Neutral Citation Number: [2008] IEHC 404

THE HIGH COURT
JUDICIAL REVIEW

2007 88 JR

BETWEEN

DAVID RAWSON

APPLICANT

AND
THE MINISTER FOR DEFENCE

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 2nd day of December 2008.

1. The Application
The applicant seeks an order of *certiorari* quashing the order of the respondent directing his discharge from the Army. He also seeks a declaration that there was a breach of fair procedures insofar as his Commanding Officer (C.O.) failed to direct his mind as to whether there existed a reasonable doubt he had innocently or inadvertently inhaled cannabis and failed to assess the representations made by the applicant. He further seeks a similar declaration in respect of the General Officer Commanding (G.O.C.). The applicant also seeks a declaration that the regulatory provisions governing his discharge are unfair and unreasonable and do not set appropriate criteria to exclude passive inhalation of an illegal substance.

2. Administrative Instruction Defence Forces Part 7, Chapter 3
The procedure governing compulsory random drug testing and monitoring for drug abuse amongst the members of the Defence Forces is provided for by Administrative Instruction Part 7, Chapter 3 (The Regulations). Para. 302(e)(1) of the Regulations states that:-

> "An individual will be deemed to have 'tested positive' if the urine sample provided reveals evidence of the use of a Controlled Drug".

This definition is repeated in para. 304(b) of the Regulations. Para. 304(a) provides for the provision of a urine sample by a member of the Defence Forces in the context of a compulsory random testing programme. When a random urine sample is taken, para. 308 provides that it is to be tested by an independent civilian laboratory. In the case of cannabis, should the specimen in question return a positive screen test result equal to or greater than 50 nanograms of cannabis metabolites (THC acid) per millilitre of urine (ng/ml), the sample will be further analysed by Chromatography/Spectrometry (GC/MS). Should this test return a reading of greater than or equal to 15ng/ml, the result will be taken to be a "test positive" for use of cannabis.

3. In the situation where a sample has tested positive in an on site screening test or where no on site screening test has taken place, para. 309(c) provides that the sample will be divided into two bottles to be sealed and accounted for in the presence of the provider. Under para. 309(d), one specimen for each sample bottle is to be tested by the laboratory. An individual whose sample has returned a test positive result may then, under para. 309(e), have the second bottle of urine analysed by an independent laboratory at the individual's own expense.

4. Where an individual tests positive under the terms of the Regulations, para. 313(b) provides that the individual's Commanding Officer (C.O.) should inform the individual, both orally and in writing of the result of the test; he should also inform the individual that administrative action is being taken that may result in his discharge and that he has seven days to make representations in relation to that discharge.

5. Paragraph 314 provides that following the elapse of the seven day period or upon receipt of the individual's submissions, the C.O. must forward his recommendation regarding the discharge or otherwise of the individual to the General Officer Commanding (G.O.C.) for consideration. The same recommendation must be forwarded to the individual who should be informed that he may further appeal to the G.O.C. within a further seven days.

6. Para. 317 provides that upon receipt of the recommendation of the C.O. and upon considering any further submissions made by the individual, the G.O.C. will decide upon the discharge or otherwise of the individual.

7. Para. 318 provides that where it appears to the G.O.C. that a reasonable doubt exists that the individual may have innocently or inadvertently ingested, or otherwise introduced the substance, he should recommend that the individual be retained in the service.

8. Background
Compulsory random drug testing (C.R.D.T.) was introduced in the Permanent Defence Force on the 21st January, 2002, pursuant to Defence Force Regulations (D.F.R.) A7, para. 8B. The administrative instruction providing for this is referred to as "A", Administrative Instruction Defence Forces Part 7, in particular, Chapter 3, which came into effect on the 1st February, 2002.

9. The applicant joined the Permanent Defence Force as a recruit on the 4th September, 2006. The applicant underwent his military training at the Military Training School, Casement Aerodrome, Baldonnel. As part of his recruit training, the applicant underwent an awareness programme on drugs.

10. On the 27th November, 2006, the applicant underwent a random drug test carried out pursuant to D.F.R. A7, para. 8B, and "A" Administrative Instruction Defence Forces Part 7, Chapter 3. The applicant duly provided a urine sample at this time. The applicant's on site sample indicated an unclear sample result. Accordingly, additional analysis was required in compliance with the procedures laid down in "A" Administrative Instruction Part 7, Chapter 3.

11. The applicant's sample was divided into two samples, an A sample and a B sample. The applicant's urine sample was divided into two vessels that were sealed and placed in the chain of custody bag. The bag was forwarded to Laboratory of the Government Chemist (L.G.C.) Forensics in Middlesex in the United Kingdom. The B sample was retained in storage by this expert laboratory, should it be required at a later stage. A consent form was duly signed by the applicant.

12. On the 11th December, 2006, the applicant was duly notified by the Army authorities that he had tested positive as the report dated the 8th December, 2006 from L.G.C. Forensics had given a result of the applicant's A sample as "greater than 35ng/ml cannabis metabolite/THC acid" following analysis by GC/NS (Gas Chromatography/Mass Spectrometry). This was consistent with the misuse of a controlled drug. The applicant was advised of his rights pursuant to the Regulations.

13. The applicant exercised his right to have the second sample, the B sample, tested. In accordance with Regulations the applicant was invited to select one of three laboratories. The three laboratories that were offered to the applicant are three leading independent forensic science laboratories that meet the criteria specified at para. 308 of "A" Administrative Instruction Part 7, Chapter 3. They are independent bodies whose analytical procedures are in accordance with the highest internationally recognised standards for the testing of drugs and other volatile substances. The applicant nominated the forensic science laboratory, Scientifics Limited and authorised the transfer of the sample for testing by application dated the 12th December, 2006.

14. The B sample was duly processed and the result was returned from the independent laboratory. Cannabis was detected in the B sample at a level of 37ng/ml following analysis by GC/NS (Gas Chromatography/Mass Spectrometry). The applicant's contention is that he passively inhaled some illegal substance. The Permanent Defence Force Compulsory Random Drug Testing Regulations provide that the presence of an illegal substance constitutes a positive result and can therefore lead to discharge from the Defence Forces. In the case of detection of cannabis, a cut-off level of 15 nanograms per millilitre is set in order to accommodate consumption by passive inhalation. The level of 15ng/ml was set by the Defence Forces and it is widely acknowledged in the scientific community that any levels of THC acid found in urine above the 15ng/ml cut-off are very unlikely to arise from passive inhalation of cannabis or cannabis resin. The confirmation level cut-off has been set to distinguish between passive inhalation and drug use and is currently mandated by a number of international bodies including the U.S. Substance Abuse and Mental Health Services Administration and the European Workplace Drug Testing Society. Both of the applicant's samples were above the cut-off levels for THC acid in urine using GC/MS (Gas Chromatography/Mass Spectrometry). The results of the applicant's tests were over twice the cut-off level of 15ng/ml.

15. The applicant was given the result of his B sample and advised that he was liable for discharge from the Defence Forces on the 10th January, 2007. The applicant was further advised that he had seven days to make representations as per "A" Administrative Instruction Part 7, Chapter 3, para.s 313 to 317. The applicant duly made representations to his Commanding Officer on the 16th January, 2007. The C.O. considered the matter under the compulsory random drug testing procedures as set out in the current Regulations.

16. On the 17th January, 2007, the C.O. made his recommendation to the G.O.C. that the applicant should be discharged from the Defence Forces pursuant to the provisions of para. 8B(1)(b) of D.F.R. A7. The applicant was advised of the C.O.'s decision to recommend his discharge. The applicant was further advised of his right to make any further submissions to the G.O.C. The applicant furnished his submissions by letter dated the 17th January, 2007. Together with these submissions, the G.O.C. considered all the documentation together with the applicant's appeal of the 17th January, 2007, and the C.O.'s recommendation. On the 26th January, 2007, the G.O.C. reached the decision that the applicant should be discharged with immediate effect from the Defence Forces. The applicant was duly notified of this decision on the 29th January, 2007.

17. On the 31st January, 2007, an application was made ex parte on behalf of the applicant for leave to apply by way of judicial review challenging the decision to discharge him from the Permanent Defence Forces.

18. The Applicant's Submissions

(a) There was no evidence that the C.O. gave any consideration to the possibility of passive inhalation being the cause of the positive result. This was neither investigated nor was the applicant given a proper chance to make that case.

(b) Lieutenant Colonel Jim Lynott is not in a position to swear that the C.O. did give the proper consideration.

(c) The level of certainty required, on the part of the C.O. by para. 318, in order to decline to recommend that an individual be retained in service is an extremely high one.

(d) The C.O.'s recommendation was not forwarded to the applicant prior to its transmission to the G.O.C. as required by the Regulations and that, as a result, the applicant was prejudiced.

19. Submissions of the Respondent

(a) Drug abuse in the Army is a particular danger and is completely incompatible with military life. All soldiers are obliged to undergo a drug awareness programme.

(b) The applicant was submitted to a random test on the 27th November, 2006. The result was "unclear". The applicant did not, at that time, volunteer his later account of how he had ingested cannabis. The applicant exercised his rights under legislation to have two samples – one for later confirmatory testing, i.e. a second sample test. The procedure attested to was in accordance with the Regulations. No objection was made to the second laboratory by the applicant.

(c) On the 11th December, 2006, the report was received. The reading was greater than 35ng/ml. This was consistent with the misuse of a controlled drug. The applicant was paraded, informed of the result and invited to have the second sample tested by one of the three independent laboratories. He opted to do this.

(d) The test results of this second sample confirmed the first, i.e. greater than 35ng/ml.

(e) The "cut-off" level to exclude possible passive inhalation of cannabis is 15ng/ml. This level is set to rule out the effects of passive smoking. This cut-off level is an internationally agreed one and is mandated by *inter alia* the U.S. Substance Abuse and Mental Health Services Administration and the European Workplace Drug Testing Society (E.W.D.T.S.). In the result it was reasonable for the respondent to conclude the applicant was under the influence of drugs at the time of the random test.

(f) The possible consequences of this are very serious. The soldier is in contact as of course with lethal weapons and required to remove himself from any obvious risk of coming under the influence of drugs. He could be a danger to himself, his fellow soldiers and the general public.

(g) On the evidence of the tests, the respondent was entitled to reject the applicant's explanation of innocent or inadvertent inhalation.

(h) The applicant did not take the opportunity on the day of the random test either before or after the "unclear" result to

explain he had been in the presence of friends in his car smoking cannabis.

(i) The applicant upon his C.O.'s recommendation of discharge was advised of his right to and did, in fact, appeal to the G.O.C. He did this in a letter dated the 17th January, 2007, in which he admitted to being in the company of friends who were smoking cannabis and referred to conflicting scientific evidence which he alleged cast doubt on the efficacy of the tests carried out by the two separate laboratories at that time. He further claimed an opportunity to produce independent evidence to his innocent/inadvertent ingestion of a substance.

(j) The G.O.C. considered all the submissions made by the applicant and refused the appeal. The applicant was paraded on the 29th January, 2007, and informed of the decision. The decision was reasonable and the procedure followed was fair.

20. The Court's Assessment

In this case it is not for the Court to determine whether the scientific evidence of the applicant should be preferred to that of the respondent's. The respondent has chosen to follow an established scientific method of determining for its purposes what constitutes a positive test result indicating the presence of a controlled drug. It chooses to set a particular limit, i.e. 15ng/ml, to rule out the possibility of passive smoking. It is clear from the evidence that passive smoking producing a concentration below this level would be of a very limited nature. It would clearly not include passive smoking over an extended period in an enclosed space. The level of ingestion of cannabis in such an enclosed space would be necessarily high and in proportion to the size of the enclosed space and the length of the exposure. In such circumstances the passive smoker may experience the same pharmacological effects as the smokers. See the affidavit herein of William Westenbrink at para. five where he describes more extreme experimental incidents but the conclusion confirms common knowledge, i.e. passive intoxication to a greater or lesser degree occurs whenever cannabis fumes are inhaled. The respondent has set what appears to be a low limit.

The respondent is dealing with a situation where members of the armed forces are likely to be in control of lethal weaponry. It is incumbent upon them to set the highest standards for such members. They could have chosen a zero tolerance level. They, in fact, chose the 15ng/ml level in order to make allowance for the possibility of entirely innocent and unintended passive smoking. They have done this because in their view use of cannabis or any other controlled drug is entirely incompatible with membership of the Defence Forces.

21. Secion 304 of the Administrative Instruction Part 7 provides as follows:-

"304 Procedures

(a) Compulsory Random Drug Testing. A member of the Defence Forces may be required at any time to provide a urine sample in the context of the compulsory random testing and monitoring programme for evidence of abuse by such member of a controlled drug. Other volatile substances on the metabolites thereof may by order of the D.C.O.S. (Sp) be added to this administrative instruction by way of amendment.

(b) Test Positive. An individual will be deemed to have 'tested positive' if:-

(i) The urine sample provided reveals evidence of use of a controlled drug.

(ii) An individual refuses to provide a urine sample for test purposes.

(iii) The Urine (sic) sample provided has been adulterated.

(c) Sanctions/administrative Action. A member who is deemed to have tested positive within the meaning of sub-para. (b) above, may be liable to retirement or discharge or relinquishment of commission in the case of an officer, discharge in the case of enlisted personnel or withdrawal of cadetship in the case of a cadet pursuant to the provisions of para. 8B(1) of Defence Force Regulations A7.

(d) One specimen from each sample will be tested by the civilian laboratory and the result of such test, confirmatory or otherwise, will be communicated to the O.I.C. of the Drugs Testing Team."

"308 - Drugs Testing Laboratory. All samples will be tested by an independent civilian laboratory. The analytical procedures to be adopted by such laboratories shall be decided by the laboratory concerned and shall be in accordance with the highest internationally recognised standards for the test of drugs and other volatile substances on the metabolites thereof. With regard to the drug cannabis, whenever a specimen returns a positive screen test result equal to or greater than 50ng/ml of cannabis metabolites, the sample is to be further analysed by Chromatography/Mass Spectrometry (GC/MS). If the sample after being analysed by GC/MS returns a reading of cannabis metabolites equal to or greater than 15ng/ml, this result is to be regarded as a 'test positive' confirming the individual's use of cannabis."

"315. Action by Higher Authority – Enlisted Personnel. On receipt of the individual's representation, or if no representations are made, after seven (7) days has elapsed, the Commanding Officer will forward his/her recommendation as to the discharge or otherwise of the individual concerned to the G.O.C. or the Bde equivalent for consideration. At the same time a copy of his/her recommendation will be forwarded to the said individual who will be informed that he/she may further appeal to the G.O.C. or equivalent within a further seven (7) days."

"318. Retention Criteria. Where it appears to a Commanding Officer on foot of any representations made, that a reasonable doubt exists that the individual who has been deemed to have tested positive within the meaning of para. 304 may have innocently or inadvertently ingested inhaled or otherwise introduced the substance, he should recommend that the individual be retained in service."

22. From the above, the following may be deduced:-

(a) A member who has been deemed to have tested positive may be discharged.

(b) If the reading on the test is equal to or greater than 15ng/ml, then this must be regarded as "test positive".

(c) The member concerned may make representations to the C.O. who will forward his recommendation of discharge or otherwise to the G.O.C. A copy of his or her recommendation should be forwarded to the individual who will be informed that they can appeal to the G.O.C. within a further seven days.

(d) Where there is reasonable doubt as to innocent or inadvertent inhalation or otherwise, the individual should be retained in the service.

23. It must be assumed that the story outlined by the applicant as to how he came to have tested positive was accepted, because no further submissions were required nor explanation called for. The question, therefore, is; was the decision which was made on the basis of the evidence as submitted a reasonable and rational one? What was the decision that was made; it was firstly that the applicant had tested positive within the meaning of the Regulations which set a cut-off point to exclude passive smoking. Not only was that decision a reasonable and rational one, but it was based clearly upon the scientific evidence provided. On this basis para. 304 was applicable and the applicant was liable to be discharged. Secondly and central to the applicant's case, the G.O.C. decided that no reasonable doubt existed that the member may have innocently or inadvertently ingested, inhaled or otherwise introduced the substance. In the light of the applicant's account of passive smoking, was there at least a reasonable doubt that he might have innocently or inadvertently ingested, inhaled or otherwise introduced the substance? Whether the court agrees or not with the decision made is not, of course, the point. This Court does not sit as a Court of appeal from the G.O.C.'s decision. The question for the Court is whether there was any reasonable or rational basis for the G.O.C.'s decision. His decision was that there was no reasonable doubt of innocent or inadvertent ingestion or inhalation. On his own account set out in his letter of the 17th January to the G.O.C., the applicant confirmed admitting that he was in the company of friends who smoked cannabis. As he avers at para. four of his grounding affidavit, he had already on the 11th December told the military authorities that he had been in his car with two friends who had been smoking cannabis.

In the view of the Court in the light of this evidence, it was reasonable and rational for the G.O.C. to decide that this did not amount to innocent or inadvertent ingestion or inhalation. As noted in his affidavit of the 31st August, 2007, John McCarthy, the Officer in charge of the Defence Forces Drug Testing Team, noted at para. 3;

> "The applicant was made well aware of the adverse effects of drug taking and his explanation that he was in a car with people who were smoking cannabis is unacceptable as a soldier would be expected to remove himself from any such situation."

This view of innocent or inadvertent inhalation seems an eminently reasonable and rational one and consequently the decision based upon it is, in my view, not susceptible to being revoked. The Army, correctly in my view, allows a low level (15ng/ml) cut-off to provide for the possibility of some level of passive smoking. In this case the reading was more than double the cut-off and was caused, on the applicant's own evidence by the presence in his car of friends smoking cannabis. This in my view provided ample grounds upon which the G.O.C. could rely in coming to his conclusion.

24. As to the applicant's complaint that the C.O.'s recommendation was not forwarded to him prior to its transmission to the G.O.C. as required by the Regulations, I note that this is denied by Lieutenant Colonel Lynott in his second affidavit at para. three. In any event even were this so, the reality of the situation is that the matter was transmitted to the G.O.C., the applicant did have the opportunity, which he took, of submitting his case and was not thereby prejudiced by any failure to comply with the Regulations had such occurred as alleged by the applicant.

25. For all the above reasons, I refuse the reliefs sought by the applicant in this case.