

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 1185 J.R.]

BETWEEN

RICHARD MULDARRY

APPLICANT

AND

**THE OFFICER COMMANDING 29TH INFANTRY GROUP KOSOVO, IRELAND, THE MINISTER FOR DEFENCE AND THE ATTORNEY
GENERAL**

RESPONDENTS

Judgment of Mr. Justice de Valera delivered on the 2nd day of March, 2007.

1. The applicant in this matter was granted leave to apply for judicial review by an order made by Macken J. on the 20th December, 2004.

2. The applicant was given leave to apply for:

1. A declaration that the applicant is and continues to be a member of C company 29th Infantry Group Kosovo.
2. A declaration that the order made by the respondents by themselves their servants or agents that the applicant be repatriated back to Ireland as an administrative measure prior to affording the applicant an opportunity to invoke his rights pursuant to the Defence Act 1954 and the regulations made thereunder is unconstitutional and contrary to Article 34 of the Constitution.
3. A declaration that the order made by the respondents by themselves their servants or agents that the applicant be repatriated back to Ireland is in breach of the principles of natural and constitutional justice and is a breach of the applicant's rights pursuant to article 6 of the European Convention on Human Rights.
4. A declaration that the purported repatriation of the applicant in the present case was *ultra vires* the powers conferred on the respondents by themselves their servants or agents and the order is null and void and of no effect.
5. An order of *certiorari* quashing the decision made by the respondents by themselves their servants or agents to repatriate the applicant to Ireland.

3. The background to this matter was succinctly summarised by the applicant in the submissions made on his behalf and is as follows:

1. The applicant is a member of the Defence Forces holding the rank of Corporal. He was a volunteer with the Kosovo Force (KFOR). The KFOR Mission began in 1999 it arose out of NATO's 1999 campaign in Kosovo. The Kosovo Force, KFOR, was deployed in the region. Ireland has participated in KFOR since August, 1999. The mission is authorised under chapter VII of the UN Charter and was approved by Dáil Éireann on the 1st July, 1999. KFOR is a NATO led peace enforcement mission. The applicant was a member of the Irish contingent on that mission.
2. A complaint having been made that the applicant had consumed alcohol in his billet on the 1st December, 2004, the applicant was charged on four charges by way of summary trial before his commanding officer. The charges were:
 - i. Committing conduct to the prejudice of good order and discipline contrary to s. 168 of the Defence Act 1954 to 1998, alleging that he consumed alcohol in the billet at Camp Clarke Kosovo contrary to part 7, paragraph 39(d) of Unit Standing Orders.
 - ii. Committing conduct to the prejudice of good order and discipline, contrary to s. 168 of the Defence Act 1954 to 1998, in that he did cause a disturbance at Camp Clarke, Kosovo after lights out contrary to part 16, paragraph 99 of Unit Standing Orders.
 - iii. Committing the offence of being drunk contrary to s. 142 of the Defence Act 1954 to 1998, contrary to s. 142 of the Defence Act 1954 to 1998 in that he, at Camp Clarke Kosovo, at approximately 23.40hrs on the 28th November, 2004, was drunk. Alternative to charge 3 committing conduct to the prejudice of good order and discipline contrary to s. 168 of the Defence Act 1954 to 1998, in that he was unfit for duty by reason of previous indulgence in alcohol.
 - iv. Committed the offence of disobeying a lawful command of a superior officer contrary to s. 131 of the Defence Act 1954 to 1998 in Kosovo on the 28th November, 2004, when ordered by Sergeant O'Brien to give his army number did refuse to do so.

3. The applicant was convicted on charges 1 and 4. Charges 2 and 3 were dismissed. The punishment awarded was a reprimand.

4. The unit to which the applicant belonged, the 29th Infantry Group KFOR, was a peace enforcing mission as stated by Lt. Col. Kilfeather in his affidavit, and I accept the description of the mission, and its difficulties and dangers, as described by him. I also, and in particular, accept his averment that it is "imperative" that the applicant's superior officers would have trust and confidence in their soldiers, including the applicant, in carrying out their duties. Lt. Col. Kilfeather, his commanding officer, states that the applicant had lost his, (that is Lt. Col. Kilfeather's) trust and confidence.

5. It has been stated on a number of occasions, and particularly by Denham J. in *Scariff v. Taylor* [1996] I.R. p. 351 that:

"The court can and should pay a particular respect to the fundamental importance, under the Constitution and under a structure of society, to the disciplinary machinery and disciplinary codes of the Defence Forces and it is only entitled to intervene when such intervention is necessary to do justice to a member of the Defence Forces in relation to any

particular proceeding or position he finds himself in.”

6. The extent to which such disciplinary procedures can be subject to judicial review must depend, to some extent at least, on the circumstances surrounding such disciplinary action – for example forbidden drinking in billets in Ireland during normal duty periods could be viewed differently to drinking while on active service in the conditions obtaining in Kosovo. However I am satisfied that in the particular circumstances of this application the procedures adopted by the applicant’s superiors could, if appropriate, be subject to judicial review by this court.

7. Insofar as these procedures have been described in the various affidavits before the court and particularly those of Andrew Kilfeather, Terence O’Brien and Kevin McCarthy, the contents of which I accept as being a true and accurate record of the events described therein, I am satisfied that they did in respect of the applicant afford him the benefit of the relevant principles of natural and constitutional justice as applicable in the circumstances.

8. I am also satisfied that the decision to repatriate the applicant back to Ireland was an administrative decision and not, as has been suggested on behalf of the applicant, a further punishment. Lt. Col. Kilfeather has very great responsibilities to his own men, and women, and to other members of the NATO led KFOR Peace Enforcing Mission and indeed also to the population of Kosovo whose protection is the very reason for the KFOR Mission. I am satisfied that he, Lt. Col. Kilfeather, is not only entitled but duty bound to take such steps as he considers appropriate consistent with the relevant disciplinary rules and regulations (which I am satisfied were observed on this occasion), to maintain the effectiveness of discipline in his command.

9. Further I am satisfied that article 6 of the European Convention on Human Rights does not apply to the facts of the matter at issue. The procedures involving the applicant were, in respect of the charges facing him, wholly disciplinary and did not constitute a criminal offence as provided for in article 6. The punishment inflicted was in the circumstances, the minimum available and, in context, trivial; nor can the concept of civil rights and obligations apply to military personnel in these circumstances.

10. Finally it is, I believe, important to note that the applicant has suffered no disciplinary punishment other than reprimand. His repatriation was for legitimate administrative purposes and he is now a Corporal with the 4th Field Artillery Regiment stationed at Mullingar and is, according to Lt. Col. Kilfeather, entitled to apply for, and be recommended (and therefore presumably capable of selection for) UN service in Liberia or by implication other overseas service with the Defence Forces.

11. In the circumstances outlined above I refuse the application for judicial review.