



**THE COURT OF APPEAL
MILITARY**

2015/556

**Sheehan J.
Mahon J.
Edwards J.**

IN THE MATTER OF S. 178G(5) OF THE DEFENCE ACTS 1954 TO 2007

BETWEEN

PRIVATE GRAHAM SHEEHAN

APPELLANT

- AND -

THE DIRECTOR OF MILITARY PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Mahon delivered on the 17th day of June 2016

1. This is a consultative case stated by the Military Judge, Colonel Michael Campion, to seek the opinion of this Court in relation to the following questions (in which references to "the Act" refer to the Defence Act 1954 as amended):

"(1) On the basis of the facts of this case, where a private, in respect of whom under s. 179C of the Defence Acts 1954 to 2007 (hereinafter referred to as "the Act"), a charge has been disposed of summarily, and a determination has been made and punishment awarded by a subordinate officer, has appealed in the prescribed manner to his commanding officer against the determination or the punishment or both pursuant to s. 179D of the Act, and the commanding officer has heard the appeal pursuant to s. 179E of the Act and made it a determination and awarded a punishment, does the private have the further right to appeal to a summary court martial against the determination made or the punishment awarded or both the determination made and the punishment awarded by the commanding officer?

(2) Am I entitled to find that Private Sheehan is NOT a person in respect of whom, under s. 178C of the Act:-

(a) a charge has been disposed of summarily, and

(b) a determination made and punishment awarded by commanding officer?

(3) Am I entitled to find that Private Sheehan has no right of appeal to the Summary Court Martial under s. 178E(2) of the Act?

(4) On the basis of the facts of this case does the summary court martial have jurisdiction pursuant to s. 187A of the Act to hear an appeal on foot of the Form 1 – Notice of Appeal to the summary court martial dated the 11th April, 2014, signed by Private Sheehan?

Introduction

2. The constitutional basis for the establishment of Military Courts (known as courts martial) for the trial of offences alleged to have been committed by persons subject to military law is Article 38.4.1 of the Constitution, which provides:-

"Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military."

3. The Defence Act 1954 (as amended) provides the statutory basis for the court martial system, and the administration of military justice in the Irish Defence Forces. The current military justice system for the Defence Forces came into effect on the 1st September, 2008, when the Defence (Amendment) Act 2007 came into operation.

4. The main purpose of the courts martial system is to provide a mechanism for the enforcement of military law in the Defence Forces. Military law consists of the system of rules and regulations contained in the Act and regulations, instructions and orders made under the authority of the Act. The main purpose of military law is to regulate the behaviour of military personnel, having regard to the unique requirements and demands of military life, in order to ensure that the required standard of discipline is maintained at all times. Members of the Permanent Defence Force are subject to military law at all times. Chapter II of Part V of the Act of 1954 (as amended) ss. 124 to 169A (inclusive) provides for the various offences against military law for which persons subject to military law may be tried and punished by court martial.

5. These sections include many offences which are not offences under the ordinary criminal laws of the State. In effect this means that persons subject to military law, as well as being subject to the ordinary criminal law of the State, may be tried, convicted and sentenced by court martial for a wide range of what are known as military offences.

6. The effect of the Defence (Amendment) Act 2007 was to completely overhaul the military justice system in the Irish Defence Forces. The changes were required in order to modernise the old system and to ensure that the revised military justice system is fully

compliant, not only with the Constitution, but also with the requirements of the European Convention on Human Rights (ECHR), in particular Article 6 and with international human rights norms. Under the new provisions, summary courts martial were introduced for the first time and changes were also made to the composition and jurisdiction of the two other types of courts martial, which had also existed in the old system ie. limited courts martial and general courts martial.

The *legitimus contradictor*

7. At a directions hearing in this case on the 4th May, 2016, Birmingham J. directed that counsel be instructed to act as *legitimus contradictor* at the hearing of this consultative case stated, and to prepare and submit written submissions. Mr. Dowling BL was appointed *legitimus contradictor* and his extensive written and oral submissions have been most helpful to this Court, as indeed have been those of Mr. Farrell S.C. on behalf of the Director of Military Prosecutions.

Background facts

8. On the 18th February, 2014, Private Sheehan, a member of the Defence Forces (7th Infantry Battalion) was charged with one offence of being absent without leave contrary to s. 137(1) of the Act.

9. A summary investigation of the charge was conducted on the 20th March, 2014, by Commandant Crowley, Company Commander of B Company, 7th Infantry Battalion, pursuant to s. 179C. In conducting the summary investigation, Commandant Crowley was acting as, and discharging the functions of, a subordinate officer to whom the power of disposing of charges against privates under the command of the commanding officer had had been delegated by Lieutenant Colonel McGuinness, the Commanding Officer of the 7th Infantry Battalion, as provided for in s. 179.

10. The subordinate officer proceeded to dispose of the charge summarily pursuant to s. 179C(5). He made a determination that the charge was proven and awarded a punishment of a fine of a sum equivalent of one day's pay (with an automatic forfeiture of seventeen days pay).

11. Private Sheehan appealed the determination and punishment to his commanding officer pursuant to s. 179D(2). His commanding officer heard the appeal pursuant to s. 179E on the 4th April, 2014, by way of a rehearing of the charge and a reappraisal of the punishment. The commanding officer made a determination that the charge was proven and awarded a punishment of a fine of an amount equivalent to one day's pay at the applicable rate pursuant to s. 178C(5)(b)(i)(III) (with automatic forfeiture of seventeen days pay). This fine was similar to that originally imposed by the subordinate officer.

12. On the 11th April, 2014, Private Sheehan's commanding officer entered a notation on the record of punishment awarded on s. 4 of the summary charge sheet as follows:-

"Remanded for trial by court martial, person charged so elects."

13. Private Sheehan duly completed a Form 1 Notice of Appeal to a summary court martial dated the 11th April, 2014. This form is provided for in rule 12(1) of the Court Martial Rules 2008, in the event of an appeal under s. 178E of the Act. The Form 1 Notice of Appeal to a summary court martial was submitted by letter dated the 25th April, 2014, to the Courts Martial Administrator and was received by the Courts Martial Administrator on the 8th April, 2014. The Military Judge reviewed the summary charge sheet and notice of appeal, and directed the Courts Martial Administrator as follows:-

"Section 3 of the summary charge sheet indicates that there was a summary investigation by a subordinate officer, who made a determination and awarded a punishment on the 20th March, 2014. Section 4 of the summary charge sheet indicates that there was an appeal subsequently heard by the commanding officer who made determination and awarded a punishment on the 4th April, 2014. Section 4 of the summary charge sheet further contains a subsequent notation dated the 11th April, 2014, by the commanding officer – remanded for trial by court martial, person charged so elects."

There had been a summary disposal of the charge by a subordinate officer under s. 179C. There was an appeal to the commanding officer under s. 179D against the determination made and the punishment awarded in the summary disposal."

There is no further right of appeal to the summary court martial nor is there a right of election to trial by court martial after the hearing of the appeal by the commanding officer."

In those circumstances the notice of appeal is not valid and the summary court martial has no jurisdiction to hear an appeal in this matter."

14. The matter was listed before the Military Judge on the 31st March, 2015, for the purposes of considering the issue of the jurisdiction of the summary court martial to hear an appeal in the particular circumstances of this case. A firm of solicitors appeared and came on record for Private Sheehan at that hearing.

15. The Director of Military Prosecutions submitted to the Military Judge that because the case had been disposed of summarily by the commanding officer pursuant to s. 178C(5) of the Act, Private Sheehan had a valid appeal. It was also submitted that to deny a right of appeal to a summary court martial from the outcome of an appeal heard by a commanding officer against the determination and finding of a subordinate officer would effectively deprive a soldier of a right of appeal against a decision of his commanding officer.

16. The summary court martial indicated its reservations regarding the submissions made in the following terms:-

"(a) It appeared to the summary court martial that the determination made and punishment awarded by the commanding officer on the 4th April, 2014, was a determination made and punishment awarded on the hearing of an appeal by the commanding officer under s. 179E of the Act and was NOT a determination made and punishment awarded on summary disposal of the charge by the commanding officer under s. 178C of the Act."

(b) It appeared to the summary court martial that s. 179 of the Act provides an alternative process for disposal of less serious charges against privates in permitting a commanding officer to delegate the power of summary disposal to a subordinate officer. In those circumstances the punishments that may be awarded by the subordinate officer are limited by s. 179C(5) of the Act and are more restricted than the punishments that may be awarded by a commanding officer on summary disposal by the commanding officer pursuant to s. 178C of the Act. Even in circumstances where a

commanding officer has delegated power to a subordinate officer under s. 179 of the Act, the private may preserve his right to access/appeal to the summary court martial by electing to have the charge referred to his commanding officer pursuant to s. 179B(1) of the Act, when he appears before the subordinate officer. He can then elect to be tried by court martial pursuant to s. 178B(1) of the Act when he appears before his commanding officer. Alternatively, he can elect under s. 178B(1) of the Act, to have the charge disposed of by his commanding officer under s. 178C of the Act and can then appeal to the summary court martial against determination made or punishment awarded by his commanding officer or both under s. 178E(2) of the Act."

17. The net issue raised in the case stated relates to whether or not a soldier who has been dealt with in the first instance by a subordinate officer, and in the second instance and by way of an appeal from the decision of the subordinate officer, by a commanding officer, enjoys a further right to appeal from the latter determination to a summary court martial.

The relevant provisions of the Defence Act 1954 to 2007

18. Sections 178 to 178D provide for minor charges against certain categories of Defence Forces personnel (being privates, seamen and certain NCO's) to be dealt with by their commanding officer on a summary basis. This is subject to a right of election for trial by way of a court martial on the part of the person charged. Section 178C provides for the manner in which charges can be dealt with summarily by the commanding officer. Section 178C(5)(ii) provides for a range of penalties which the commanding officer may impose should the accused be summarily convicted. In general these provide for reductions in pay, deferral of pay increments, the imposition of a fine up to a maximum of seven days pay, the stoppage of local leave or shore leave up to a maximum of fourteen days, a direction that the convicted man undertakes additional duties, or a warning. This range of penalties is more severe than are applicable if the inquiry is undertaken by a subordinate officer as occurred in this case.

19. Section 179 provides for the appointment of a "subordinate officer" by the "commanding officer" to dispose of charges against privates or seamen. Section 179B(1) provides that the "subordinate officer" so appointed must afford the charged person the right to elect to have the matter dealt with by the "commanding officer", and if such election is made, the matter is then disposed of before the "commanding officer" as if the "subordinate officer" had never been appointed. If the charged person so elects it is unequivocally the case that any such determination made by the "commanding officer" may be appealed to a summary court martial.

20. Section 179 provides as follows:-

"(1) A commanding officer may, subject to and in accordance with regulations made under s. 184 delegate to any officer under his command the power of disposing of charges against privates or seamen under the command of the commanding officer in respect of any of the scheduled offences in Part I of the Eleventh Schedule to this Act, and every officer to whom such power is delegated shall be for the purposes of this section, be a subordinate officer.

(2) A subordinate officer investigating a charge against a private or a seaman, who is subject to military law, of having committed any of the offences referred to in subs. (1) of this section shall:-

(a) dismiss the charge if, in his discretion he considers that it should not be proceeded with or,

(b) where the subordinate officer consider that the charge should be proceeded with, and refer the charge to the commanding officer who shall deal with the charge in accordance with ss. 178 to 178D or,

(c) subject to this section and in accordance with regulations made under s. 184, deal with the charge summarily."

21. As already indicated the penalties which a subordinate officer may impose on conviction, are less in terms of severity and in range than those which can be imposed by a commanding officer.

22. Section 179D and E provide for an appeal from the decision of the subordinate officer to the commanding officer in respect of conviction and/or penalty, and for such appeal to be by way of rehearing of the charge and a rehearing as regards punishment.

23. Upon the hearing of an appeal by the commanding officer against the findings of a subordinate officer in relation to conviction and/or penalty, the range of penalties available to the commanding officer in the event that the conviction by the subordinate officer is upheld, are greater in terms of severity and in range than are available to a subordinate officer. It is possible therefore that an individual having unsuccessfully appealed a conviction, or a penalty determination, imposed by the subordinate officer may receive not only a more severe penalty/punishment by the commanding officer, but a penalty/punishment which the subordinate officer would not have jurisdiction to impose in the first instance. This is in stark contrast to, for example, the position which prevails in circumstances where a conviction or penalty is appealed from the District Court to the Circuit Court. In such event, the Circuit Court cannot impose a greater penalty than the District Court was empowered to impose in the first instance.

24. Section 172E(2) provides for an appeal from a determination of a commanding officer to summary court martial. While there is no express provision enabling a person (such as Private Sheehan) who was originally convicted and punished by a subordinate officer, having appealed that conviction and/or penalty to the commanding officer, to further appeal the commanding officer's determination to a summary court martial, neither is there an express provision prohibiting such appeal to a summary court martial.

25. Section 178E(2) provides that where "a charge has been disposed of summarily" and "a determination made and punishment awarded by an authorised officer or commanding officer as the case may be" an appeal lies to a summary court martial "against the determination or the punishment or both the determination and the punishment".

26. An "authorised" officer is different to a "subordinate" officer.

27. It is contended on behalf of the Director of Military Prosecutions that because Private Sheehan's appeal from the decisions of the subordinate officer to his commanding officer involved a rehearing of the charge and a resentencing in the case of the conviction being upheld, rather than a mere review of the hearing and punishment determination by the subordinate officer, the hearing by the commanding officer was a "determination" of the issues by him, and that as such, they were amenable to an appeal as provided for by in s. 178E(2).

28. It is submitted by the *legitimus contradictor* that the legislation does not provide for an appeal to a summary court martial by a person (such as Private Sheehan) who has, in the first instance, elected to have his case determined by a subordinate officer, and

who, having done that, has then appealed that determination (either in respect of conviction or punishment, or both) to his commanding officer. He points to s. 178E as providing the basis for an appeal. Section 178E provides as follows:-

"(1) This section and sections 178F and 178G shall apply in relation to a compensation order made under section 177C or 178C as they apply to a punishment awarded under the said section 177C or 178C, as the case may be, and for the purpose of such application references in this section and sections 178F and 178G to a punishment shall be construed as references to a compensation order.

(2) A person in respect of whom, under section 177C or 178C:-

(a) a charge has been disposed of summarily, and

(b) a determination made and punishment awarded by an authorised officer or commanding officer, as the case may be,

may appeal in the manner prescribed by court martial rules to the summary court-martial against the determination or the punishment or both the determination and the punishment.

(3) . . ."

29. It is his contention that for a person to avail of an appeal to a summary court martial, the disposal of his case, its determination and the punishment awarded must have taken place under s. 117C or 178C.

30. Section 177C deals with matters disposed of summarily by an "authorised officer". This provision is clearly not applicable to Private Sheehan. Section 178C provides for the summary disposal of charges by a "commanding officer". It is argued that neither ss. 177C or 178C can have any relevance to a determination by a "subordinate officer".

31. The counter argument (being that supportive of the right of appeal to the summary court martial) is that a person who has been tried in the first instance by a "subordinate officer" and appeals to the "commanding officer" then becomes an individual whose case is determined by the "commanding officer" pursuant to s. 178C. This is so, it is argued, because the hearing before the "commanding officer", albeit an appeal from the determination of the "subordinate officer" is a full rehearing of the case with the risk, if the appeal from the "subordinate officer" is unsuccessful, that harsher penalties will be imposed.

32. While the logic or reason for a procedure enabling the "commanding officer" to direct a "subordinate officer" to hear and determine certain charges (and upon conviction to impose punishment), rather than deal with them himself, is not explained in the legislation, the likely reason is a practical one aimed at reducing the workload that would, if such a provision did not exist, be imposed on the "commanding officer". This assumes that the types of offences which are likely in practice to be delegated to "subordinate" officers will be numerous. It is clearly to be inferred that it was the intention of the legislature that many minor offences against military discipline would routinely be determined by "subordinate" officers rather than "commanding" officers. One advantage of this is that proceedings before the former are in practice likely to be less formal and the accused concerned will face a lighter range of penalties in the event that he is found guilty of the charge.

33. While such a scheme makes good, common and practical sense at one level, an immediate observation is that the determination of cases and the imposition of penalties albeit relatively mild penalties governed by legislative provisions (if such be the case) that result in an individual being subjected to a determination in the first instance by a non judicial military officer and with a right of appeal confined to another, albeit more senior, non judicial military officer, is problematic. If both the *legitimus contradictor*, and the Military Judge, respectively, are right in their interpretation of the legislation, it seemingly envisages that the function of determining guilt and punishment in such cases is to be conducted in a purely administrative way, and without judicial oversight.

34. Article 6 of the European Convention on Human Rights provides that the determination of any criminal charge should be the consequence of a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 2 of Protocol No. 7 to the Convention (22nd November, 1984) provides for the right to appealing criminal cases to a higher tribunal. If the procedure as provided for in the Defence (Amendment) Act 2007 and which is the subject matter of this consultative case stated, is that Private Sheehan has no right of appeal to a summary court martial, and that his appeal procedure in relation to his conviction and punishment has been exhausted by virtue of his appeal to his "commanding" officer then, in effect, he has been tried and punished without the possibility of review by an independent judicial authority.

35. In *Donegan v. Dublin City Council* [2012] 3 I.R. 600, McKechnie J. in his judgment stated (at p. 644):-

"The second aspect of this matter is whether s. 2 of the Act of 2003, in and of itself, when applied to s. 62(3) of the Act of 1966, achieves a like or similar result. That section obliges a court when interpreting and applying any statutory provision, passed before or after its enactment, to do so, in so far as possible, in a manner compliant with the State's obligations under the Convention. However, the court, when undertaking this exercise, is 'subject to the rules of law relating to such interpretation and application'. Such would include both the common law and statute law."

36. McKechnie J. went on to state:-

"It is quite clear that the Oireachtas has directed that every statutory provision or rule of law should be given a Convention construction if possible; that is a construction compatible with the State's obligations under the Convention. Therefore if such a construction is reasonably open it should prevail over any other construction, which although also reasonably open, is not Convention compliant. Even in cases of doubt, an interpretation in conformity with the Convention should be preferred over one incompatible with it. However, this task must be performed by reference to the rules of law regarding interpretation."

37. Similar sentiment was expressed by Sheehan J. in *M. (J.) (a minor) v. Member in Charge Coolock Garda Station* [2013] 2 I.R. 175, when he stated:-

"Case law concerning the interpretation of s. 2 of the Act of 2003 in this jurisdiction was effectively summarised as being that the court is under an obligation to interpret the relevant statutory provisions in accordance with the European Convention on Human Rights but only so far as it does not do so in contra legem."

38. Section 5 of the Interpretation Act 2005, states:-

"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction):-

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of:-

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

39. The wording of s. 179F is worthy of close examination. That section provides as follows:-

"The operation of a punishment awarded (other than stoppage of local leave or shore leave) or a compensation order made under this Chapter shall be suspended

(a) in any case until the time for bringing an appeal (whether against the determination, punishment or compensation order, as the case may be) under section 178E or 179D has expired, and

(b) in a case where the appeal is brought within that time, until the appeal or, in the case of an appeal under section 179D, any further appeal is finally determined (and the determination, punishment or compensation order, as the case may be, has been confirmed) or abandoned or the time for bringing any further appeal has expired."
(Emphasis added)

40. Section 179D deals with determinations made by a "subordinate" officer, and the right of an individual dissatisfied with such determination to appeal to a "commanding" officer". The inclusion of the phrases "any further appeal" and "any further appeal has expired" in s. 179F(b) are meaningless and superfluous if the legislation contemplates there being no further appeal beyond the appeal to the "commanding" officer.

41. It must be assumed, until the contrary is shown, that the legislature intended the provisions of the Defence Act 1954 (as extensively amended, as recently as 2007) should in compliance with Article 6 of the ECHR and, indeed, the Constitution. Such compliance requires an element of judicial oversight in relation to determinations of liability and punishment in respect of charges which, in reality, are criminal charges.

42. It is also relevant that the severity and range of penalties that were available to the "commanding" officer at the hearing of an appeal to him from the determination of the "subordinate" officer are greater than were available to the "subordinate" officer in the first instance. While the incidences of a "commanding" officer imposing significantly increased penalties (including penalties which were not available for imposition by the "subordinate" officer) may be rare, it is nonetheless a fact that a person in the position of the appellant faces a risk of being subjected to increased penalties. It is most unlikely that the legislature could ever have intended that a full rehearing of a charge by a "commanding" officer with the power to increase penalties in this way should be denied a right of appeal.

Conclusion

43. The court will answer the questions posed to it by the Director of Military Prosecutions as follows.

"(1) Yes.

"(2) No.

"(3) No.

"(4) Yes.

[Sheehan and Edwards JJ agreed with the Judgment delivered by Mahon J.]