or so later.

61. It is further to my mind inconsistent with the applicant's complaints about being in some way taken short by the decision of the AO that at no subsequent time prior to the commencement of these proceedings did the applicant bring to the attention of any of the relevant authorities Mr. Atha's comments made on the 6th December, 2013.

62. I am therefore satisfied that there is no substance in this point.

63. Turning now to the applicant's final argument about the unresolved technical issue, it is necessary to look in a little more detail at the exchanges that took place. It will be recalled that Mr. Atha's original report of the 5th September, 2013, was submitted to the AO on the 19th September, 2013. He passed it on to Concateno, who responded on the same day to all of the issues raised by Mr. Atha. The response was sent to Mr. Atha who emailed the applicant's solicitors on the 2nd October, 2013, pronouncing himself satisfied with the response in all but one respect and that related to the absence of a creatinine test of the sample.

64. In his email of the 2nd October, 2013, Mr. Atha said:

> "Thank you for your email enclosing additional evidence provided by the Military Authorities in this case. These effectively resolve most of the caveats in my report of 5th September, mostly not to your clients benefit.
>
> I am afraid that the full report has blocked the "failed chain of custody" route, and the result does appear to be valid (confirmed by appropriate analytical technics) and to exceed the cut off level. However, I have been unable to locate any reference to creatinine content of the sample. I also note there are no comparable results from the analysis of the B Sample, however there is no reason to presume this result to be less valid (e.g. based on different methods) than for the A Sample…
>
> Test results-
>
> The calibration test shows accurate or slight under reporting of levels within the accepted margin of error suggestion a reading of 152ng/ml may have represented an actual level or (sic) around 154-155ng/ml…
>
> Creatinine-
>
> Nowhere is there any reference to the creatinine content or to dilution/adulteration test – these would normally be conducted at the screening stage. If the sample was unduly concentrated this would also elevate the test results compared to the actual levels of B.E. in your client's system… essentially the new evidence validates the test result and remaining comments and conclusions were reached on that basis."

65. It is absolutely clear from the foregoing that Mr. Atha, was, at that stage, accepting the validity of the test results and suggesting that if anything, they were under reported. The only outstanding issue was that of the absence of a creatinine test. When the AO resumed his interview with the applicant on the 9th October, 2013, he correctly noted that the only outstanding issue related to creatinine levels. Mr. Atha was asked to explain what his concerns in that regard were and an undated unattributed document appears to have emanated from him which was submitted to the AO on the 15th November, 2013. This again explains the creatinine issue and suggests that creatinine levels are normally measured at the screening stage. As I understand it, the reason for this is that a high creatinine level could indicate an abnormally concentrated sample of urine which might tend to give a higher test result. In the same document, Mr. Atha says:

> "The main issue favoring your client is the over reporting of the 150ng/ml 'standard' results, suggesting that at the time of the test the equipment was slightly over reporting the true levels in samples by between 4% and 6% (156 and 159ng/ml reported). This would suggest the levels in your client's A Sample to have been just below the cut off threshold of 150ng/ml, thus reporting the sample as a 'positive' would represent an unsafe conclusion".

66. On its face, this statement would appear to be entirely inconsistent with what Mr. Atha said in his email of the 2nd October, 2013, in which he remarked that the calibration test showed accurate or slight under reporting of levels within the accepted margin of error.

67. Confronted with this email, the AO, perhaps understandably confused, submitted this document and four questions of his own to Mr. Traynor who responded to them as described above. Mr. Traynor said that the creatinine levels had now been tested and were normal, thus putting paid to any suggestion by the applicant that this could have affected the test result in any way. Mr. Traynor said that contrary to what was alleged by Mr. Atha, creatinine testing was not common practice in drug screening. He went on to say that Mr. Atha's analysis was incorrect.

68. It is now sought to suggest that Mr. Atha in alleging over reporting was dealing with an issue entirely divorced from creatinine levels. If that is so, then there is a remarkable lack of clarity about Mr. Atha's comments which on the one hand appear to relate to creatinine levels and on the other are contradicted by his earlier report. Mr. Traynor dealt with the creatinine question comprehensively and said simply that Mr. Atha was wrong. This is now portrayed as a failure to deal with an important scientific issue raised by the applicant. Indeed in his subsequent email of the 6th December, 2013, Mr. Atha now says that there was a total failure to deal with what he describes as the "key issue at stake" which is the over reporting of the standard benzoylecgonine calibration test. Mr. Atha concludes his email by saying:

> "This could represent a case of negligence in failing to take account of the calibration margin of error, or wilful falsehood if they realised the error and are trying to cover it up".

69. These extraordinary allegations by Mr. Atha make it all the more surprising that the applicant did not trouble to bring them to anyone's attention prior to the institution of the proceedings or indeed to obtain an affidavit from Mr. Atha standing over them. The absence of such an affidavit is notable for the fact that Mr. Traynor has sworn an affidavit in which he avers that if anything, the test procedure adopted had a tendency to under report the benzoylecgonine level. He avers that Mr. Atha's contentions to the contrary misinterpret the figures and are incorrect.

Conclusion

70. It must be remembered that the AO appears to have interviewed the applicant on two separate occasions at some length. He was entitled to come to a view on the applicant's credibility on the accidental ingestion issue, particularly having regard to the inconsistencies in the applicant's account previously referred to, the absence of any corroborating evidence and the fact that it was not raised before the CO but only on appeal after receipt of an expert report suggesting it might provide a defence. There is no question of reversing the onus of proof as suggested by the applicant in his written submissions. The breach of discipline was proved by the positive test which the AO and GOC were entitled to conclude was not undermined by the applicant's expert evidence. The breach of discipline having been established, it was a matter for the applicant to satisfy the relevant decision maker that there had been an accidental ingestion which ought to inform the disciplinary option to be selected. The plain fact of the matter is that the applicant's explanation was found not to be credible. There was nothing irrational or unreasonable about this in my view. Nor was there a failure to have regard to any matters that ought to have been considered. I can identify no unfairness in the procedures to which the applicant was subjected.

71. Accordingly, for these reasons, I must dismiss this application.