

THE HIGH COURT**JUDICIAL REVIEW****[2009 No. 1241 J.R.]****BETWEEN****DANIEL SOMERS****APPLICANT****AND****THE MINISTER FOR DEFENCE****RESPONDENT****JUDGMENT of Mr. Justice Herbert delivered the 30th day of October 2012**

By Order of this Court made on the 1st December, 2009, the applicant was granted leave to seek an order of *certiorari* by way of judicial review quashing the decision of the General Officer Commanding, 4th Eastern Brigade of the Public Defence Forces discharging the applicant from the Public Defence Forces with effect from the 2nd December, 2009 and other reliefs, on each of the 26 grounds set out in the Statement of Grounds filed on the 1st December, 2009. The application is supported by a verifying affidavit of the applicant sworn on the 1st December, 2009. A Statement of Opposition was filed by the respondent on the 9th March, 2010, supported by seven affidavits.

The applicant joined the Public Defence Forces, (hereinafter, P.D.F.) as a recruit on the 15th September, 2003. It was a condition of his service with the P.D.F. that he would be required at any time to submit to a Compulsory Random Drugs Test, (hereinafter, C.R.D.T.). The requirement for this, the procedures involved in the testing and, the procedures attendant upon the result of the test, in particular a Positive Test, are set out in the Administrative Instruction Defence Forces A7 Chapter 3 (hereinafter, "the Administrative Instruction"). Despite the stated effective date of the 11th March, 2009, for this Administrative Instruction, the parties in the present application were agreed that its provisions governed the present case. I assume that this is so by reason of the provisions of para. 305A of the Administrative Instruction. Section 1, para. 301(b)(1) of the Administrative Instruction provides that it is P.D.F. policy that the unlawful possession, supply or use of a controlled drug is incompatible with membership of the P.D.F. Para. 301(d) provides that the primary objective of C.R.D.T. is deterrence and, that all personnel, randomly selected, irrespective of rank, will be tested.

For the purpose of this application the relevant part of the C.R.D.T. testing procedure is set out at section 2, para. 306 of the Administrative Instruction. Section 2, para. 306 provides that personnel selected for the C.R.D.T. will be required to provide a urine sample in an Integrated Cup selected by the donor within a defined period of four hours under the supervision of a civilian drugs testing team collector. In the instant case, following an on-site drugs screening test of that urine sample, (by the donor selecting a test key and inserting it into the designated socket area of the integrated cup) the result was unclear.

By reason of this fact, in compliance with the provisions of Appendix A section 4, of the Administrative Instruction the following steps were carried out. A laboratory request/chain of custody form was commenced. The applicant opened a provided sample collection kit, and decanted approximately equal amounts of the urine in the integrated cup into each of the two smaller containers contained in that kit. These were separately sealed by the civilian collector with "A" and "B" seals and signed and dated. The integrated cup and the various forms, after the latter had been checked and completed, and where required, signed by the applicant, were placed in a transparent bag which was then sealed by the civilian collector.

The applicant asserts that as he was confident that there should be no illegal substances in his body, he asked the civilian collector if it were possible to have a blood sample taken. It is the applicant's recollection that this civilian collector stated that this was not necessary as false positives had come up many times before and a urine sample was "OK". It is important to note that the Administrative Instruction makes no provision for blood sampling or testing. The applicant avers that one of the civilian collectors asked him if he had taken any medication that morning and he replied that he had taken vitamin tablets and had used eye drops. This is reflected in a chain of custody form dated the 5th February, 2008, signed by the applicant and a collecting officer under the heading, "CURRENT MEDICATION". A Medscreen Limited certificate of analysis, dated the 11th February, 2008, under the heading, "STATED MEDICATION", records, "Centrum Eyedrops and Dental Injection". The Request Form for controlled drugs and substance abuse testing in the Defence Forces, Appendix B to the Administrative Instruction at S. 6, provides for details of medication taken or administered in the previous 30 days. The affidavit of Alan Traynor, Toxicologist, who certified the Medscreen result, sworn on the 28th August, 2010, states that the medication recorded in the original test certificate was taken into account at the time of the analysis. Appendix A Part 4 Serial No. 19 requires that the donor be asked about all medication taken by him or her over the last 30 days with particular reference to, antibiotics, dental/hospital treatment/injections, travel sickness pills, prescribed and non-prescribed medication and herbal and homeopathic products.

The "A" sample was forwarded to Medscreen Limited, 20B Blackfriars Lane, London, and was received by that company on the 7th February, 2008. A certificate of analysis, dated the 11th February, 2008, of that sample states that the chain of custody was intact. The sample was found to contain a level of 183ng/ml of cocaine metabolite, "Benzoylcegonine". The certificate recorded that this exceeded the cut-off level of 150ng/ml and could not be explained by Centrum Eyedrops or a Dental Injection. Annex M of the Administrative Instruction provides that the cut-off concentration for confirmation tests for cocaine metabolite (Benzoylcegonine) is 150ng/ml. By the provisions of Annex L the screening cut-off concentration is 300ng/ml.

The applicant was informed to this result on the 18th February, 2008. In accordance with the provisions of para. 308 of the Administrative Instruction, the applicant elected to have the "B" sample tested, at his own expense. Scientifics Limited, Drug Testing Group, 500 London Road, Darby, was chosen by him from a list of three accredited civilian laboratories approved by the Director of Administration of the Public Defence Forces. A Certificate from this company dated the 10th March, 2008, states that the "B" sample

was analysed by it, using gas chromatography mass-spectrometry on the 7th March, 2008, together with standards and blanks, according to their in-house method, FORS 403 and, proved positive for the presence of Benzoylcegonine (Cocaine metabolite at a level of 240ng/ml, exceeding the 150ng/ml. cut-off level). The applicant was advised of this result on the 27th March 2008, in compliance with the provisions of paras. 326 and 327 of the Administrative Instruction.

The applicant made written representations to his Commanding Officer in accordance with the provisions of para. 327(d) of the Administrative Instruction on the 1st June, 2009. These were considered by the Commanding Officer in compliance with the requirements of para. 327(e) and para. 327(f) of the Administrative Instruction, and he furnished a written report dated the 8th June, 2009. He considered each of the thirteen representations made to him by the applicant and, stated his conclusions in respect of each of them. In exercise of the power vested in him by para. 327(g) and para. 327(h) of the Administrative Instruction, he recommended to the General Officer Commanding the 4th Western Brigade that the applicant be discharged from the Public Defence Forces.

In accordance with the provisions of para. 327(i) of the Administrative Instruction, the applicant made a written representation to the General Officer Commanding 4th Western Brigade in July 2009. On receipt of this representation the General Officer Commanding, on the 17th July, 2009, appointed Lt. Col. Brendan Healy, Intelligence Officer, 4th Western Brigade to act as Appeals Officer and conduct a *de novo* hearing of the applicant's case in accordance with the provisions of para. 327(k), (l), and (m) of the Administrative Instruction. The appeals Officer furnished his written report, dated the 21st September, 2009, to the General Officer Commanding, 4th Western Brigade, in which he rejected the applicant's representations and recommended that the applicant be discharged from the Public Defence Forces.

In this application for judicial review, the court is not concerned with the merits or otherwise of the recommendations made and the decisions taken in this case, by the P.D.F. Authorities. However, in order to determine the challenge made by the applicant to the fairness of the procedures adopted by the Appeals Officer in making these recommendations and reaching these decisions, it is necessary to refer to three aspects of the material evidence. In his written representation of July, 2009, to the General Officer Commanding, 4th Western Brigade, the applicant at para. 10 of his response to the recommendations, dated the 8th June, 2009, of his Commanding Officer, stated as follows:-

"The reason why I stated that I was unaware how I have tested positive in Finner Camp on the 05th Feb, '08 is because I have never knowingly partaken in any illegal substances. After talking to Dr. Hession, because of Dr. Quinn's absence and the Toxicology Dept. in Beaumont Hospital in Dublin the fact that I was out on the Saturday 2nd Feb. at a friends going away party and had visited a string of bars and nightclubs in Sligo - Connelly's Bar, Ship inn, McHughes bar and the Clarence nightclub to name a few. That my drink could have been SPIKED or I could have mistaken someone else's drink for my own which could have been altered, plus it was explained to me that cause of the wide usage of cocaine in Ireland that a large amount of our currency is contaminated with the drug. And that a lot of the toilets in bars and clubs in particular the cisterns, if in either of these case hand to mouth or hand to nose levels of the substance could be found in a drugs test. But also if this banned substance was in my system the blood and urine test conducted by Dr. Quinn would have shown up."

At para. 3 of his report dated the 21st September, 2009, the Appeals Officer refers to this response by the applicant and addresses it as follows:-

"Pte Daniel Somers states that it is possible that his drink was spiked or otherwise interfered with.

I interviewed witnesses nominated by Pte Daniel Somers that confirm that he was out drinking on 02 Feb. '08 in Sligo. I also confirmed that they visited a number of bars and a nightclub throughout the night. A number of friends from Sligo were out celebrating with a colleague. The party ended up at a nightclub in Sligo which was well known by the locals and Gardaí as a place where drugs were distributed. Witness says confirmed that a lot of alcohol was consumed and taxis were required to bring them home.

I have considered the possibility that Pte Daniel Somers drink could have been spiked but there was no sufficient details presented to me that Pte Daniel Somers drink or any other persons drink was spiked. Representation not accepted."

A detailed chronological account of events, dated the 11th August, 2009, was submitted by the applicant to the Appeals Officer, (ten pages/128 paragraphs). This contains, *inter alia*, the following:-

"47. 11.45 I left the gym and met Pte Devins who was in the car park outside waiting in his car. He asked what had kept me. I told him, he was as shocked as I was.

48. We left Finner camp immediately showed our passes to the military policeman on the main gate of the barracks.

49. On the way into Sligo pte Devins mentioned to me that if I was going to get a blood test that to go and see a Dr. Quinn, he is a professional independent medical doctor, but also stands in for the medical officers in Finner.

50. 12.15 I arrived at my dentist appointment at 12.15 (see attached form) where I was dealt with there.

51. I had no lunch.

52. 13.00 arrived at the doctors but it was closed so I waited in the car park till it opened at 13.55.

53. 14.00 entered the doctors, the secretary knew me through other friends. She commented on me being in uniform and told me to take a seat in the waiting room.

54. 14.30 I was seen to by Dr. Quinn.

55. Explained to him what had happened and that I wish to have a blood and urine sample taken and it to be tested for all types of illegal substances.

56. The samples were taken in a sterile environment in medical containers.

57. However, Dr. Quinn informed me that cause it was afternoon that I would have to take the samples around to the Toxicology Department, if they were left idle till the morning they would be null and voided as that the morning collection

had already gone.

58. 14.50 Left Dr. Quinn's office.

59. 14.55 Samples left into Toxicology department in Sligo General Hospital.

61. Thinking it [an Order to report to his P.D.F. Unit Headquarters in Galway], would have something to do with the tests that I hand on the 5th of the same month. I rang Dr. Quinn's office to find out if the results were back from the samples he had taken. I got through to his secretary who told me that Dr. Quinn was unavailable, but would put me through to the duty nurse,

62. I asked the duty nurse could she tell me if the results were in from the tests I had taken on the 5th, she told me they were and I asked were they positive or negative.

63. The duty nurse told me that the results were negative in both the blood and the urine samples that were taken on the 5th of Feb. '08 for all illegal substances. (See attached sworn affidavit by Dr. R. Quinn)."

In an affidavit sworn on the 28th April, 2008, Dr. Roddy Quinn, The Mall Family Practice, Barrack Street, Sligo, states as follows:-

"1. I am a General Practitioner and Medical Consultant and I say that I am the Doctor and G.P. for Daniel Somers of Cappanraheen, Craughwell, in the County of Galway and I make this Affidavit from facts within my own knowledge save where otherwise appears and whereso, otherwise appears I say that I believe the same can be true.

2. I say that on or about the 5th February, 2008, at about 2.30 pm I was consulted by Daniel Somers aforesaid who informed me that he had been told that he had been tested positive in a random test at Finner Camp in Co. Donegal where he was training with the Irish Army and that at his request I conducted a procedure for the taking to two samples from him, namely, a sample of blood and a sample of urine.

3. I say that I placed the date upon the samples and placed them into a bag.

4. I say that at the time of the attendance by Daniel Somers on me he was known to my Secretary who was at Reception.

5. I say that the results of the said tests have been returned directly to me and I have read the same and I say that the said test results show a negative reading for cocaine metabolite. I say that I have signed my name and a copy of the said test results prior to the swearing of this Affidavit and have appended them hereto.

6. I make this Affidavit for the benefit of the O.C. of An Chead Chaith Western Command, Galway."

The Toxicology Laboratory Report, dated the 7th February, 2008, from the Department of Chemical Pathology, Beaumont Hospital to the Department of Pathology, Sligo General Hospital, (requesting doctor: Dr. R. Quinn) states that Drug Screen Urine Tests were carried out as requested for, benzodiazepines, barbiturates, opiates, cocaine, propoxyphene, phenothiazines, cannabis, amphetamine, methadone, L.S.D. and, alcohol and none were detected. A similar report of equal date states that Drug Screen Blood tests were carried out as requested for benzodiazepine, barbiturates, tricyclics, paracetamol, salicylate, and, alcohol and none were detected. This Drug Screen Urine Report contains the following statement, "(Report not valid for Pre-Employment/Workplace Testing. Please contact lab for details)."

Paragraph 7 of the report of the Appeals Officer dated the 21st September, 2009, contains the following consideration and analysis of these matters:-

"Pte Daniel Somers contends that as the samples taken by Dr. Quinn, came back negative that this gives reasonable doubt as to the CRDT results. I met with Dr. Quinn in his surgery in Sligo at 11.45hrs on the 25th Aug: 09. I had received a letter from Pte Daniel Somers which I gave to Dr. Quinn allowing him discuss Pte Daniel Somers drug test on 05 Feb. 008 with me. Dr. Quinn stated that 05 Feb. 2008 was the first visit of Pte Daniel Somers to his surgery. However, he has been his patient since and has had a number of appointments. Dr. Quinn referred to Pte Daniel Somers medical file and confirmed that he conducted urine and blood tests for his patient Pte Daniel Somers. He couldn't remember all the details but his normal routine was that he or the nurse would take the blood sample and the patient would produce the urine sample after a visit on his/her own to the toilet. He would not normally supervise or be present while the urine sample was being produced. If the samples were taken in the morning he would normally send them to the laboratory from the surgery himself. However, in this case he probably gave the samples to Pte Daniel Somers to bring to the Laboratory as these samples were taken in the afternoon. When I discussed this with him he acknowledged that there was no independent chain of custody. He stated that he put Pte Daniel Somers name on the samples and only took one sample. There was no "B" sample taken. Dr. Quinn stated that the test for urine and blood was done in a clinical manner and NOT for compliance with international drug taking standards.

The Samples were sent from Sligo General Hospital to the Chemical Toxicology department in Beaumont Hospital, Dublin.

The Laboratory indicated that on the Urine Sample for Pte Daniel Somers there was an N.D. (none detected) for Cocaine. This test was conducted on 07 Feb. '08. The form with this result however notes that 'Results are not valid for Pre-Employment/Workplace Testing'. There was no chain of custody recorded throughout this process.

The Laboratory indicated that the Blood Sample was tested on 07 Feb. 2008 however, there was no result given for Cocaine metabolite (Benzoylcegonine). Again there was no evidence that there was a chain of Custody recorded throughout this process.

I have noted the process used by Dr. Quinn and the status of the results from the laboratory. I am NOT satisfied that the Chain of Custody process for the samples taken by Dr. Quinn match the adherence to Chain of Custody procedures of the CRDT by the Defence Forces as outlined in Ref N. Representation not accepted."

At para. 4(e) and (f) of his recommendations/conclusion the Appeals Officer stated that in his *de novo* consideration of the applicant's appeal he noted the Defence Forces policy that the use of a controlled drug was incompatible with membership of the

P.D.F. However, he also stated that he had taken into consideration the peripheral and mitigating aspects of the case. The applicant was very anxious to remain in the P.D.F., which was his occupation of choice and to avoid any imputations on his good name and character through being discharged for the use of a controlled drug. He asked to be retained in service or at least be permitted to participate in the P.D.F., Targeting Drug Testing Process. (This latter was a recommendation available to an Appeals Officer pursuant to the provisions of para. 327(n)(3) of the Administrative Instruction. Pursuant to the provisions of para. 327(o) and (p) of that document a General Officer Commanding could decide to defer a decision whether or not an individual should be discharged from the P.D.F., for a period not greater than eighteen months on condition that the individual agreed to submit to targeted drug testing during that period and remain on administrative duties until he or she had passed at least two targeted drugs tests).

The Brigade Social Worker and also the Unit Personnel Service Support Officer had both orally confirmed to him that the applicant had discussed with them the great stress and anxiety which he had suffered since the 5th February, 2008. The Brigade Social Worker was most sympathetic towards the applicant who consistently stressed his innocence and, she indicated that she would ensure that the applicant got the assistance which he required. The Unit Personnel Service Support Officer stated that she had often worked with the applicant and considered that he was a good soldier who had been most obliging and helpful. Sergeant Brian Carleton, appointed Signal Sergeant in January 2009, in a character reference dated the 10th April, 2009, stated that he had always found the applicant, whom he had known for a number of years previously to be reliable, enthusiastic and honest and a great asset to the Signals and to the Unit.

The applicant was described by Private Shane McGlynn who shared a house with him in February 2008, as a good example and, identified the applicant as the person who had influenced him to become a blood donor. The Appeals Officer had regard to a letter dated the 26th June, 2009, from Dr. Ellen McSweeney, a Consultant Haematologist with the Irish Blood Transfusion Service, which confirmed that the applicant was a blood donor and was on their panel at that time. The Appeals Office also had regard to a letter dated the 10th July, 2009, from Jo Lawlor, Apheresis Donor Services Manager of the Irish Blood Transfusion Service, which certified that the applicant attended the national Blood Centre at James' Street, Dublin, on a monthly basis at their request to make a platelet donation. This letter stated that a platelets unit had a shelf life of only five days and that this service was of the utmost importance to patients undergoing chemotherapy and major surgery and to premature babies. (At para. 15 of his analysis and consideration of the applicant's representations, the Appeals Officer states that he spoke to Ms. Sandra Healy of the Blood Transfusion Service. She was unable to give him information about the applicant as an individual blood donor. She advised him that donors are screen tested for transmittable disease, but that drug testing was not employed. Each donor was asked to fill out a Health and Life Form which included a question on drugs).

The Appeals Officer noted that at para. 5 of his written representations made in July 2009, to the General Officer Commanding 4th Western Brigade, the applicant had stated that he had for many years been an active participant in these blood and platelets donor schemes. The applicant believed that, "arising from the sensitivity of these donations the blood was tried and tested rigorously for any obscurities" which activity he considered was "totally incongruous with partaking in drugs". The Appeals Officer recorded that at para. 6 of the applicant's written representations to the General Officer Commanding he submitted that if he were to be discharged from the P.D.F., he would be unemployed and to all intents and purposes unemployable. The applicant stated that he would be unable to continue paying the mortgage on his house at a time when his partner of five years was pregnant with their first child.

At the hearing of the application before me, counsel for the applicant relied upon the following grounds in seeking judicial review:-

1. In breach of fair procedures the Appeals Officer, without informing the applicant of that fact or of the result sought in writing, through the Adjutant 4th Western Brigade and, obtained written advice from the Officer in Command Defence Forces Drugs Testing Team on a number of technical matters raised by the applicant in relation to the C.R.D.T. procedure.
2. In breach of fair procedures the Appeals Officer without informing the applicant of that fact or of the result, obtained advice from the Legal Services Branch of the P.D.F., as to the standard of proof to be applied by him in determining the appeal.

At the hearing of the application before me, both sides accepted that the burden of proof lay on the officer initiating administrative action pursuant to the provisions of para. 327(b) of the Administrative Instrument. At para. 11 of the Statement of Opposition the respondent denied that the Appeals Officer failed to conduct a fair hearing or to adequately examine the matters complained of or brought forward by the applicant and, at para. 13 denied that the Appeals Officer obtained specialist or legal advice without disclosing same to the applicant or that any such alleged matters rendered the appeal unfair.

3. The Appeals Officer failed to apply the correct standard of proof, which in a disciplinary procedure where the applicant's future career as a member of the P.D.F. was in issue was a standard equivalent to the forensic standard of proof beyond reasonable doubt, or alternatively, a standard of proof on the balance of probabilities but with a requirement for more substantial evidence to establish allegations prejudicial to the applicant.
4. In breach of fair procedures the Appeals Officer failed to inform the applicant of the balance of proof or of the standard of proof; erred in law in placing the burden of proof on the applicant and, erred in law in applying an erroneous and inconsistent standard of proof, namely, convincing or persuading.
5. The recommendation of the Appeals Officer that the applicant be discharged from the P.D.F., for the use of a controlled drug was unreasonable, irrational and contrary to common sense having regard to the material before him.
6. In breach of fair procedures, the Appeals Officer and the General Officer Commanding 4th Western Brigade failed to consider properly, or at all, the option of retaining the applicant in service with the P.D.F., conditional upon his participating in a targeted drugs testing process as provided for in para. 327(n) and (o) of the Administrative Instruction; failed to give any adequate reasons for not exercising the discretion to avail of that option and, in the case of the General Officer Commanding, failed to give any or any adequate reasons for his decision to discharge the applicant from the P.D.F.
7. The Appeal process failed to comply with the provisions of Article 6 of the European Convention on Human Rights and Fundamental Freedoms as it is framed or established on an ad hoc basis without any adequate legal guidelines or instructions as to the process.

In his letter dated 28th July, 2009, to the Officer in Command Defence Forces Drugs Testing Team, the Appeals Office stated that, "As a number of the representations [*made by the applicant*] are technical in nature I am requesting assistance from the OICDFDTT in order to properly inform Pte Somers on my investigations and to make recommendations to the GOC". In this letter the Appeals Officer

identified the queries raised and averments made by the applicant which gave rise to his request for information and then asked the following questions:-

- (a) Did the procedures employed by the Defence Forces Drugs Testing Team comply with best practice and standards both nationally and internationally?
- (b) Was it common for the, "A" and "B" samples to indicate different results and what implications if any did such a difference have for the final result?
- (c) Why, when both results were below the cut-off level of concentrations for screening tests for cocaine metabolites as per. Annex L11 of the Administrative Instruction was the matter further processed.
- (d) Was it possible from the results to confirm or to contradict the possibility raised by the applicant that his drink may have been "spiked" or otherwise interfered with without his knowledge.
- (e) (i) If the donated sample was not within the specified temperature range should it have been secured and retained until after a second sample had been provided.
- (ii) Was the applicant asked at the correct time in relation to all medicine taken by him over the appropriate time?
- (iii) Was all the related documentation dealt with appropriately?
- (f) Did the tests carried out by the doctor in Sligo on the 5th February, 2008, which resulted in a negative finding for drugs in the applicant's system have the same status as the Defence Forces Compulsory Random Drugs Testing.

It was accepted by Counsel for the applicant during the hearing of the application before me that the query at "C" above arose out of a misreading by the applicant of the Administrative Instruction and no issue was therefore raised with respect to it.

The response dated the 11th August, 2009, from the Officer in Command Defence Forces Drugs Testing Team to the Appeals Officer deals with the items (a) to (f) inclusive sequentially. Excluding the reply to item "C", which is no longer relevant, these replies were as follows:-

- "1(a) The drug testing procedures conducted by the Defence Forces are in line with the European Workplace Drugs Testing Society (EWDTs) guidelines and international best practice. These procedures have been subject to Judicial Review and have been found to be acceptable to the High Court.
- (b) Differences in "A" and "B" sample results are normal. Analytical methods conducted by laboratories (all UKAS accredited) are slightly different so you would not expect exactly the same result. Both samples were above the internationally accepted cut-off level of 150ng/ml. so both samples were positive. Whether a sample is 1ng/ml. or 100ng/ml. above the cut-off level is irrelevant, the overall test result is positive.
- (d) It is not possible to confirm or contradict Pte Somers statement on a possible spiking from test results. The laboratory can only confirm the presence of a substance, in this case cocaine metabolites, above internationally agreed cut-off levels. Purity of the substance, the individual's metabolism and time factors cannot be ascertained from the sample.
- (e) Pte Somers makes three separate representations in para. 3(e), these I will address in sequence;
 - (1) Annex "A" to the Admin. Instr. A7 Chapter 3 is the document used by the civilian collector during the drug test. Serial 12 indicates that the temperature of the donated specimen was within the specified temperature range. The collector initialled Serial 12 and Pte Somers signed the end of the page.
 - (2) The collector also completes a chain of custody form if samples have to be sent to the laboratory for analysis. This form is completed during the test in the presence of the individual donor and requires the collector to ask the donor to declare any current medication taken over the previous 30 days. Pte Somers made a declaration and signed the form.
 - (3) I am satisfied from my examination Pte Somers file that all attendant documentation was completed and dealt with appropriately. Pte Somers has recently received copies of all documents through the FOI [*Freedom of Information*] process. Attached please find copies of Annex "A" and the chain of custody form to enable you to analyse Pte Somers queries and representations and to confirm or contradict my comments above.
- (f) The Compulsory Random Drug Tests conducted by the Defence Forces meets all internationally accepted standards and the laboratories used are all UKAS accredited. The procedures have been subject to Judicial Review and High Court rulings. Although the doctor in Sligo has stated in his affidavit that Pte Somers provided a blood and urine sample for testing, there appears to be no independent verification of the donor, no chain of custody of the samples or who handled them after they were placed into a bag, no accreditation of the laboratory, no statement as to the procedure carried out in obtaining the samples and no affidavit from the doctor's secretary. It should also be noted that on the bottom of the toxicology reports from Beaumont Hospital the following proviso is made "Result not valid for Pre-Employment/Workplace Testing". I would therefore conclude that this test holds less weight and status than that of the CRDT.
- 2. The briefing given to all donors by OICDFDTT prior to the CRDT clarifies that if a test is to be sent to a laboratory for analysis it does not indicate a positive. Tests are only declared positive after laboratory analysis. At no stage during the process on the 05 Feb 2008, would Pte Somers have been told that his test was positive.
- 3. Pte Somers did not indicate or declare that he thought his drink was spiked or interfered with to the civilian collector when completing the chain of custody form."

Both pages of this letter dated the 11th August, 2009 carry the notation "Staff in Confidence" at the top and at the bottom of each page.

The Appeals Officer, through the Adjutant 4th Western Brigade wrote to the Officer in Command, Defence Forces Drugs Testing Team by letter dated the 18th August, 2009, enclosing a copy of the applicant's 128 paragraph account of Events, (to which I have already adverted), dated and received on 11th August, 2009, and, seeking his comments thereon. The reply to this letter, dated the 14th September, 2009, addresses the questions raised by the applicant in this Account of Events regarding a number of procedural steps taken in the course of his compulsory random drugs tests on the 5th February, 2008. The reply concludes with the statement, "as such I have no doubt that the procedures were supervised and followed closely on the day". In the penultimate paragraph of this letter dated the 14th September, 2009, the author states as follows:-

"5. The fact that Pte Somers stated that he handed his independent samples into Sligo General Hospital himself, that there is no record of their movements between the doctors surgery, Sligo General Hospital and Beaumont Hospital together with the proviso on the Beaumont toxicology report throws considerable doubt as to the validity of these individual tests."

Again both pages of this reply are marked, "STAFF IN CONFIDENCE" at the top and foot of each page. This penultimate paragraph adds additional comment to that already contained in para. 1(f) of the letter dated the 11th August, 2009, from the same author, - the Officer in Command Defence Forces Drugs Testing Team. The author now appears to contend that what is stated by him throws considerable doubt on the validity of the tests commissioned by the applicant and, not just that they should be afforded less evidential weight than the Defence Forces compulsory random drug tests. At paras. 77, 78 and 79 of his Account of Events, dated the 11th August, 2009, the applicant stated as follows:-

"77. 18th Feb. 08, rang Dr. Quinn's office again, he was unavailable but the duty nurse was there, so I spoke with her and told her my situation and about the results, she gave me the Ext. number for the Toxicology dep. in Sligo.

78. I talked to one of the lab technician who gave me a reference number and told me to contact Bomonte hospitals toxicology dept in Dublin cause it is there laboratory who medical tests it,

79. I rang Bomonte hospital toxicology dept and got through to a technician called Brian, who in fact tested my blood and urine. He said that there was no way that there was any illegal substance in either the blood or urine sample which he tested belonging to me and if there were he would have found it. I also mentioned the amount of 189ng/ml which he was extremely low. The medical technician also noted that he could not understand why the test conducted by the civilian man in finner camp tested positive."

From a consideration of para 7 of the report of the Appeals Officer i dated the 21st September, 2009, which I have already cited, it is manifest that these criticisms by the Officer in Command Defence Forces Drugs Testing Team of the validity of the tests relied upon by the applicant and, of their evidential weight in comparison with that of the Defence Forces Compulsory Random Drugs Tests, materially influenced the decision of the Appeals Officer and, were key elements in his conclusion that the applicant had used a controlled drug during his service with the P.D.F.

In my judgment, it is an insuperable obstacle to the fairness of the procedures adopted in this case, whether the Appeals Officer was acting solely in a determinative role or, partly also in an investigative role, that the text of these letters dated the 11th August, 2009, and, the 14th September, 2009, from the Officer in Command Defence Forces Drugs Testing Team to the Appeals Officer were not furnished to the applicant and, the applicant afforded a reasonable opportunity to respond, including the granting of reasonable time, if requested by him, to obtain expert advice and to present rebutting evidence on this topic. I find this to be particularly so having regard to the gravity of the matter from the point of view of the applicant. His prospects of a future career in the P.D.F. would be greatly influenced even if not actually decided, by the conclusions and recommendations of the Appeals Officer.

In these letters, particularly at para. 1(f) of the letter of the 11th August, 2009, and para. 5 of the letter of the 14th September, 2009, the Officer in Command Defence Forces Drugs Testing Team presented a factual exposition as to why the Defence Forces Compulsory Random Drugs Tests results in the applicant's case should be preferred by the Appeals Officer to the results of the drugs (urine) test commissioned by the applicant. The Administrative Instruction A7 chapter 3, section 1, paragraphs 301 and 302, stipulate that the test be by urine sample only. The results themselves were on their face irreconcilable and therefore presented a serious issue on the question of proof. These were matters which the Appeals Officer was obliged to evaluate and weigh in the balance before reaching his conclusions and, making his recommendations to the General Officer Commanding 4th Western Brigade. The applicant, most unfortunately, was given no opportunity to address this material before it was accepted and acted upon by the Appeals Officer. I find that the applicant was therefore denied, even if not consciously, deliberately or officiously, the full and fair hearing required by para. 327(k) of the Administrative Instruction and by law. The court cannot speculate as to whether or not the outcome would have been any different had these letters been furnished to the applicant.

At para. 10 of his affidavit, affirmed on the 31st March, 2010, the Appeals Officer states that to the best of his recollection, the applicant, who had access to, "his own legal advisers", never requested sight of legal or technical advice obtained by the Appeals Officer. Undoubtedly, in para. 13, of his written representations to his Commanding Officer on the 1st May, 2009, approximately two months prior to the appointment of the Appeals Officer to conduct a *de novo* hearing of the applicant's case, the applicant states, "I say and am advised that you have discretion in the matter . . . etc.". The correspondence exhibited in this application includes a letter, dated the 12th November, 2009, - more than three months after the Appeals Officer furnished his written report, - from O'Regan Little, Solicitors, Dublin, commencing ". . . we have been consulted by the above named client in relation to his proposed discharge from the P.D.F. . . .". At para. 12 of his affidavit sworn on the 10th May, 2010, Lt. Col. Hanna, the applicant's commanding officer exhibits a letter dated the 4th April, 2008, addressed to him by Silke and Company, Solicitors, Galway. This was slightly more than one year and five months prior to the appointment of the Appeals Officer to conduct the *de novo* hearing of the applicant's case. By letter, (exhibited also), dated the 11th April, 2008, Lt. Col. Hanna directed Silke and Company, to address their correspondence to the Secretary-General of the Department of Defence. At para. 12 of this affidavit Lt. Col. Hanna states, "I am not ware that the Applicant's solicitors pursued the matter further and I note that the allegations in their letter of the 4th April, 2008, are not repeated in his affidavit".

However, even if Silke and Company, Solicitors, of some other firm of solicitors acted for the applicant between the 4th April, 2008, and the 12th November, 2009, the obligation was not on the applicant or on whatever legal or other advisers he may have had at that time, to seek fair procedures. They were not obliged to surmise that the Appeals Officer might possibly have sought legal or technical advice from some third party and seek discovery or disclosure of whatever documents or records may have been generated in seeking such advice. The onus was at all times on the Appeals Officer to ensure that the applicant was afforded fair procedures

and he was therefore obligated to make full disclosure of all such documents to the applicant whether they were sought or not.

In *Georgopoulos v. Beaumont Hospital Board* [1998] 3 I.R. 132 at 154, Hamilton C.J., giving the judgment of the Supreme Court held as follows:-

"It is submitted on behalf of the plaintiff that the Irish courts have accepted that a breach of fair procedures occurs when a decision-maker acts on the basis of information which had been obtained outside of the hearing and which is not disclosed to the party adversely affected.

I unreservedly accept the submission provided it relates to facts which are relevant to the matters in issue before the Tribunal. It does not apply to questions of legal advice given to a Board or Tribunal in relation to the conduct of an inquiry."

It is not necessary for me to decide and, I do not decide, whether it is a breach of fair procedures for a decision-maker to seek "technical advice", as distinct from legal advice in relation to the conduct of the inquiry. I am satisfied and I find that the advice sought and obtained by the Appeals Officer in the present case from the Officer in Command Defence Forces Drugs Testing Team and, upon which he acted was advice relating to facts relevant to the matters at issue before him and in respect of which he was obliged to make a decision. As the Appeals Officer did not inform the applicant that he intended to seek such advice from the Officer in Command Defence Forces Drugs Testing Team and did not furnish the applicant with a copy of each of his letters seeking that advice and did not furnish the applicant with a copy of each of the letters received by him from the Officer in Command Defence Forces Drugs Testing Team in reply, there was a clear breach of fair procedures.

The court will therefore grant an order of certiorari quashing the order made by the General Officer Commanding 4th Western Brigade on the 25th September, 2009, discharging the applicant from the Public Defence Forces. I do not consider it necessary or appropriate to determine the remaining grounds upon which the applicant seeks relief in this application.