Neutral Citation Number: [2006] IEHC 334

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2006 No. 31 J.R.]**

**BETWEEN**

**DAVID CARROLL**

**APPLICANT**

**AND**
**THE MINISTER FOR DEFENCE**

**RESPONDENT**

**Judgment of Mr. Justice Herbert delivered the 10th day of November, 2006.**

1. By Order, made *ex parte* on 13th January, 2006, the applicant was granted leave to seek judicial review of the decision of the respondent not to continue the service of the applicant as a member of the Permanent Defence Force.

**Facts**

2. By notice dated 3rd June, 2003, the applicant, having completed 29 years service in the Permanent Defence Force applied, pursuant to the provisions of s. 65 of the Defence Act, 1954, for a fifth period of continuance of two years service in the Permanent Defence Force to enable him to have rendered 31 years qualifying service towards a pension.

3. Section 65 of the Defence Act, 1954, empowers the respondent by Regulations to provide for the continuance in service in the Permanent Defence Force of men of the Permanent Defence Force who have completed a total continuous period of 21 years service.

4. It was common case between the parties that the relevant Regulation is paragraph 11 (as amended) of the Defence Force Regulations, A 10 Enlistment, Promotions, Reductions, Transfers to the Reserve Defence Force and Discharge. Subparagraphs (4)(a) and (5)(a) of paragraph 11 (as amended) of the Defence Force Regulations, A, 10, which the parties accepted were the relevant provisions, provide as follows:-

> "Subject to the provisions of subparagraphs (2) and (3) of this paragraph, continuance in service shall:-
>
> (a) In the case of a person enlisted in the Permanent Defence Force before 1st January, 1994, be authorised by:-
> the Deputy Chief of Staff (Support), where such continuance would result in the man serving in the Permanent Defence Force after he has attained the age of fifty years;
>
> or
>
> The General Officer Commanding the Command in any other case.
>
> (5) The continuance in service of a man of the Permanent Defence Force under the provisions of this paragraph shall not be authorised unless:-
>
> (a) In the case of a person enlisted before 1st January, 1994:-
>
> (i) The man's continuance in service is recommended by his commanding officer;
>
> (ii) If the man is a private, he is graded not lower than Private Three Star;
>
> (iii) The man's military conduct is assessed now lower "GOOD" in accordance with the provisions of paragraphs 38 and 40 of the Defence Force Regulations A. 8;
>
> (iv) The man's continuance in service is in the interests of the service."

5. On the 4th January, 2006, the General Officer Commanding the Command did not recommend that the applicant be continued in service. The recommendation of the applicant's commanding officer was dated 19th December, 2005. The applicant's conduct was assessed as unsatisfactory. The reasons given for this decision were that:-

> "During the two years prior to the assessment date Sergeant Carroll has been charged on 26 occasions totalling over 78 days AWOL [absent without leave] all charges were proven. His continuance in service is not in the interests of the service".

6. The applicant claims that this Assessment was not fairly carried out in accordance with well established practice in implementing the provisions of paragraphs 38 to 40 inclusive (as amended) of the Defence Force Regulations, A. 8., Documents, Orders, Records, Correspondence and Returns. In particular the applicant points to the fact that he was not issued with a warning in compliance with the terms of paragraph 229, s. 3 of Part 10 of the "A" Administrative Instructions Defence Forces 30 October 1987.

7. Paragraph 38 of the Defence Force Regulations, A. 8., provides that except in the case of a non-commissioned officer or private who on discharge has had less than 6 months service, the military conduct of a non-commissioned officer or private shall be assessed on 5 bases-exemplary, very good, good, fair and, unsatisfactory.

8. Subparagraph (e) of paragraph 38 provides that a non-commissioned officer or private, who during the period of two years immediately prior to the date of assessment:-

> "(ii) Forfeited pay as a consequence of being absent without leave for a period exceeding 21 days or for periods exceeding in the aggregate 21 days
>
> shall be assessed as unsatisfactory."

9. Administrative Instruction 229 of s. 3 Part 10 of the "A" Administrative Instructions Defence Forces, is headed:-

> "Issue of warning to personnel whose conduct is likely to cause their applications for extension, re-engagement or

continuance in service to be refused on conduct grounds".

10. It then provides as follows:-

> "Where a member is seen to behave in a manner which in the long term will result in his conduct being assessed as less than "GOOD"-DFR A.8 Para. 38, thereby possibly resulting in a refusal of application for extension of service/re-engagement or continuance, he shall be paraded and advised to improve his standards, and of the possible consequences of a continuation of the behaviour in question. It is unfair to wait until the member actually applies for extension, etc, to inform him that he will not be eligible for extension etc, on conduct grounds. Personnel whose conduct gives cause for concern in this regard shall be paraded at least nine months (and earlier, if possible) before such extension – re-engagement/continuance is due and warned of the consequences of failure to show improvement. This parading shall be recorded on A.F.667B and retained on the Unit personal file".

11. For the Reporting Year January 2001 to December 2001, Lieutenant Colonel Farrell, the applicant's reporting officer in his Report dated 22nd April, 2002, stated:-

> "Sergeant Carroll's performance during the period under review was inadequate. He had several long periods of absence and was completely unreliable".

12. The Commanding Officer agreed with this assessment on 10th June, 2002. It was accepted on behalf of the applicant at the hearing of this application for judicial review that, as recorded in the applicant's Personal File Notation, Part One, the applicant's Commanding Officer, on 24th October, 2002, paraded the applicant in the presence of the Regimental Sergeant Major and informed the applicant as follows:-

> "Sergeant Carroll subject to you applying to continue in service in the Defence Forces from 27 to 29 years that because of your disciplinary record to date under the terms of the Defence Force Regulations A. 10., paragraph 11(4) it is not proposed to recommend your continuance in service".

13. For the Reporting Year January 2002 to December 2002, the same Reporting Officer, in his Report dated 21st July, 2003, stated:-

> "Sergeant Carroll proved to be completely unreliable during the reporting period. His pattern of absences was such that his contribution to the M.A.A. was negligible. He has no potential for promotion, and his continued service is of doubtful benefit".

14. The Commanding Officer agreed with this assessment on 22nd July, 2003. It was not contended by the applicant that he had not received these two A.F.667B Annual Confidential Reports.

15. The applicant was discharged from the Permanent Defence Force with effect from midnight on 13th January, 2006, after a period of 31 years service. He is entitled to a military pension appropriate to this service. The applicant was born on 5th April, 1958. He would have been obliged to retire from the Permanent Defence Force on reaching his 60th birthday.

**Issues**

16. It was contended by the applicant that this was not, as was contended by the respondent, a "warning" within the spirit or the terms of Administration Instruction 229. He further submits that even if it should be construed as a "warning" it was not given "at least nine months (and earlier, if possible), before such extension/re-engagement/continuance is due". The date of termination of the applicant's then present engagement in the Permanent Defence Force was 13th October, 2003, the date of his application to continue in the Permanent Defence Force was 3rd June, 2003 and, it is stated by his Commanding Officer at paragraph 16 of the Affidavit sworn by him on 23rd February, 2006, that the date of assessment was 13th October, 2003. The applicant contends that in order to comply with the spirit and the provisions of Administrative Instruction 229, it was essential that he should have been paraded and warned before he had accumulated 21 days of forfeiture of pay through absence without leave in the 2 year period prior to 13th October, 2003, thereby rendering it impossible for his military conduct to be assessed as meeting the absolute minimum standard of "GOOD" as required by paragraph 11(5)(a)(iii) of the Defence Force Regulations A. 10.

17. It was demonstrated on behalf of the respondent, by reference to the military record, that even after the 24th October, 2002, the applicant continued to be absent without leave and, as a consequence, received a severe reprimand and forfeited a further six days pay. From the applicant's Conduct Sheet, exhibited in the affidavit of his Commanding Officer, Commandant Jim McCarthy, sworn on 23rd February, 2006 and, not contested in evidence, it appears that in the period 24th October, 2001 to 30th September, 2002, the applicant was absent without leave on 72 days and five and a half hours and forfeited 72 days pay. It was submitted on behalf of the respondent that on the facts the military conduct of the applicant had to be assessed as "UNSATISFACTORY" having regard to the provisions of paragraph 38(e) of the Defence Force Regulations, A. 8, and that his continuance in the Permanent Defence Force could not therefore be authorised by reason of the provisions of paragraph 5(a)(iii) of the Defence Force Regulations A. 10., so that he had to be discharged from that Force in accordance with the provisions of paragraph 58(t) of the Defence Force Regulations A. 10.

**Conclusions**

18. By direction of the Adjutant-General given by letter/notice dated 30th October, 1987, the "A" Administrative Instructions Defence Forces Part 10, are to be read in conjunction with Defence Force Regulations A. 10. Administrative Instruction 229 is specifically concerned with the assessment of the military conduct of non-commissioned officers and privates in accordance with the provisions of paragraph 38 of the Defence Force Regulations A. 8. Between 13th October 2001, (the start of the period of two years immediately prior to the date of assessment), and 6th December, 2001, the applicant had forfeited 22 days pay as a consequence of being absent without leave, so that as of the 6th December, 2001 he would have had to be assessed as "UNSATISFACTORY" in accordance with the provisions of paragraph 38 of the Defence Force Regulations A. 8. Therefore, whether or not it is to be regarded as a "warning" as contemplated by Administrative Instruction 229, the information given to the applicant when he was paraded on 24th October, 2002, was in any event too late to have done anything to have adverted an assessment of "UNSATISFACTORY", as indeed also was the A.F. 667B Annual Confidential Report of 10th June, 2002.

19. The applicant could not have been temporarily assessed as "GOOD" pursuant to the provisions of paragraph 40(2) of the Defence Force Regulations A. 8, as he could not show that he had not incurred an entry on his Conduct Sheet in the 6 months prior to the date of assessment on 13th October, 2003. It was accepted at the hearing of this application for judicial review that the applicant continued to go absent without leave even after the events of 24th October, 2002.

20. The provisions of paragraph 40 A, were not applied to the applicant which is scarcely surprising on the facts outlined above. It provides that:-

> "The Adjutant General on the recommendation of the Commanding Officer and the General Officer Commanding the Command, may authorise an assessment of military conduct one grade higher than that provided for in paragraph 38 of these Regulations in the case of a non-commissioned officer or private whose military conduct, subsequent to the date of the current assessment, has merited reconsideration".

21. This matter concerns the Permanent Defence Force, a disciplined organisation, vital to the security of the State where the reliability and availability of each serving member, and particularly a member of the applicant's rank is of crucial significance and overwhelming importance. Administrative Instruction 229 is not part of the Defence Force Regulations. It could not in any sense be said to be "an integral and indispensable part of the statutory intendment", *[State (Elm Developments Limited) v. An Bord Pleanála* [1981] I.L.R.M. 108 at 110 per Henchy, J., Supreme Court]. It is a direction only, a step which the Adjutant General considered ought to be taken by commanding officers in the interest of fairness where the behaviour of a member of the Permanent Defence Force might result in a refusal of a subsequent application by that member to be continued in the Force. It is clear, from the very comprehensive nature of the 17 item list of Qualities and Attributes acquired to be considered and assessed by a Reporting Officer as set out at Part 3 of the Annual Confidential Report Form, that a member of the Permanent Defence Force might well be unaware or not sufficiently aware that some aspect or aspects of his or her behaviour might result in his or her conduct being assessed as less than, "GOOD", so that it would be only just and proper that the member should be formally warned in advance of the problem. In my judgment this is the sort of problem which Administrative Instruction 229 was very properly designed to address.

22. I am satisfied that the applicant, as a long serving member of the Permanent Defence Force – then 29 years – and holding the rank of Sergeant, must have been fully aware of the seriousness and likely impact on his career in the Permanent Defence Force of his being constantly absent without leave contrary to the provisions of s. 137(1) of the Defence Act, 1954. This subsection provides as follows:-

> "Every person subject to military law who absents himself without leave is guilty of an offence against military law and shall, on conviction by court-martial be liable to suffer imprisonment or any less punishment awardable by a court-martial."

23. It is recorded in the applicant's Conduct Sheet exhibited on affidavit and admitted into evidence that after "trial" on 31st January, 2000, the applicant had received a Severe Reprimand in addition to forfeiture of a day's pay for an offence of this nature committed by him on 12/13 January, 2000. In my judgment the inevitable consequence of this flagrant, serious and repeated offending against military law and discipline must have been abundantly manifest to this applicant. Despite receiving the A.F.667B Report on 10th June, 2002 and, despite the events of 24th October, 2002, the evidence clearly establishes that the applicant continued to go absent without leave on a regular basis. Though no direct evidence was given on affidavit to show that the warnings provided for by Administrative Instruction 229 were universally or even generally given, I am satisfied that it is reasonable for this Court to infer that the directions of the Adjutant General would conscientiously be carried out by Commanding Officers. As his continuance as a member of the Permanent Defence Force was a matter of very considerable import to the applicant, it appears to me that as a matter of justice and fairness of procedures he was entitled to expect that each step in the assessment process would be carried out even if that particular step was established only by a Direction in the form of an Administrative Instruction and did not form an integral part of the statutory assessment process itself. In my judgment the fact that the almost inevitable consequence of his being constantly absent without leave ought to have been totally obvious to and fully appreciated by somebody in the position of this applicant, does not entitle the Commanding Officer to disregard the particular procedural requirement of the Direction. The Direction was intended to be part of the decision making process affecting the applicant's personal rights: the Administrative Instruction 229 expressly provides that the "parading shall be recorded on A.F. 667B and retained on the Unit personal file".

24. I find that the event of 24th October, 2002, was a "warning" as contemplated by Administrative Instruction 229 despite the rather positive language employed by Commanding Officer McCarthy. I find on the balance of probabilities, having regard to the affidavit evidence, especially having regard to the applicant's Conduct Sheet, that even if this warning had been given not later than 30th November, 2001, - that is in excess of one year and nine months prior to the date of assessment on 13th October, 2003, – the applicant would have continued regardless to go absent without leave, which he did, despite the punishment of a severe reprimand and forfeiture of a days pay which he had received on 31st January, 2000. I find that the applicant has not furnished any evidence that the failure to give him a warning prior to 30th November, 2001, was deliberate or in reckless disregard of the procedural requirements of Administrative Instruction 229. I find on the balance of probabilities on the affidavit evidence that the procedural requirement to give a warning was simply overlooked, probably because as far back as the period of 38 days from 24th October, 2001 to 30th November, 2001, both days inclusive, the applicant was absent without leave for 18 of those days and by 6th December, 2001, (the date of assessment was 13th October, 2003), was absent without leave for 22 days though not put on trial for these and other absences without leave until 24th February, 2002.

25. Other than this unfortunate lapse, which I find was due to inadvertence on the part of the Commanding Officer, I find that the statutory procedures relating to the assessment and to the applicant's application to continue in service in the Permanent Defence Force, pursuant to the provisions of s. 65 of the Defence Act, 1954, were fully observed. I find that there was nothing irrational or flying in the face of fundamental reason and common sense in the assessment of the applicant's military conduct as being "UNSATISFACTORY"; in the conclusion of his Commanding Officer that the applicant's continuance in service was not in the interests of the Service or, in his recommendation that the applicant not be continued in service. I am fully satisfied on the affidavit evidence that there was more than ample material to justify this assessment, conclusion and recommendation on the test propounded in *State (Keegan) v. Stardust Victim's Compensation Tribunal* [1986] I.R. 642 of the Supreme Court.

26. I consider that the general principles now applied by this Court and the Supreme Court in circumstances of this nature are correctly summarised by Hogan and Morgan in "*Administrative Law in Ireland*" ([1998] – 3rd Ed. – Round Hall Sweet and Maxwell), at p. 446, as follows:-

> "… the courts seek to examine all the circumstances of the case in order to ascertain whether the disregard of procedural requirements in that particular context has caused real prejudice. If the applicant cannot show that he has been "wrong footed or damnified" by a breach of the prescribed procedure, then either the provisions in question will be classified as directory, (so that, in fact, the decision maker did not act *ultra vires*) or the courts will admit that there was an inadvertent excess of jurisdiction, but will refuse relief on discretionary grounds since this breach did not prejudice the applicant."

27. I find that the applicant has failed to demonstrate that he suffered any prejudice or was "wrong footed or damnified" in any way

as a consequence of the failure, prior to 30th November, 2001, to parade him and advise him to improve his standards and warn him of the possible consequences of his continuing to go absent without leave. For the reasons I have already stated, I am satisfied, on the balance of probabilities that the applicant was or ought to have been fully aware of those consequences for any future application by him pursuant to s. 65 of the Defence Act, 1954, and would not in any event have desisted from the particular behaviour. Neither his being paraded and warned on 24th October, 2002, nor repeated "trials" and punishments stopped him from continuing to go absent without leave on a regular basis.

28. The granting of relief in the form of *Certiorari* and Declaration by way of judicial review is discretionary in the court. The exercise of this discretion to withhold such relief is, of course, undoubtedly one which the court must approach with the very greatest caution. However on the particular facts of the instant case, I am quite satisfied that these reliefs sought by the applicant should be refused. The court will therefore dismiss the application for judicial review.

**Other Cases Referred to in Argument**
29. *Byrne v. Minister for Defence and Lieutenant – General C.E. Mangan, Chief of Staff* [High Court – March 31st, 2004, – Finnegan P., Unreported].