

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2013 No. 94 JR]**

**BETWEEN**

**FINTAN CORR**

**APPLICANT**

**AND**

**THE DIRECTOR OF MILITARY PROSECUTIONS, THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL AND  
OFFICER COMMANDING MCKEE BARRACKS COMPANY**

**RESPONDENTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Noonan delivered the 10th day of December 2014**

**Background**

1. The applicant is a member of the Permanent Defence Forces holding the rank of private. He enlisted in the Army on the 24th April, 2006. In September, 2012, he was assigned for duty at the Military Justice Centre, McKee Barracks in Dublin. His direct superior was Commandant Noel Conway and his commanding officer was Commandant Manus Ward. On the 14th November, 2012, the applicant was ordered by Commandant Conway to report for duty to the Military Justice Centre between the hours of 09.00 and 12.30 on the 16th November, 2012. It is alleged that the applicant absented himself from his post for a brief period during those hours and this came to the attention of Commandant Conway who summoned the applicant to his office at 14.50 hours that afternoon. The applicant duly attended Commandant Conway's office where a conversation between the two took place.

2. Arising out of these events, Commandant Conway prepared a document entitled "SUMMARY CHARGE SHEET". This document is stated to be prepared pursuant to Appendix D to Defence Forces Regulations A7 and pursuant to ss. 177A(ii), 178A(b) & 179A(b) of the Defence Act 1954, as amended, ("the Act") and para. 76A of DFR A7. That Appendix provides for a document in this format divided into eight sections, the first of which is entitled "FOR SUMMARY INVESTIGATION BY A COMMANDING OFFICER/SUBORDINATE OFFICER". Thereafter the charge sheet listed four charges being preferred against the applicant as follows:

1st Charge: Absence without leave contrary to s.137 of the Defence Act 1954 with particulars given.

2nd Charge: Disobeying a lawful command of a superior officer contrary to s.131 of the Defence Act 1954 with particulars.

3rd Charge: Behaving in an insubordinate manner towards a superior officer contrary to s.133 of the Defence Act 1954 with particulars.

4th Charge: Behaving in an insubordinate manner towards a superior officer contrary to s.133 of the Defence Act 1954 with particulars.

3. The latter two charges arose out of different allegations of insubordination during the course of the same conversation. The charge sheet gave details of witnesses and was signed by Commandant Conway and dated the 21st November, 2012.

4. It would appear that Charges 1, 3 and 4 are scheduled offences under Part I of the Eleventh Schedule to the Act and Charge 2 is a scheduled offence under Part II of the same schedule. The Act provides that all four charges may be disposed of summarily but in the case of a Part II scheduled offence, the prior consent of the first-named respondent ("the DMP") is necessary for summary disposal.

5. On the 21st November, 2012, the Charge Sheet was brought to the attention of the commanding officer, Commandant Ward, who, in a document entitled "Form 5" applied to the DMP for his consent to the summary disposal of Charge 2. Form 5 was signed by Commandant Ward and dated the 22nd November, 2012. A handwritten note appears at the foot of the document in the following terms: "*Consent granted by DMPros F McCarthy Comdt 22/11/2012*".

6. On the 22nd November, 2012, a document stating to be pursuant to Appendix C to DFR A7 and entitled "NOTICE TO BE GIVEN TO A MEMBER OF THE DEFENCE FORCES IN ADVANCE OF THE SUMMARY INVESTIGATION OF AN OFFENCE PURSUANT TO SECTIONS 177A, 178A AND 179A OF THE DEFENCE ACT 1954, AS AMENDED, AND PARAGRAPH 76 OF DFR A7" was served on the applicant placing him on notice that at 10.00 hours on the 26th November, 2012 at McKee Barracks he was thereby detailed "to appear at the investigation of 4 charges as attached."

7. In his affidavit sworn in these proceedings on the 22nd July, 2013, Commandant Ward says "that on the 26th November, 2012, the summary investigation of the four charges took place before me". He describes the procedure and avers that the charges were read out to the applicant and he was advised of his rights. Commandant Ward asked the applicant whether or not he wished to have the charges disposed of summarily before Commandant Ward or by way of court-martial and the applicant elected for the former. He then says that the summary investigation proceeded and refers to various events that did or did not occur during the hearing which he describes as "the investigation". He says further that the summary investigation could not have proceeded without the prior consent of the DMP. He says with reference to the outcome of the investigation that no conviction was imposed on the applicant, rather he made a determination that the charges of a disciplinary nature had been proved and he awarded a punishment of a fine of two days'

pay totalling a sum of €158.20.

### The Proceedings

8. The within judicial review proceedings were instituted by the applicant seeking, *inter alia*, an order of *certiorari* quashing the "convictions" referred to and various ancillary reliefs. Although many grounds were advanced in the applicant's statement grounding the application, at the hearing of the application matters resolved themselves to a very net issue. The applicant says Commandant Ward's decision was made without jurisdiction because in effect the hearing of the evidence is the "investigation" within the meaning of the Act and the regulations made thereunder, and the commanding officer must first conduct the investigation before he puts the applicant on his election and then seeks the consent of the DMP to summary disposal, the "disposal" being the determination of the commanding officer and the award of a punishment if applicable.

9. The respondents argue that on the contrary, what the Act and the relevant regulations require is that the commanding officer must first seek the DMP's consent prior to embarking on the hearing of the evidence, making a determination and awarding a punishment if applicable, these steps in combination constituting the "disposal" of the charges. The respondents thus submit that the investigation, which is to be distinguished from the hearing, has by that juncture already taken place.

10. Leave was granted by order of Peart J. made herein on the 11th February, 2013.

### The Legislation

11. The Act was amended by the Defence (Amendment) Act 2007 which inserted a number of new sections dealing with the bringing of charges against members of the Permanent Defence Forces. It appears that the procedure was broadly similar to that which obtained prior to the commencement of the Act of 2007 (See e.g. *Dunford v. Minister for Defence* (Unreported, High Court, Laffoy J., 15th December, 1995) etc.) but a number of new procedural rules were introduced including the requirement for the consent of the DMP in certain cases. The new procedures were given statutory effect by the Rules of Procedure (Defence Forces) 2008, S.I. No. 204 of 2008.

12. Section 22 of the Act of 2007 provided for the substitution of a new s. 177 of the Act dealing with charges against officers and other specified persons (not including enlisted men such as the applicant):

"177. - (1) A charge against a person subject to military law -

(a) as an officer, or

(b) as a non-commissioned officer in the rank of sergeant major or battalion quarter-master or their equivalent naval ranks,

shall, subject to the giving of a notice under section 177A, in accordance with regulations made under section 184, be investigated by the person's commanding officer or, if the Deputy Chief of Staff (Support) so directs, by such officer as the Deputy Chief of Staff (Support) may appoint for the purpose.

(2)(a) Where a person is charged with a scheduled offence, the officer investigating the charge under subsection (1) of this section shall-

(i) where the person charged holds the rank of lieutenant colonel or commander or any higher commissioned rank -

(I) subject to paragraph (b) of this subsection, dismiss the charge if, in his discretion, he considers that it should not be proceeded with, or

(II) remand the person charged for trial by court-martial if he considers that the charge should be proceeded with,

(ii) in any other case-

(I) subject to paragraph (b) of this subsection, dismiss the charge if, in his discretion, he considers that it should not be proceeded with, or

(II) remand the person charged for trial by court-martial if he considers that the charge should be proceeded with, or

(III) subject to this section and to regulations made under section 184, refer the charge for summary investigation by an authorised officer.

(b) In the case of a charge against a person for a scheduled offence specified in Part II of the Eleventh Schedule to this Act, dismissal of the charge under subparagraph (i)(I) or (ii)(I) of paragraph (a) of this subsection or referral of the charge for summary investigation by an authorised officer under subparagraph (ii)(III) of the said paragraph (a) shall be subject to the prior consent of the Director and where the Director refuses consent in any such case the person charged shall be remanded for trial by court-martial."

13. Thus, s. 177 provides for the investigation of charges against officers by potentially one of three people, a commanding officer, an officer appointed by the Deputy Chief of Staff (Support) or, in the case of summary investigation, an officer authorised by either of the foregoing.

14. Section 24 of the Act of 2007 substituted a new s. 178 dealing with charges against "men", the word "man" being defined in s. 2 of the Act as a person who is for the time being a member of the Defence Forces, but does not include an officer, and thus includes the applicant:

"178.-(1) This section and sections 178A to 178D apply to the summary disposal by a commanding officer of a charge

against a person subject to military law as a man other than a sergeant major or battalion quarter-master sergeant or their equivalent naval ranks.

(2) (a) Where a person referred to in subsection (1) of this section is charged with a scheduled offence, the commanding officer investigating the charge (including a charge referred to the commanding officer under section 179(2)(b) or 179B) shall-

(i) subject to paragraph (b) of this subsection, dismiss the charge if, in his discretion, he considers that it should not be proceeded with, or

(ii) remand the person for trial by court-martial if he considers that the charge should be proceeded with, or

(iii) subject to this section and to regulations made under section 184, deal with the charge summarily.

(b) In the case of a charge against a person referred to in subsection (1) of this section for a scheduled offence specified in Part II of the Eleventh Schedule to this Act, dismissal of the charge under subparagraph (i) of paragraph (a) of this subsection or the decision to dispose of the charge summarily under subparagraph (iii) of the said paragraph (a) shall be subject to the prior consent of the Director and where the Director refuses consent in any such case the person shall be remanded for trial by court-martial."

15. Thus, where Part II scheduled offences such as Charge 2 are involved, the commanding officer's decision to dispose of the charge summarily is subject to the prior consent of the DMP.

16. Section 25 of the Act of 2007 inserted a number of new sections which insofar as relevant provide:

"178A.-Where a charge against a person referred to in section 178(1) is to be investigated by a commanding officer, the person charged shall be entitled to receive, in the prescribed manner, at least 24 hours before the charge is to be so investigated-

(a) written notice in the prescribed form of the date on which and the time and place at which the charge is to be so investigated, and

(b) a copy of the charge sheet containing particulars of the offence concerned, a list of the witnesses who will be giving evidence against the person and copies of any available evidence to be given against the person and any witness statements.

178B.-(1) Before disposing of a charge summarily under section 178C, the commanding officer shall, in the prescribed manner-

(a) ask the person charged whether he elects to have the charge disposed of summarily by the commanding officer or to be tried by court-martial, and

(b) inform the person charged that he may obtain legal advice regarding the matter of the election and, where the person wishes to obtain such legal advice, that the hearing shall be adjourned for such period as the commanding officer considers reasonable (which period shall not in any case be less than 48 hours).

(2) Where the person charged elects to be tried by court-martial, whether or not the person obtains legal advice, the commanding officer shall remand the person for trial by court-martial and shall refer the charge to the Director for his directions but otherwise shall proceed to dispose of the charge summarily under section 178C and may do so then and there..."

"178C.-(1) This section applies where the person charged elects under section 178B to have the charge disposed of summarily by the commanding officer and, in the case of a scheduled offence specified in Part II of the Eleventh Schedule to this Act, the Director has consented to the charge being disposed of summarily..."

17. Section 178C goes on to provide for a number of options available to the commanding officer for dealing with the matter summarily including a range of punishments that may be awarded.

18. Section 31 of the Act of 2007 substituted a new s. 184 in the Act dealing with the making of regulations in relation to the investigation and summary disposal of charges which insofar as relevant provides:

"184.-(1) For the purposes of this Chapter, the Minister may make regulations, not inconsistent with this Act, in relation to all or any of the following matters:

(a) the investigation and summary disposal under this Chapter of charges against persons subject to military law, including the exercise of the right to elect for trial by court-martial...

(e) the making of an application to the Director to deal summarily with a charge against a person for an offence specified in Part II of the Eleventh Schedule to this Act;"

19. The 2008 Rules were made pursuant to s. 184 and insofar as relevant to the issues herein provide:

*"Application to the Director for consent to dismissal of charge or referral of charge of scheduled offence (Part II) for summary investigation*

17. (1) An application for the Director's consent to the dismissal of a charge under Chapter IV of Part V of the Act shall be in writing in Form 4.

(2) An application for the Director's consent to the referral of a charge for a scheduled offence (Part II) for summary investigation by an authorised officer under section 177(2)(a)(ii)(III) or to the decision by a commanding officer to dispose of a charge for a scheduled offence (Part II) summarily under section 178(2)(b) shall be in writing in Form 5 and

shall be made as soon as possible after the investigating officer or the commanding officer has completed his or her investigation.

*Prosecution file to be submitted to the Director*

18. (1) In any of the following cases, the documents and things referred to in the following sub-rule (in this rule referred to as the "prosecution file") shall be forwarded to the Director by the investigating officer, the authorised officer or the commanding officer concerned with the application for the Director's directions or consent or as soon as possible after that application is submitted:-...

(d) where the consent of the Director is sought to:...

(iii) the decision by a commanding officer to dispose of a charge for a scheduled offence (Part II) summarily under section 178(2)(b).

(2) The prosecution file to be forwarded to the Director shall contain or include:-

(a) a copy of any report concerning the case prepared by the investigating officer, authorised officer or the commanding officer concerned;

(b) a copy of the summary charge-sheet;

(c) any summary or abstract of evidence;

(d) any written statements or written record of evidence of any witnesses or potential witnesses;

(e) a list of any potential witnesses;

(f) any statements made by the accused including records or transcripts or interviews conducted under caution;

(g) a list of any exhibits;

(h) any other information or material in the possession of the investigating officer, authorised officer or commanding officer which may be material to, or which the Director notifies that officer is material to, the Director's consideration of the charge or charges, or to the giving of any consent...

*Consent to dismissal of charge*

24. Where the Director consents to:-...

(iii) the decision by a commanding officer to dispose of a charge for a scheduled offence (Part II) summarily under section 178(2)(b) the Director shall give notice of such consent in writing to the investigating officer, the authorised officer or the commanding officer concerned and shall return the prosecution file to such investigating officer, authorised officer or commanding officer. The officer concerned shall copy a written record of any disposal of the charge to the Director."

20. Regulation 77 of DFR A7 provides as follows:

"(1) In all cases involving the investigation of a charge or charges, the charge or charges shall be investigated without unnecessary delay and at such time and at such place as the officer investigating the charge or charges may appoint.

(2) The officer conducting the summary investigation shall cause the person preferring the charge or charges, together with all available witnesses mentioned on the charge-sheet, and also the person being charged and any available witnesses desired by the person being charged, and any other available witnesses of whom he or she may learn, to appear before him or her at a stated time at his or her office or headquarters or other available place, with all available evidence, including the service record of the person being charged, and shall there informally investigate the charge or charges. Notice as required by paragraph 76 of these regulations will be served on the person being charged before the summary investigation..."

21. Regulation 78D relating to the summary disposal of charges for all ranks provides at paragraph (3):

"(3) During the investigation full opportunity shall be given to the person charged to cross-examine the witnesses whose statements are unfavourable to him or her, and to present anything he or she may desire on his or her own behalf, either in defence or mitigation, and all available witnesses requested by the person charged shall be called and examined. A resume of the evidence presented will be recorded under "Account of Proceedings" on the Summary Charge Sheet as set out in Appendix D to these regulations."

22. It is thus absolutely clear from Rule 17(2) as it applies herein that the commanding officer must apply in writing for the consent of the DMP to disposal of a Part II scheduled offence (here Charge 2) as soon as possible after the commanding officer has completed his or her investigation. The crux of this case therefore is what is meant by the expression "investigation" in this rule.

**Submissions**

23. Mr. McDonagh SC, counsel for the applicant, submits that the "investigation" can only refer to the hearing before the commanding officer of the evidence against the accused soldier. In support of this argument, he refers to the above cited sections of the Act and says that s. 178A provides that the "investigation" is to take place at a time and place which must be notified at least 24 hours in advance to the person charged. On that occasion, evidence is given by witnesses, a list of whom must be furnished in advance to the person charged.

24. He argues that unlike civilian law, there is no book of evidence so that the person charged cannot know the evidence against him until it has been adduced before the commanding officer. It is only at that stage, when he knows the case against him, that he is required to elect for summary disposal or trial by court-martial, assuming always that the commanding officer considers that it is a charge which can be disposed of summarily. Once he so elects, it is then and only then that the consent of the DMP can be sought,

it being a futile exercise seeking consent before that point as the person charged may elect for trial by court-martial thus rendering any consent superfluous.

25. The applicant argues that further support for this proposition is to be gained from the Appendix D form under DFR A7 which suggests that the "investigation" is the event that comprises the taking of evidence before the commanding officer at a specified time and place. DFR A7 in fact dates back to the 1940s although has been successively updated to 2008.

26. An additional argument made by the applicant arises from Rule 18 which provides that the prosecution file shall be forwarded to the DMP either with the application for consent to summary disposal or as soon as possible thereafter. The rule provides that the prosecution file shall contain or include a number of items, amongst them any summary or abstract of evidence and a written record of evidence of any witnesses. The applicant says that since the evidence is taken at the hearing before the commanding officer, this rule must mean that the prosecution file accompanying the application for consent can only be completed after such hearing has taken place. This again is consistent with Rule 24 which requires the DMP to return the prosecution file, obviously having considered same for the purpose of determining whether to consent or not, at the time of giving such consent. Again, it is said that the DMP could not give meaningful consideration to the giving of consent without knowing what the evidence is against the person charged.

27. Ms. Bolger SC, counsel for the respondents, submitted that if the applicant's construction of the rules is correct, then the rules are in conflict with the Act which must take precedence. She argued that the investigation in fact takes place before the hearing of the evidence and that hearing, in combination with the commanding officer's determination is the "disposal" of the matter contemplated by the Act. Since the consent of the DMP must be obtained prior to the disposal, this means that such consent must be forthcoming in advance of the hearing of the evidence, as occurred in this case.

28. She initially submitted that the prosecution file in this case consisted merely of the charge sheet and the application for consent, Form 5, which was sufficient for the DMP to consider and give consent. However she subsequently modified that submission having regard to the fact that it emerged that Form 5 contains the words "The prosecution file within the meaning of the Rules of Procedure is NOT attached".

29. She submitted that the scheme of the Act envisages a speedy and efficient procedure, particularly appropriate to the military, for summary disposal of charges and the notion of interrupting the hearing to seek consent and then subsequently resuming on a later occasion would lead to an absurd result clearly not contemplated by the statute. She argued further that all the relevant sections make clear that the prior consent of the DMP was required for summary disposal.

30. The respondents placed particular emphasis on s. 178B(2) which provides:

"Where the person charged elects to be tried by court-martial, whether or not the person obtains legal advice, the commanding officer shall remand the person for trial by court-martial and shall refer the charge to the Director for his directions but otherwise shall proceed to dispose of the charge summarily under section 178C and may do so then and there." (Emphasis supplied).

31. It was argued on behalf of the respondents that this provision could not make sense in circumstances where the commanding officer was obliged to revert to the DMP for consent after an election for summary disposal by the person charged because he could not then dispose of the charge "then and there".

32. A number of other provisions referring to "prior consent" were also said to be inconsistent with the applicant's contention that the consent must in fact be obtained subsequent to the hearing of the evidence.

33. The respondents also submitted that it is well settled that the courts should be slow to interfere in matters of military law and a number of authorities were cited in support of that proposition.

34. Finally, the respondents relied on the maxim *de minimis non curat lex* on the basis that the punishment awarded was very modest and the determination would not affect the applicant's service record, although this was disputed, and thus no real prejudice accrued to the applicant.

### **Analysis of the Issues**

35. It seems to me that rule 17(2) is absolutely clear in its terms and permits of no ambiguity. The consent of the DMP must be obtained after the completion of the investigation. I am also of the opinion that the Act, the Rules and the Regulations make it clear that the investigation is the taking of the evidence, on oath if required by the person charged, at a time and place that must be notified to the person charged at least 24 hours in advance.

36. This interpretation is in my view the only one that is consistent with the Act, the Rules and DFR A7. The Appendix D form explicitly recognises that what must be notified to the person charged at a specified time and place is the investigation and it is only then that the evidence is taken. Indeed as mentioned above, Commandant Ward in his affidavit expressly says that on the 26th November, 2012, the summary investigation of the four charges took place before him which is an entirely accurate characterisation of the event.

37. Contrary to what the respondents submit, it appears to me that if the consent of the DMP must precede the taking of the evidence, this would give rise to an illogical result. It would mean that the DMP would be asked to consent to the summary disposal of charges about which he can know nothing at a time when his consent may ultimately be entirely irrelevant if the person charged elects for trial by court-martial. This is further consistent with the fact that the person charged can only be put on his election after the evidence has been heard because it is only at that point in time that he can know what the evidence against him is.

38. The Act also makes clear that the commanding officer must put the person charged on his election before disposing of the charge summarily providing further support for the proposition that the disposal comes after the taking of evidence and is the determination of the commanding officer and the award of any punishment if applicable.

39. Insofar as s. 178B(2) contains a reference to disposing of a charge summarily then and there, in my opinion this must be construed as a reference to charges where the consent of the DMP is not required for summary disposal.

40. I accept entirely the proposition that the courts should be slow to interfere in matters of military law but that cannot be prayed in aid where there is a clear want of jurisdiction involved.

41. Further, it seems to me that on any view of the matter, it could never be suggested that charges against a soldier of disobeying orders, absenting himself from his post without leave and insubordination were other than potentially very serious and I cannot see how *de minimis non curat lex* could apply to such charges irrespective of the penalty awarded.

### **Conclusion**

42. It follows therefore that the determination of the commanding officer in this case was made without jurisdiction and must be set aside. Since a consolidated penalty was applied to all charges including those not requiring consent of the DMP for summary disposal, the charges cannot be severed and the entire decision of the 26th November, 2012 must be quashed.

43. I will therefore grant an order of *certiorari* in those terms.