

**THE HIGH COURT
JUDICIAL REVIEW**

[2002 No.835 J.R.]

BETWEEN

DONAL De ROISTE

APPLICANT

**AND
THE JUDGE-ADVOCATE GENERAL,
THE MINISTER FOR DEFENCE, IRELAND AND
THE ATTORNEY GENERAL**

RESPONDENTS

Judgment of Quirke J. delivered the 27th day of July 2005.

By order of the High Court (O'Neill J.) dated 17th December, 2002, the applicant was given leave to seek various declaratory and other reliefs by way of judicial review, including an order of *certiorari* quashing a report entitled "The report of inquiry into the circumstances surrounding the retirement in the interests of the service of Lieutenant Donal Roche on 27th June, 1969". That report was completed by the first named respondent, ("the JAG."), in September, 2002. It was then adopted by the second named respondent, ("the Minister"), who published it on 2nd October, 2002.

The applicant claims, *inter alia*, that the Minister appointed the JAG to conduct an inquiry into certain circumstances which resulted in the involuntary retirement of the applicant from the Defence Forces in June, 1969.

The applicant claims that he was the subject of the inquiry and had a legitimate, fundamental and significant interest in its conduct because its conclusions and recommendations affected his reputation and good name.

He contends that the JAG conducted and completed the inquiry prematurely and without due observance of the principles of natural and constitutional justice. He says that he was not afforded fair procedures by the JAG, who failed to exercise the powers conferred upon her by the second respondent judicially.

He claims that, because the inquiry was conducted unlawfully, the resultant report was flawed and defective and it must be quashed on that ground.

FACTUAL BACKGROUND

1. The applicant was involuntarily retired from the Defence Forces in 1969 "in the interests of the service" on grounds that he was suspected of associating with persons engaged in subversive activities.

In 1997 he was granted leave by the High Court (Geoghegan J.) to challenge the decision to retire him. The grounds for leave included, *inter alia*, a claim that the decision resulting in his retirement was made in breach of the principles of natural and constitutional justice and *ultra vires* relevant statutory provisions.

The High Court (McCracken J.) by order dated 28th June, 1999, and, (on appeal), the Supreme Court, by order dated 19th January, 2001, refused the applicant the relief which he sought on grounds, primarily, of his inordinate and inexcusable delay in seeking relief.

2. On February 8th, 1999, during the hearing of a Motion for Discovery in those proceedings the High Court (Kinlen J.), suggested that the Minister should check the files within his possession and, if possible, supply the applicant with copies of any statements made by the applicant or letters written by the applicant or the applicant's solicitor during the investigation which resulted in the applicant's retirement in 1969.

3. On 15th May, 2001, a file was located in a safe in the Department of Defence. It contained documents including a letter from a (named) solicitor addressed to the Chief of Staff of the Defence Forces. It was dated 30th May, 1969, and it provided as follows:

"Dear Sir. We act for a First Lieutenant Donal Roche who has instructed us to act on his behalf with regard to various serious accusations and charges made against him by the Army. Our client states that he has been brought before various officials and officers of various ranks and accused of misconduct, indiscretion, being a security risk etc. On one occasion he was charged with the offence of being a security risk and on another occasion gross misconduct and so on, with the result that our client does not know where he stands.

He is being pressurised and badgered which is quite unfair, due to the fact that he has not yet been formally charged and notice given to him and an opportunity afforded him to make his own case for his own Defence. Every action that has been taken up to now against him has been completely to his prejudice. We must point out that in the Defence Act, 1954 there are various protections given to officers which have been ignored in our client's case.

Our client would therefore like to know what charge, if any, is being preferred against him."

The discovery of that letter was not made known to the applicant and no documents were made available to him at that time.

4. A decision was made on 1st July, 2002, by Major-General Sean.F.Brennan to afford the applicant access to the files and papers surrounding his retirement from the Defence Forces in 1969. Major-General Brennan made that decision in his capacity as an authorised officer within the Defence Forces for the purposes of the Freedom of Information Act. The decision was made in response to a request made on behalf of the applicant under the Freedom of Information Act for access to those files and papers.

5. On 2nd July, 2002 the Minister, in exercise of the power vested in the Government by s.15(3) of the Defence Act, 1954 "charged..(the JAG)..with the performance of a duty". The nature of the duty which the J.A.G was required to perform was identified in a document furnished by the Minister to the JAG. It was entitled Terms of Reference. It provided as follows:

"Case of ex-Lieutenant Donal Roche

The Judge Advocate General, Ms. Onah McCrann, had been asked to review all Defence Forces and Department of Defence files relating to the decision to retire ex-Lieutenant Donal Roche from the Defence Forces in June, 1969 from the following perspectives in particular;

'To enquire into the circumstances surrounding the retirement of ex-Lieutenant Donal Roche by means of a complete review of all relevant documentation held by the Department of Defence and by the Defence Forces, and to have full access to any civil or military personnel for the purposes of their providing explanation in relation to any apparent gaps or ambiguities in the documentation and to report to the Minister with her conclusions and recommendations.'

Notwithstanding the decision of the authorised officer under the Freedom of Information Act the Minister directed that the applicant should not be afforded access to the files and papers relevant to his dismissal from the Defence Forces until after the completion of the process and the publication of the Report of the JAG.

6. For reasons which have not been identified the JAG requested the Minister to amend the Terms of Reference. He did so on 15th July, 2002, adding the following paragraph: "The Inquirer is to be entitled, within the Terms of Reference, and the manner of the Inquiry contemplated, to take such representations in writing for any party whom she considers to be appropriate.

7. On 16th July, 2002, the JAG advised the applicant's solicitor that:

"the Terms of Reference of the above Inquiry have been broadened to entitle me, within the Terms of Reference and the manner of the Inquiry contemplated, to take such representations in writing from any party whom I consider to be appropriate...I am of the view that it is appropriate that your client be invited to make such written representations. I am anxious to deal with this matter as expeditiously as possible and if you are instructed to make written representations on behalf of your client you might notify me accordingly, I would envisage that any written representations should reach me on or before Friday 26th July."

8. The applicant's solicitors replied to the JAG on 24th July, 2002, requesting that documentation from all government departments and agencies of State involved in the retirement should be examined and the applicant interviewed. They also sought an extension of time within which to submit representations.

The JAG replied on 29th July, 2002, advising that she was not entitled pursuant to the Terms of Reference to take oral evidence from any party and would not interview the applicant or any other individual. She extended the time for receipt of written representations to 31st August, 2002, indicating that she did not envisage any further extension of time in that regard.

9. Mr. Michael Howard who is the Assistant Secretary of the Department of Defence wrote to the JAG on 30th July, 2002, summarising the "position" of the Minister in respect of the process upon which the JAG had embarked. The security considerations in 1969 and the need for propriety and good judgment by officers of the defence forces at that time were emphasised on behalf of the Minister.

Major General Sean F. Brennan wrote to the JAG on 30th July, 2002, attaching formal submissions from the Defence Forces contending *inter alia* that "the documents disclosed that Lieutenant Roche was given ample opportunity to make his own case, to consult his legal advisors and to defend his action. There was no requirement for him to be tried with an offence...

Referring to the applicant's files and papers he added that "...at the request of the Department of Defence I agreed to defer their release until the completion of this review. These documents include details of the interviews conducted with him (the applicant) in April or May 1969 as well as related reports".

10. On 30th August, 2002, the applicant's solicitors furnished written submissions to the JAG.

Under the heading "Introduction" the applicant pointed out (a), that his submission was made "blind, without sight of the Defence Force files, or the Department of Defence files.." and (b), that he had not had access to any civil or military personnel and did not know if there were any gaps, apparent or otherwise or ambiguities in the documentation.

The submission concluded with a request that "documents should be examined with a view to actively determine the identity of the accusers that...(the applicant)... never had an opportunity of meeting" and that the applicant and former Commandant Patrick Walsh, who wished to tender evidence, be interviewed by the JAG.

11. By letter dated 4th September, 2002, the JAG replied acknowledging receipt of the submissions and advising that

"...the Terms of Reference permit access to any civil or military personnel for the purpose of their providing explanations in relation to any apparent gaps or ambiguities in the documentation. Where I consider it necessary and appropriate I will avail of such access purely for the purpose of obtaining explanations in relation to any apparent gaps or ambiguities from the documentation... I do not propose to take oral evidence from any party in respect of my review of the documentation or even insofar as it is envisaged by the Terms of Reference..."

12. By letter dated 18th September, 2002, the applicant's solicitors advised the JAG that her letter of 4th September had not been received until 13th September and that the applicant's solicitors would reply "over the next few days".

They did so by letter dated 20th September, 2002, arguing that the proper construction of the Terms of Reference permitted the JAG to interview the applicant and ex-Commandant Patrick Walsh and that the applicant should "have sight of the file in order to make proper submissions in this review..".

13. By letter dated 19th September, 2002, the JAG responded to the letter from the applicant's solicitors dated 18th September, 2002, stating "I have now completed my review of the documentation furnished to me by the Minister for Defence. My report was sent to the Minister on 17th September."

14. By letter dated 23rd September, 2002, the applicant's solicitors wrote to the JAG stating *inter alia* that "we are disturbed to find that you have furnished your report to the Minister on 17th September. We do not understand the hastiness in sending your report when there were matters outstanding... we wish to point out that the subject matter of this review has had disastrous consequences for the life of our client and his family...we formally request that our concerns be addressed... please advise of the steps you will take to address these matters by return..."

15. The JAG responded by letter dated 24th September, 2002, confirming her earlier letter of 19th September, 2002, and the fact that...

"I have now completed my review of the documentation relating to the retirement of your client and my report thereon was delivered to the Minister for Defence on 17th September, 2002. Any further queries that you may have in relation to the matter should be directed to the Minister for Defence as my involvement in the matter is now concluded."

16. The applicant's solicitors wrote to the Minister on 27th September, 2002, explaining the sequence of events which had occurred from the applicant's perspective, arguing that the JAG had acted unfairly by requiring the applicants to *"make blind submissions and not... affording us an opportunity to be heard..."* and formally requesting that the report as presented be returned to the JAG in order to *"...allow the Inquiry to proceed in accordance with the requirements of natural and constitutional justice..."*.

17. By letter dated 1st October, 2002, Mr. Conor Kerlin who is a Principal Officer in the Department of Defence responded on behalf of the Minister stating that:

"The Inquiry conducted by the Judge-Advocate General... was comprehensive and has been conducted correctly and in accordance with the Terms of Reference designed to ensure that she would be in a position to give the Minister full and impartial advice... Your firm made a comprehensive submission... within which you put forward your case on behalf of your client... The (JAG) was engaged in a review of matters of documentation and record. It was never envisaged that (JAG) would attempt to have conducted the equivalent of a full court hearing."

Referring to the earlier decision of the High Court (McCracken J.) dismissing the applicant's Judicial Review proceedings on grounds of delay he continued *"it was the existence of the extant judgments of the courts... that led the Minister to the view that an independent review by the Judge-Advocate General by reference to all of the records and documentation available in this case, would provide a mechanism to address your client's representations and concerns in this matter."*

18. The report of the JAG is entitled "Report Of Inquiry Into The Circumstances Surrounding The Retirement 'In The Interests Of The Service' Of Lieutenant Donald Roche On 27th June, 1969".

Under the heading "Interpretation of Terms of Reference" the report provides that

"The matters which will be addressed by this Inquiry having regard to the terms of reference and the contents of the documentation reviewed are as follows:

- (1) Whether it is possible to ascertain the circumstances surrounding the retirement of ex-Lieutenant Donald Roche from a review of the documents provided to me.*
- (2) Whether or not it is possible to conclude that it was reasonable to retire ex-Lieutenant Donald Roche from the Defence Forces 'in the interests of the service'.*
- (3) Whether or not it is possible to conclude that fair procedures were followed or that there was a breach of fair procedures.*
- (4) What steps, if any, should be taken by the Minister in respect of the matter."*

19. Under the heading "Documentation" the report identified a number of documents and described the manner in which they were considered. It concluded

"I had, pursuant to the Terms of Reference, a brief meeting with Major General Sean Brennan on 30th July, 2002, for the purpose of obtaining clarification as to some of the military terms and abbreviations used in the files. He also confirmed to me that the copy intelligence files which I have examined is identical to the original intelligence file of which three copies exist."

20. Under the heading "The Facts" the report set out the history of the applicant's career in the army indicating that *"there is nothing in the documentation... to suggest that (the applicant) had come to the attention of his superiors for anything that might adversely effect his military career prior to April, 1969"*.

The report continued *"it appears from an initialled hand-written memorandum dated 22nd April, 1969, on the intelligence file that what is described as a 'confidential source' had reported that (the applicant) was in the company of members of the Dublin IRA splinter group on 16th and 17th April, 1969, and... discussed with them a forthcoming auction of army vehicles at Clancy Barracks on 23rd April, 1969. The memorandum indicates that it was not possible at that stage to say whether or not the connection was subversive."*

Another hand-written memorandum in the same handwriting confirmed the applicant's attendance at the auction.

A further hand-written undated and unsigned memorandum in the same handwriting identified three subversive individuals with whom (the applicant) was believed to have been in contact. Another undated and unsigned memorandum in the same handwriting headed "Summary" detailed three interviews between army personnel and the applicant. It expressed concern that (the applicant) posed a serious security risk.

The report of the JAG stated that *"the memorandum makes it clear that there is no evidence to indicate a subversive connection between..."* the applicant and the person with whom he was in contact on 16th and 17th of April, 1969.

The other documentation referred to in the Report comprised memoranda recording the questioning of the applicant by military personnel during interviews. The memoranda are unsigned and the identities of the questioners were not apparent from the documents. An unsigned typewritten note recorded that the applicant wished to submit a written account of the matter after his third interview.

Further documents referred to in the Report include letters and reports (including a security report) to and from senior officers in the armed forces. These letters and reports summarised the facts as outlined and details of the interviews with the applicant.

The report places emphasis upon a typewritten report of interviews which apparently took place on 28th and 29th May, 1969,

between the Deputy Judge-Advocate General and the applicant.

That typewritten report is dated 29th May, 1969. It was sent by the Deputy Judge Advocate General to the Chief of Staff of the Defence Forces and in turn by the Chief of Staff to the Minister for Defence.

21. In her report the JAG found as follows:

"The Deputy Judge-Advocate General reports of having told..(the applicant)..that he had been called in to advise the Chief of Staff of the matter and that he was reluctant to do anything until (the applicant) had submitted the written Statement which he had in turn indicated he wished to submit on 30th April, 1969. The Deputy Judge-Advocate General states in the report that he was told by (the applicant) that his solicitor...had undertaken to write...The Deputy Judge-Advocate General told (the applicant) that no letter had been received... and ...went over the contents of the intelligence report again with him, the contents of which (the applicant) did not challenge although he is recorded as having said that he did not appreciate what he was guilty of...the Deputy Judge-Advocate general records that he went over the matter again with him as a result in minute detail, told him the facts disclosed a very serious state of affairs and advised him that he should seriously consider his situation and return the following morning at 10 with his statement. (The applicant) is noted to have asked whether there would be any objection to him consulting his solicitor and (was told that) ... there was not...(The applicant) reported to the Deputy Judge-Advocate General's Office the following morning, 29th April, 1969,... (presumably 29th May 1969)... at 9.40am and he said that he would not make any further statement and then left. The report concludes that having regards to the (the applicant's) demeanour and his refusal to make a statement, the Deputy Judge-Advocate General was satisfied that his retention in the forces constituted a grave security risk."

The JAG's report continues:

"It is clear that a letter was sent by (the applicant's) solicitor dated 30th May, 1969, to the...Army Headquarters. The letter sought clarification as to what charge, if any, was being preferred against (the applicant). It is not clear when this letter was received and while a draft reply was prepared to the letter it would appear from the file that the draft was never finalised and the letter was not replied to...No further correspondence appears to have been received from (the applicant's) solicitor prior to his retirement."

Under the heading "Conclusions" the JAG addressed the question:

"Whether it is possible to ascertain the circumstances surrounding the retirement of x-lieutenant Donal Roche from a review of the documents provided to me."

She concluded *inter alia* that:

"Insofar as the documentation goes, it is possible to determine the circumstances surrounding x-lieutenant Roche's retirement..."

Addressing the question "Whether or not it is possible to conclude that it was reasonable to retire ex-Lieutenant Donal Roche from the Defence Forces 'in the interests of the service'." She reported (at p.60) that:

"I am of the view that it was certainly reasonable of (the applicant) to offer to provide a written statement in respect of the matter and it was further reasonable of the authorities to expect that such a written statement would be provided. When (the applicant) did not provide the statement he was again, at a very late stage in the proceedings and when the matter was revisited by the Deputy Judge-Advocate General at the request of the Minister, asked by the Deputy Judge-Advocate General to furnish the written statement, and whether because of naivety or some other reason and having had the benefit of legal advice, (the applicant) refused to provide such a statement. In these circumstances, having regard to the nature of the investigation and having regard to (the applicant's) refusal to provide a statement I do not think that it was unreasonable that a decision be taken to continue to recommend to the Minister for Defence that (the applicant) be retired by the President in the interests of the service."

Addressing the question "Whether or not it is possible to conclude that fair procedures were followed or that there was a breach of fair procedures" the JAG concluded (at p.21) that:

"While it is not possible to say, having regard to the content of the documentation, whether or not there was a breach of fair procedures in the context of the conduct of the investigation, the merits of the case may well have resulted in the retirement of (the applicant) in any event. As I have previously indicated, given the passage of time and the death of certain essential witnesses and, in particular the then Deputy Judge-Advocate General Colonel Cullen, it is not possible to determine the precise nature of what transpired at the four interviews of (the applicant) which interviews are noted in the documentation."

Addressing the question "What steps, if any, should be taken by the Minister in respect of the matter?" the JAG advised that no benefit would be derived from holding an oral inquiry into the matter and continued:

"having regard, however, to the fact that (the applicant) has on many occasions sought access to his files in relation to his service in the armed forces I am of the view that he should now be afforded access to all documentation seen by me during the course of this Inquiry up to the date of his retirement. So as to ensure that he can satisfy himself as to the content of that documentation and to the transparency of this review... In this context, it should be noted that, as indicated in the submissions received by me on behalf of the defence forces, a decision had already been taken to furnish such documentation to (the applicant) which decision was deferred at the request of the Minister until the conclusion of this review"

22. The Minister formally adopted the report of the JAG on an unknown date and on 2nd October, 2002, published the report which apparently attracted considerable media attention.

23. The decision made on 1st July, 2002, by the authorised officer (Major General Brennan) to release all documents to the applicant relating to his retirement was not communicated to the applicant until the completion of the report of the JAG on 17th December, 2002.

THE APPLICANT'S CLAIM

Mr. Bradley S.C. on behalf of the applicant contends that the process undertaken and completed by the JAG was conducted in a manner which violated the applicant's constitutional rights and the principles of natural and constitutional justice.

The JAG was entitled, as a matter of law, to interpret the terms of reference which governed the process upon which she was engaged.

She interpreted those terms of reference as requiring her to investigate certain matters, including (a) whether or not it had been "reasonable" to retire the applicant from the defence forces in 1969, (b) whether "fair procedures" had then been afforded the applicant and, (c) what steps, if any, should be taken by the Minister in respect of the "matter".

Mr. Bradley S.C. argues that the applicant was never advised that the JAG had so interpreted the Terms of Reference.

He says that (a), the investigative process undertaken was established by the Executive and was focussed upon issues which concerned the applicant's right to enjoy a reputation and good name. That right is constitutionally protected, (b) the applicant, therefore, had a legitimate, fundamental and significant interest in the process and in its conclusions and recommendations and, (c) he was, accordingly entitled to be heard and to be provided with fair procedures within the process, including sight of the documentation which was the focus of the inquiry so that he could make informed submissions and representations directed towards protecting his reputation and good name.

Mr. Bradley says that the applicant was wilfully deprived of the documentation which he sought and was denied a full and adequate hearing either orally or in writing. He was also denied the opportunity to make additional representations by the premature completion of the report by the first respondent and the refusal of the second respondent to return the matter to the JAG to facilitate additional representations.

Finally he argues that, having regard to the gravity of the issues under investigation the applicant was entitled to adduce evidence on his own behalf either orally or on affidavit.

Response

Mr. Gleeson S.C. on behalf of the respondent contends that the report of the JAG is not justiciable.

He says that the conclusions and recommendations of the JAG do not have any automatic legal effect and do not interfere with any legal right attaching to the applicant. Neither the applicant nor any other person has a legal right to require the Minister to act upon the findings of the report.

He argues that the report is "legally sterile" in nature because the Minister is not required by law to act upon any conclusion or recommendation contained in the report.

He says that the duty with which the JAG was charged was to submit a report which would inform the Minister of an event which occurred in 1969. No consequences necessarily follow from the submission of report and none did. No legal right of the applicant was or will be affected by its findings and recommendations.

He contends further that, if the report of the JAG is justiciable, there was no failure to provide the applicant with fair procedures, no breach of natural or constitutional justice in the conduct of the process and no breach of any legal or constitutional right vested in the applicant.

He says that the applicant has not been prejudiced by denial of access to the documentation. Full written submissions were made on his behalf to the JAG.

He points out that no adverse findings against the applicant have been made in the report so that his good name has not been damaged by the process or by any conclusion reached or recommendation made in the report.

He says that the JAG was entitled to complete the report expeditiously. The applicant's complaints made after the report had been furnished to the Minister were complaints, he says, which had already been made within the written submissions submitted to the JAG on 30th August, 2002. Accordingly, no useful purpose would have been served by providing the applicant with the opportunity to make additional similar representations to the JAG.

JUSTICIABILITY

Mr. Gleeson S.C. contends that the report of the JAG was a report intended to inform the Minister of an event which occurred in 1969. He says that it does not give rise to any grounds for supervision by way of judicial review.

He relies upon the decision of the High Court (Kearns J.) in *Ryanair v. Flynn and McCauley* [2000] 3 I.R. 240 in support of his contention.

In that case the respondents were commissioned "...to conduct an inquiry into the escalating dispute at Dublin Airport and furnish a report to the Minister" pursuant to the provisions of s.38 (2) of the Industrial Relations Act 1990.

The court held, (at p.263) that the matter was not justiciable because the decision sought to be impugned was not "susceptible to being quashed in the sense that no legal rights of the applicant (were) affected by what is a mere fact-finding report...".

In consequence the court held, (at p.264) that the respondents were "under no obligation ... to act judicially ..." but was nonetheless satisfied that the inquiry had been conducted in a manner which was fair and appropriate in the circumstances.

Mr. Gleeson S.C. argues that in the instant case no legal rights of the applicant have been affected by the report of the JAG and that accordingly no decision has been made which is "susceptible to being quashed." Therefore, he says, the report and its conclusions, findings and recommendations are not amenable to judicial review.

He says that, although there was no obligation upon the JAG to act judicially, she did in fact do so.

The principle identified by the High Court (Kearns J.) in *Ryanair v. Flynn and McCauley* (supra) is not in dispute. The courts will only intervene by way of judicial review (a), in matters where there is a public law dimension and (b), in respect of a decision, act or

determination which will affect some legally enforceable right or a right so close to such a right that "...a probable, if not inevitable, next step.." will be "...that some legal right will, in fact be infringed."

In *Ryanair*, the Court was satisfied that no decision, act or determination had been made by the respondents which affected any such right or contingent right then vested in the applicant. In that case the respondents had been commissioned to submit to the Minister a "...mere fact-finding report..".

In the instant case the position is different. Mr Gleeson S.C. says that the process undertaken by the JAG was a review of Defence Force documents and the completion of a report "...so that...(the Minister could)...inform himself of an event which occurred in 1969."

He cannot be correct.

I say that because on the 15th July 2002 the Terms of Reference were, at the request of the JAG, broadened to entitle her to "...take such representations in writing from any party whom she considers to be appropriate.." She wrote to the applicant's solicitors the following day inviting representations from the applicant. She advised that "...I am of the view that it is appropriate that your client be invited to make...representations." The applicant was in possession of no documents at that time. The files and papers relating to his enforced retirement had been withheld from him at the direction of the Minister. The JAG knew that such was the case. If, as Mr Gleeson contends, the process upon which the JAG engaged was a review of Defence Force documents it would have been absurd for her to have sought representations from the applicant in relation to those documents. She knew that he had been deprived of access to them and had never seen them. The process undertaken by the JAG was significantly more than a review of documentation for the purpose of submitting to the Minister a "...mere fact-finding report..". It was a process which required the JAG to reach conclusions and make findings of fact and recommendations to the Minister.

I accept the contention advanced by both parties that as a matter of law the JAG was entitled to interpret the terms of reference which governed the process upon which she was engaged.

She interpreted those terms of references as requiring her to reach conclusions and make findings of fact inter alia on the following matters (i), whether or not the decision made by the Government in 1969 to advise the President that the applicant should be required to retire from the defence forces had been "reasonable" and (ii), whether or not the applicant had been afforded fair procedures by the State when that decision was made. Her interpretation permitted her to make recommendations to the Minister as to "what steps, if any, should be taken...in respect of the matter...". She did so. Those recommendations arose from the findings of fact and conclusions contained in the report.

Undeniably the applicant's good name was adversely affected by his retirement by the President on the advice of the Government in 1969.

Proceedings directed towards restoring the applicant's good name which were commenced in 1997 were dismissed by the Courts in 2001 because of his delay in seeking relief. There the matter rested. The applicant appeared to have exhausted the remedies available to him.

On the 2nd July, 2002, for reasons which are not readily apparent, the Minister charged the JAG with the conduct of the process which has given rise to these proceedings. The process was established by the Minister exercising powers conferred by statute upon the Government.

The process conducted by the JAG was investigative in nature. It was focused entirely and exclusively upon matters directly concerned with the applicant's reputation and good name. It addressed four specific questions, including a question which the courts had, in 2001, declined to address (i.e. the provision of fair procedures for the applicant in 1969). It reached conclusions. It made findings of fact. It made recommendations to the Minister which resulted from those findings of fact.

Mr. Gleeson points out that the decision to retire the applicant from the Defence Forces in 1969 was final and has been held to be lawful. That is certainly the case. He says that the outcome of the process undertaken by the JAG does not have any automatic legal effect because neither the Minister nor anyone else is obliged by law to act upon its conclusions and recommendations. That is also correct. He says that, accordingly, the JAG's report and its findings and recommendations are "legally sterile" because no legal right vested in the applicant has been or can be affected by them. He invokes the principle identified by the High Court (Kearns J.), in *Ryanair* in support of his contention.

I cannot accept Mr Gleeson's argument.

The Minister established this investigative process, on behalf of the Government, by assigning to the JAG a "duty" which entitled her to reach conclusions and make findings of fact and recommendations. The assignment was effected pursuant to the provisions of s15 (3) of the Defence Act 1954. The conclusions, findings and recommendations of the JAG directly and almost exclusively concerned the applicant's reputation and good name. The applicant was invited to participate in the process by making representations to the JAG. Those representations were, presumably, intended to influence the outcome of the process and to have an impact upon the conclusions, findings and recommendations of the JAG.

It is true that the conclusions, findings of fact and recommendations contained within the report of the JAG will not have a mandatory consequence for the applicant in terms which are strictly legal in nature. That is so because the Minister is not required by law to act upon those conclusions, findings and recommendations. However the so-called "legally sterile" nature of those conclusions, findings and recommendations is not, by itself, a sufficient ground to deprive the applicant of the right to seek the relief which he seeks.

In *Maguire v. Ardagh* [2002] 1 I.R. 385 the Supreme Court (Hardiman J.) considered "findings of fact" which, it was contended were "legally sterile" in the sense that no automatic legal consequences would follow such findings.

Hardiman J. at p.668 described "findings of fact" as

"...the phrase used to describe the binding findings of a judge or jury on the factual issues before a court.... I have no doubt that the phrase, according to its ordinary and natural meaning, describes a rigorous analytical process leading to factual conclusions, conducted by a body uniquely equipped or authorised to do so. It is the diametric opposite, in my view, of the sort of opinion expressed about a work of art or music..... when it is recalled that the hypothetical finding of fact in this case might involve a finding as serious as "unlawful killing", made by a parliamentary sub-committee acting under the authority of both Houses, I believe that it is quite fanciful to consider that a reasonable man or woman in the

street would not regard a report so phrased as a solemn finding of demonstrated wrongdoing."

He continued;

"...in law, "findings" are given the special status of being presumed to be true for the purpose of justifying any comment based on them. Nor would it be unreasonable having regard to the Oxford English Dictionary meanings. There, the primary meaning of the word "findings" is "the action or an instance of finding or discovering", and the relevant special meaning is "the result of a judicial or other formal inquiry; a verdict".

In the instant case the JAG made findings concerning the applicant. Relying upon those findings she concluded that it had been reasonable for the (then) Minister for Defence to recommend to the President that the applicant should be involuntarily retired from the Defence Forces in 1969.

The decision to recommend that the applicant should be involuntarily retired in 1969 has been deemed by the courts to have been lawfully made. No determination has been made by the courts or by any lawfully authorised tribunal or body as to whether or not the decision to recommend his involuntary retirement was "reasonable".

The instant proceedings are concerned with a process which was apparently undertaken "*inter alia*" to make such a determination. The applicant was not specifically advised that this was "*inter alia*" the focus of the process. He was not provided with access to documents which were relevant to the issue to be determined.

It is argued on behalf of the respondents that because the JAG's findings, conclusions and recommendations were "*legally sterile*" in the sense outlined above the conclusions, findings and recommendations contained in her report are not amenable to review by this court. It is contended that the applicant was not entitled to the application of fair procedures by the JAG and that she was not obliged to act judicially in the conduct of the process.

In *Maguire v. Ardagh* (Supra) Hardiman J. considered the question of findings of a tribunal of inquiry which, it was argued, would be "*legally sterile*". He declared that:

"The arguments of the respondents draw heavily on the proposition, undoubtedly correct, that the findings of a tribunal of inquiry are said on high authority to be "legally sterile" in the sense of having no strictly legal consequences. This quality is sufficient to prevent the results of a tribunal's inquiries being regarded as an administration of justice within the meaning of Article 34 of the Constitution. The applicants do not submit that the "findings of fact" by the sub-committee would be an administration of justice. But they say, and it has not been disputed, that while such findings have no "legal" effect, they may have many and far reaching effects. Moreover, I have to say that I find the phrase "legally sterile" extremely unattractive in any realistic human context.... One is therefore left with an entity described as a "finding of fact or conclusion" which, it is agreed, could in practice have an adverse affect on an individual. But that, the respondents contend, does not take away from the central truth that "in law" it is of no effect at all.

*I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law. If this is the law then it can only be described as a legal fiction.... no ordinary person hearing that a parliamentary committee had found as a fact that a named person had unlawfully killed another would be expected, by anyone other than a small minority of lawyers, to reflect that that of course was merely a matter of opinion. It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any persons rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has "no" effect. Not merely is it conceded that it would have effects: these effects would sound, *inter alia*, in the area of the affected person's constitutional rights. When, later in this judgment, I consider the United States cases on the House un-American Activities Committee, it will be seen that many persons have been economically ruined and socially outcast by virtue of decisions which are "legally sterile".*

He continued:

"I believe the foregoing demonstrates the wisdom of the judgment of this court In re Haughey [1971] I.R.217 where it was held, in the words of Ó Dálaigh C.J. at p.264:-

"...in proceedings before any tribunal where a party to the proceeding is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may correctly be classed as proceedings which may affect his rights ...".

The instant proceedings concern a process established by statute by the government of a sovereign State. It was conducted by a statutory personage entitled "The Judge-Advocate General". The process was concerned directly with matters relating to the reputation and good name of the applicant. The report which resulted from the process was adopted on behalf of the government and published.

It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name whether favourably or adversely. He enjoys the right to reputation and a good name. That right is constitutionally protected.

I am satisfied that since the process undertaken directly concerned matters relating to the applicant's reputation and good name its findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings.

FAIR PROCEDURES

It is well settled that a person accused of a serious offence whose conduct has become the subject matter of a tribunal of inquiry is entitled to certain protections including:

- (a) details of the allegations made against him or her and the evidence which will be relied upon in support of those allegations,
- (b) the right to cross-examine "accusers",

(c) the right to adduce evidence in rebuttal and

(d) the right to address the tribunal in defence (by Counsel if necessary).

The provision of fair procedures must not however be understood as requiring that every person who is the subject of an investigative or other process will invariably be entitled to adduce oral testimony in support of any representations which he or she wishes to make. Whether there must be an oral hearing in any particular case will depend upon the matters under investigation, the circumstances of the case, the nature of an applicant's interest in the process and the extent to which his or her right or rights may be jeopardised. See the *State (Williams) v. Army Pension Board* [1983] I.L.R.M.308 and *V.Z v. Minister for Justice* [2002] 2 I.R.135.

The applicant claims that the JAG infringed the rule *audi alteram partem* by failing to acquaint him with details of the case which he had to meet within the process undertaken by the JAG.

Insofar as the applicant had a "case to meet" within the process it can be summarised as a series of contentions advanced on behalf of the Minister and the Defence Forces (a), that the decision to recommend his involuntary retirement in 1969 had been "reasonable", (b), that he had been provided for with fair procedures at the time when the decision was made and (c), that no steps should be taken by the Minister in respect of the applicant's involuntary retirement.

The applicant had been provided with the Terms of Reference which governed the process. The applicant was, accordingly, on notice that the JAG was inquiring into the circumstances surrounding his involuntary retirement.

The Terms of Reference suggested *prima facie* that the inquiry would be confined to a review of documentation. The applicants solicitors were then advised that the terms of reference had been broadened in order to entitle the JAG to take presentations in writing from "any party whom she considered to be appropriate...".

It is unsurprising that the applicant's solicitors pointed out that the written submissions furnished on behalf of the applicant to the JAG on 30th August, 2002, had been made "blind" without sight of the files from the Defence Forces the Department of Defence.

When the JAG received the applicant's written submissions on the 30th August, 2002, she was aware that a decision had been made by Major General Brennan (in his capacity as an authorised officer for the purposes of the Freedom of Information Act), to release the relevant papers to the applicant.

She was aware also that the Minister had directed that the applicant should not be afforded such access until after the completion of the process.

By failing to provide the applicant with access to the relevant documents the JAG and the Minister deprived the applicant of the opportunity to make meaningful and informed representations to the JAG within the process directed towards the vindication of his right to his reputation and good name

Mr. Gleeson S.C. has candidly acknowledged that, within the process, the applicant had been subjected to several instances of "... *apparent injustice*". The deprivation of access to the relevant papers was, he said, one such instance. He could offer no explanation for that deprivation. In the absence of an explanation the injustice to the applicant remains apparent.

A conscious decision was made on behalf of the Minister to deprive the applicant of access to documents to which he was (then), apparently lawfully entitled. The decision was made at the commencement of a process which directly concerned the applicant and was investigating (a), an earlier decision taken by a former Minister for Defence and (b), the conduct of members of the Defence Forces.

Two of the three participants within the process, (the Minister and the Defence Forces), had access to the documents. The applicant, who was lawfully entitled to have access to the documents, was deprived of that access by a direction given by the Minister to a member of the Defence Forces.

That was patently unfair to the applicant. It comprised a failure to provide him with fair procedures and a failure to observe the principles of natural and constitutional justice in the conduct of the process. No explanation has been offered on behalf of the respondents by way of justification or mitigation. It remains therefore unexplained and inexplicable.

The failure to provide fair procedures were by no means trivial, insubstantial or technical in nature. It inhibited and may well have prejudiced the capacity of the applicant to make fair and adequate representations to the JAG. A simple example of this inhibition and possible prejudice is to be found in the conclusion of the JAG on the issue of whether the decision to involuntarily retire the applicant from the Defence Forces had been "reasonable."

She reported (at p 60 of her report) that:

"When the matter was revisited by the Deputy Judge-Advocate General at the request of the Minister, asked by the Deputy Judge-Advocate to furnish the written statement, and whether became of naivety or some other reason having had the benefit of legal advice,..(the applicant..) refused to provide such a statement. In these circumstances, having regard to the nature of the invitation and having regard to the..(applicant's)..refusal to provide a statement I do not think that it was unreasonable that a decision be taken to continue to recommend to the Minister for Defence that (the applicant) be retired by the President in the interests of the service."

Documents within the relevant files indicated that the interviews between the Deputy Judge-Advocate General and the applicant took place on 28th and 29th May, 1969. The files also contained a letter from the applicant's (then) solicitor dated 30th May, 1969 which claimed that the applicant was being pressurised and badgered but not formally charged. The letter claimed that no notice had been given to him indicating wrongdoing and no opportunity afforded to him to make a defence. A demand was made as to whether any charges were to be preferred against him.

The contents of that letter dated 30th May, 1969, may have provided an explanation for the applicant's "... *refusal to provide a statement*..." on 29th May, 1969. That refusal formed the basis of the JAG's conclusion that the decision to involuntarily retire the applicant was "reasonable."

The applicant was deprived of access to the relevant papers (including the records of the interviews on the 28th and 29th May 1969

and the letter from his solicitor on 30th May, 1969,).He was deprived of the opportunity to make representations to the JAG which might have affected her conclusion that his involuntary retirement at that time had been "reasonable".

Perhaps she would have rejected those representations.Perhaps she had already considered the possible explanation referred to.Perhaps she overlooked it.The applicant does not know.The court does not know.The applicant was not afforded the opportunity to offer that explanation to the JAG for her consideration.

Mr Bradley says that the applicant has been denied fair procedures in a number of additional respects.It is unnecessary for the court to consider those additional claims.It follows from what I have already found that the applicant is entitled to declaratory relief and to an order quashing the conclusions and findings in the JAG's report.I will hear Counsel as to the form of order to be made.

The decision made in 1969 to recommend the applicant's retirement from the Defence Forces remains unaffected by any order made in these proceedings.