

THE HIGH COURT  
JUDICIAL REVIEW

[2017 No. 110 JR]

BETWEEN

KILLIAN WHELAN

APPLICANT

AND

MINISTER FOR DEFENCE

RESPONDENT

**JUDGMENT of Mr. Justice Binchy delivered on the 27th day of November, 2019**

1. The applicant is a lieutenant in the Defence Forces currently attached to 2 Brigade, Transport Corps, Athlone. He entered the Defence Forces as an Officer Cadet in 2006 and was commissioned as a second lieutenant on 16th January, 2008.
2. In January 2015, a medical officer in the Defence Forces recommended that the applicant face a Medical Board because he had failed a fitness test and had failed to bring his body mass index ("*BMI*") to 30 or below. At the time that he joined the Defence Forces, the applicant had a BMI of 33. On 18th December, 2014, his BMI was 36.
3. The Medical Board was convened and met on 15th April, 2015. It concluded that the applicant was "*below Defence Forces' medical standards*" on the grounds of: "*persistent obesity (BMI > 35) rendering him unfit for armed military duties*". The applicant was informed that he had 7 days within which to give notice of intention to make representations against the determination of the Medical Board to the Director of the Medical Corps (who is now referred to as the Director of the Medical Board), and that he would have a further 28 days of giving such notice to make such representations in writing. He was also informed that such representations may be made by himself or on his behalf through a medical or legal representative.
4. The applicant exercised his right to make such representations by notice of appeal dated 18th May, 2015. He expressly stated that he did not include in his appeal representations from either legal or medical bodies because, in his words, he believed "*that the issue was resolvable and he accepted personal responsibility for the resolution of the same.*" He also stated, at para. 4 of his notice of appeal:

*"I wholly understand the issues with my consistently high BMI in both my personal, professional and indeed medical status and furthermore I understand the potential outcomes for my career of the classification 'X' [I explain this classification below] in light of the above circumstances. The issue of my high BMI and difficulties with weight have been a constant obstacle for me for the last number of years, and despite a significant amount of time given I have failed to remedy the same".*

While not disputing the decision of the Medical Board, or his medical classification by the Board, he said, at para. 11:

*“Although my inability to lower my BMI has negatively affected my career in a plethora of ways I have continued to serve in a number of appointments through 2 BDE and have never suffered any significant illness or injury which has prevented me from carrying out my duties as a transport officer or any of the other tasks which I may be assigned from time to time. I currently carry out OO2 [ordinary officer] duties in LBH as my medical status prevents me from carrying out armed regimental duties for the time being. My current status is neither sustainable in a practical nor professional sense and I am wholly committed both physiologically and psychologically to resolve my weight and BMI issues with vigour and determination.”*

5. He then went on to request a *“forestalling on the decision of the Medical Board and the granting of a period of 7 months”* to resolve what he described as a curable condition, namely his obese state. The form of appeal also set out a series of steps which the applicant was taking to address his BMI and weight related issues.
6. The Director of the Medical Board, namely Colonel Gerald Kerr considered the appeal and in a decision of 11th June, 2015, he upheld the determination of the Medical Board. In his decision, Colonel Kerr stated that the applicant had had ample opportunity to get his weight under control. He stated that having achieved a weight loss resulting in a weight of 126kg by the end of a course which the applicant had attended in [this is the HRFA attended by the applicant] his weight had returned to 133.8kg at the time of the Board. He also noted that the applicant presented no medical evidence or case in his appeal which would warrant a reversal of the opinion of the Board.
7. The procedures which I have summarised above are set out in a document entitled *“Administrative Instruction A12 (New Series) Medical Treatment 2015”* at paras. 214 (G) – (J). At Para. J of this document, it is provided as follows:

*“The DMB [Director of the Medical Board] shall consider all written representations made for the purpose of these proceedings by or on behalf of the officer or enlisted soldier who was reclassified by the Medical Board to “below defence forces medical standards” within 28 days of receipt of same together with the Medical Board report and the relevant medical documents which were put before the Medical Board, shall complete part 4 of annex “A”, and shall immediately notify the officer commanding the officer or enlisted soldier of his/her decision.”*

At para. (K) of the Administrative Instruction it is stated that:

*“The officer or enlisted soldier’s commanding officer will inform him/her of the DMB’s decision on the representations against the determination of the Medical Board and complete part 5 of annex ‘a’. NOTE: For further action on the part of the commanding officer see Administrative Instruction part 10.”*

This latter document was not exhibited or opened to the Court. I mention this because while the processes described above are clearly set out within the *Administrative Instruction* the processes subsequently followed do not appear to be described in any of the documentation exhibited or opened the Court.

8. In so far as is relevant to these proceedings, the Defence Forces Regulations ("*DFR*"), A12, 7th May, 1943 Edition (as amended) provide at part vi:

**Part VI. – Medical examination and grading**

*Section I. – General*

**Application of these regulations**

59. The provisions of this part of these regulations shall apply to all officers, cadets, non-commissioned officers and privates except as provided in para. 77.

**Prescribed categories**

60. The medical grades and categories prescribed in s. II of this part of these regulations shall be used in determining and describing the degree of mental and bodily fitness required for service in the Defence Forces...

**Classification or reclassification**

- 66.(1) Classification or reclassification shall be carried out in accordance with instructions which shall be issued by the Director, Medical Corps. The classification of an officer or an enlisted person shall be entered on his or her medical book (LA20 or AF30 as appropriate).
- (2) Routine classification or reclassification to any grade, other than Grade X, of members of the Defence Forces shall be carried out by a medical officer of the Medical Corps. The decision of the Medical Corps may be appealed to the appropriate command medical officer who shall convene a Medical Board to classify or reclassify the officer or enlisted person concerned. The decision of the Board shall be final...

*Section II medical classification*

**Determination of classification**

70. All personnel of the Defence Forces shall be graded under each of the following headings: -
- (a) Year of birth;
  - (b) Constitution;
  - (c) Military fitness;
  - (d) Keeness of vision;
  - (e) Colour vision; and
  - (f) Keeness of hearing.

The combination of these grades shall be the medical classification in each case.

**Standards of classification**

- 71.(1) Year of birth. This shall be recorded as the last two digits of the year in which the member was born.

- (2) Constitution. Grading under this heading shall have regard to the presence or absence of physical or mental impairment, disability, and/or physiological alteration, and the level of medical care required.

Grade 1: Personnel with no significant impairment or disability who are considered healthy and at most require only routine medical surveillance and unscheduled medical care.

Grade 2: Personnel with minor impairments or disabilities who require supervision and/or treatment, where the medical supervision is at intervals of not less than six months, or where an unexpected interruption of treatment will not create an unacceptable risk to health.

Grade 3: Personnel with moderate impairments or disabilities who have a chronic medical condition which requires supervision and treatment at intervals more frequently than every six months, or where an unexpected interruption of treatment will cause an unacceptable risk to health.

Grade 4: Personnel with marked impairments, disabilities or medical conditions requiring close medical supervision by a clinical specialist.

Grade T: Personnel suffering from or recovering from a serious illness or injury where there are temporary significant restrictions on duties, and personnel who because of their medical condition are temporary (sic) unfit.

Grade X: Below Defence Forces' constitutional standards, i.e. those who do not fall into Grade T and who are of a standard lower than Grade 4.

9. Regulation 71 goes on to provide for similar standards of classification in respect of military fitness, keenness of vision, colour vision and keenness of hearing. The first two digits of a person's classification refer to his date of birth, the third to his constitution, the fourth to his military fitness and the last three to his keenness of vision, colour and hearing respectively. The finding of the Medical Board that the applicant was "below Defence Forces' medical standards resulted in the applicant being deemed to be a Medical Classification Code ("MCC") 87 XX 111. The "XX" meant that the applicant was deemed to be of a constitution below Defence Forces' constitutional standards (determined in accordance with the medical classification criteria above, and also below Defence Forces' standards of military fitness).

10. Regulations 74(1) - (3) of the DFR provide as follows:

*"(1) The inclusion of Grade X in any part of the classification code under any one of the headings specified in paragraph 70 hereof in a member's medical classification shall cause the overall classification of the member to be below Defence Forces' medical standards.*

- (2) *Where a member on classification or reclassification is found by a Medical Board and confirmed by the Director, Medical Corps to be Grade X, he or she shall be regarded as being unfit for service with the Defence Forces and his or her commanding officer shall initiate action towards retirement, relinquishment of commission or discharge, as the case may be. Where an officer found to be in this category is serving on Defence Forces' Headquarters' Staff the relevant personnel staff officer shall notify the Chief of Staff, the Adjutant-General or the Quartermaster General as may be appropriate, so that the necessary steps may be taken towards retirement or relinquishment of commission.*
- (3) *If, such an officer, non-commissioned officer or a private is employed in the capacity in which the disability or disabilities which occasioned his or her being graded X does not interfere with the efficient performance of his or her duties, or is unlikely to cause further risk to his or her health, his or her commanding officer or head of branch at Defence Forces' Headquarters as the case may be, may forward an application for the retention of such officer, non-commissioned officer or private, together with his or her recommendations through the usual channels to the Adjutant-General who,*
- (a) *in the case of an officer, may recommend to the Minister for Defence that such officer be not retired or be not required to relinquish his or her commission immediately; or*
- (b) *in the case of an enlisted person may order that such enlisted person be not discharged immediately.*

*In either case the Minister for Defence or the Adjutant-General, as the case may be, may subsequently order that the officer or enlisted person be required to retire or relinquish his or her commission or be discharge because of such disability."*

11. I return now to the facts of this case. Following upon the decision of Colonel Kerr, the applicant purported to appeal that decision to his commanding officer, General Michael Beary, on 31st July, 2015. In this appeal he again stated that he was not including any representations from either legal or medical bodies because, he stated, he believed that the "issue" was well on the way to resolution and he again accepted personal responsibility for the resolution of the same.
12. Before General Beary made any decision on this application, a Commandant Michael Murray, whom the applicant describes as his "immediate line officer" wrote to General Beary, on 14th September, 2015, recommending that the applicant be afforded the opportunity to continue his career in the Defence Forces. It appears from the report of Commandant Murray that he was purporting to follow the procedures that are to apply after a finding of medical grade classification X has been determined by the Director of the Medical Corps. In his report, Commandant Murray refers to correspondence that he had with the Director of the Medical Corps in relation to the procedures to be followed,

and he notes that the "*D Med (by which I understand him to refer to Colonel Kerr) stated that 'the processing of the Medical Board and its appeal concluded the Medical Branch remit.'*"

13. It appears from Commandant Murray's report that he was somewhat uncertain as to the procedures to be followed at this juncture and in his report he refers to DFR A12 para. 74 (3) which I have set out above. He sought an opinion from the Commissioned Officers' Management Organisation on the proposed course of action, and that body expressed the opinion that the applicant should be given the opportunity to appeal at each stage of the process, if required. Commandant Murray then goes on to deal with the applicant's representations in relation to the issue. He had interviewed the applicant on 30th March, 2015, in advance of the Medical Board hearing, and the applicant had acknowledged his responsibility and the possible serious consequences if he failed to address the issue satisfactorily. He notes that the applicant requested permission to attend a health related fitness assessment ("*HRFA*") course commencing on 15th April, 2015 and he recommended the applicant's participation in the course. He notes that the applicant had lost over 14 kilos since 13th April, 2015, and his BMI had reduced from 39 to 35. He also notes that the applicant had successfully completed a swim test on 20th August, 2015. This was the third limb of the Defence Forces' fitness test (the applicant having previously completed the first two limbs comprising press-ups and sit-ups). Accordingly, by that time the applicant had reached the standard required in all parts of the Defence Forces' fitness tests.
14. Commandant Murray then refers to an administration document which was not opened to the Court which states at part 10, para. 447:

*"The member shall then be given 7 days, within which he may make such representation as he thinks fit, which should be considered by the relevant military authority prior to making a decision. Failure to observe these principles could lead to litigation in the courts by the member who is discharged alleging breach of his natural or constitutional rights."*

Part 10 of this document is also referred to at para. 214 (K) of the Administrative Instruction A12 document referred to above, and it would appear to have application as to the procedures to be followed after the determination of the Director of the Medical Board.

15. In any case, Commandant Murray expressed the view that the applicant had demonstrated his ability to reduce his BMI and, having completed the fitness tests successfully, he considered that the applicant had demonstrated sufficient progress to be afforded the opportunity to continue his career in the Defence Forces, and he recommended accordingly. He also concluded by saying that if the applicant's current improvement is maintained, a case would be submitted to the Director of the Medical Board to have his medical grading reclassified.

16. Commandant Murray's report is addressed to "GOC 2 BDE", whom I understand to be General Beary. Following upon receipt of the applicant's appeal to him, and also the report of Commandant Murray, General Beary sought a further opinion in the matter from a Commandant Clarke who reported on 17th September, 2015. In his report, Commandant Clarke refers to the same progress made by the applicant as was referred to by Commandant Murray in his report. He also referred to what he described as a multi-faceted and holistic approach being followed by the applicant to address his weight and BMI issues. Apart from reducing his weight and his BMI, he referred to the applicant's participation in the HRFA course, meetings with a clinical psychologist in the Defence Forces, adherence to a diet and lifestyle plan, and participation in a diet and mindfulness course. Commandant Clarke concludes by stating that the applicant had acknowledged that he had not faced his weight and related problems with the seriousness expected of a serving commissioned officer, but having interviewed the applicant and having reviewed his appeal, he was of the opinion that the applicant was then fully aware of the gravity of the situation and was now addressing the matter positively. Accordingly, he recommended that the applicant should be allowed to continue in service, provided that he maintained what he described as his "*already substantial progress*".
17. On 23rd October, 2015, General Beary refused the applicant's appeal. In his report of the same date, General Beary refers to the determinations of the Medical Board, the Director of the Medical Board and the independent investigation conducted by Commandant Clarke. He said also that he noted the submissions made by the applicant and that he had considered those submissions and taken them into account. Nonetheless, it was his conclusion that:

*"The classification of 'below Defence Forces' medical standards' is not ordinarily compatible with service in the Defence Forces. It is apparent that simply passing the fitness test at this stage will not necessarily mean that Lt. Whelan's medical grade is immediately upgraded and as such, I am not satisfied that there is sufficient non-medical evidence or exceptional circumstances to quash the decisions of the Medical Board and the DMC in this instance".*

General Beary then went on to refer to the inability of the applicant to qualify to participate in a DPT Young Officers course. He considered this to be evidence that his medical classification grading of XX interfered with the efficient performance of his duties. In his decision, General Beary states that he informed the applicant that he had 7 days from the date of the decision to add additional submissions for consideration by "*higher authority*".

18. On 9th August, 2016, Major General Kevin Cotter, Deputy Chief of Staff of the Defence Forces, issued a recommendation for the retirement of the applicant pursuant to s. 47 (2) of the Defence Act 1954. He did so having regard to the determination of the Medical Board dated 15th April, 2015, and the recommendations of General Beary, and also having regard to the provisions of DFR A12, para. 74 (2). In this recommendation he states that he has taken into account the appellant's appeal to him and states that he has

noted the resultant clinical assessment directed by him and conducted by the SMO (Senior Medical Officer) of 2 BDE, of July 2015 and the advice given to him by the Director of the Medical Board that the classification awarded to the applicant by the Medical Board had not been changed. He concluded his recommendation by directing notification of the same to the applicant and further directing the applicant be informed that he have 14 days from 9th August, 2015, to make any submissions for the attention and consideration of the Chief of Staff.

19. On 20th September, 2016, solicitors acting on behalf of the applicant wrote to the Defence Forces' personnel policy branch requesting certain information and documentation. At the same time, the solicitors lodged comprehensive submissions on behalf of the applicant in response to the recommendation of Major General Cotter. The submission was lodged in light of the tight deadline imposed for receipt of submissions, while at the same time requesting that no decision should be made until such time as all documentation requested was made available to the applicant. I will address these submissions below. On 24th October, 2016, the applicant was notified that the Chief of Staff, Vice-Admiral Mark Mellett had considered the applicant's case, and had recommended his retirement from the Defence Forces pursuant to s. 47 (2) of the Defence Act and Defence Force Regulation A 15 para. 18 (1) (B), to the Minister for Defence. The applicant was sent a copy of Vice-Admiral Mellett's letter to the Minister. In this letter, Vice-Admiral Mellett says that he has considered and taken into account the following:
  - (1) The initial determination of the Medical Board of 15th April, 2015;
  - (2) The appeal of the applicant to the Director of the Medical Board, and the rejection of same on 11th June, 2015;
  - (3) The appeal of the applicant to the Deputy Chief of Staff to be retained in the service, and the clinical assessment conducted by SMO 2 BDE in July 2016 and the advice to him by the Director of the Medical Board that the Medical Classification Code ("MCC") awarded to the applicant by the Medical Board had not changed;
  - (4) The recommendation of the General Officer Commanding of 2 Brigade of 30th October, 2015, in respect of the retirement of the applicant;
  - (5) The provisions of Defence Forces Regulation A.12 para. 74 (2);
  - (6) The applicant's submission to Vice-Admiral Mellett.
20. The letter concludes by stating that having regard to all of the above, Vice-Admiral Mellett was satisfied with the determination of the Medical Board and concurred with the recommendations of the General Officer Commanding 2 Brigade and the Deputy Chief of Staff. This decision was made without responding to the request of the applicant's solicitors that no decision should be taken until such time as all documentation relied upon by the Defence Forces was made available to the applicant.



21. The decision of Vice-Admiral Mellett was the last decision in the sequence of decisions leading up to these proceedings, which were initiated by way of *ex parte* docket on 6th February, 2017. Leave to issue the proceedings was granted by Noonan J. on that date.
22. Subsequent to the decision of Vice-Admiral Mellett, but prior to the issue of proceedings, the applicant procured a number of medical reports. The purpose of these reports was to support that which he now claimed i.e. that neither his weight nor his BMI were sufficient reason to consider that he was unfit for his duties as an officer in the Defence Forces, and that, on the contrary, he was in fact in good health and neither his BMI nor his weight impaired him in any way from fulfilling his duties. These reports were sent to the respondent by letter dated 18th January, 2017. The applicant received a reply dated 24th January, 2017 stating that the Director of the Medical Corps had read the reports but that nothing in them changed his view as to the conclusions of the medical Board.

### **The proceedings**

23. The applicant seeks the following reliefs:
  - (1) An order prohibiting the respondent, his servants or agents, recommending the dismissal and/or retirement of the applicant pursuant to the provisions of the Defence Forces Act 1954.
  - (2) A declaration that the failure by the respondent to provide sufficient reasons for the decision to dismiss the applicant breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Forces' regulations.
  - (3) A declaration that the failure by the respondent to provide documentation and/or information sought that related to the decision to dismiss the applicant breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Forces' regulations.
  - (4) A declaration that the refusal by the respondent to engage at all with the submissions made by the applicant on the issue of his dismissal breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Forces' regulations.
  - (5) A declaration that the refusal by the respondent to engage with medical reports provided by the applicant on the issues of his medical fitness and fitness to serve breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Forces' regulations.
  - (6) A declaration that the refusal by the respondent to consider a regrading of the applicant's Medical Classification Code breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Act 1954 and the regulations made thereunder.

- (7) A declaration that insofar as the regulations failed to provide for an adequate of system of appeal and/or regrading of medical status said regulations are *ultra vires* and contrary to the provisions of the Defence Act 1954 as amended.
- (8) A declaration that the operation by the respondent of a fixed and rigid policy with regards to the medical classification of (sic) breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the Defence Forces' regulations.
- (9) A declaration that the failure by the respondent to investigate expeditiously the fitness of the applicant to serve, breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, and/or was *ultra vires*, and/or breached the applicant's legitimate expectation that serious allegations concerning fitness to serve against him pursuant to the Defence Forces' regulations, would be dealt with expeditiously.
- (10) A declaration that the respondent in restricting the duties the applicant could undertake has acted *ultra vires*.
- (11) A declaration that the respondent breached the applicant's rights in failing to provide a means of overturning the Director of Medical Corps classification of the applicant pursuant to Defence Force Regulation A.12 para. 74 (2).
- (12) An injunction by way of application for Judicial Review restraining the respondent, its servant or agents from proceeding to dismiss the applicant pending the hearing of the trial of this action. Such injunction was granted at the leave stage of these proceedings.
- (13) An Order providing for all necessary and/or consequential and ancillary directions in relation to this application for relief.
- (14) An interim Order restraining the respondent from any further order suspending the applicant herein without leave of this Honourable Court. Such an Order was made at the time leave was granted by Noonan J.
- (15) Such further or other Order as this Honourable Court may deem fit.
- (16) An Order, if necessary, extending the time within which to bring the within application.

**Grounds of which relief is sought**

24. The applicant relies on the following grounds:

- (1) He claims that he was not given any adequately detailed reasons with regard to the decision to dismiss him from the Defence Forces. While he was advised that his BMI needed to be lowered, he was not provided any adequately detailed reasons why his BMI renders him unfit and/or necessitates his dismissal. The failure to

provide the applicant with reasons is in breach of his right to fair procedures and natural and constitutional justice.

- (2) The respondent failed to provide the applicant with the documentation that detailed the decision making process surrounding the decision to dismiss the applicant.
  - (3) The respondent has failed to engage adequately or at all with the submissions and legal reports provided by the applicant, in breach of his right to fair procedures and natural and constitutional justice.
  - (4) The failure by the respondent to investigate expeditiously the fitness of the applicant, with the result that his career has been left in stasis. The applicant did not pursue this ground.
  - (5) The respondent has acted in an arbitrary and capricious manner.
  - (6) The respondent has breached the principles of natural and constitutional justice.
  - (7) The respondent has acted *ultra vires*.
  - (8) The failure on the part of the respondent, his servants or agents to engage with information supplied by the applicant is in breach of the provisions of the Defence Forces Act 1954 and/or the regulations made thereunder.
25. The proceedings are grounded upon an affidavit of the applicant sworn on 6th February, 2017. In his affidavit, the applicant outlines the background to his enrolment as a cadet in the armed forces in July, 2006. He avers that he underwent medical examinations and it was noted that he had a BMI of 33 at that time. He successfully completed his cadetship on 16th January, 2008, following which he was awarded a commission as an army officer by the President of Ireland.
26. The applicant then proceeds to outline the factual background giving rise to these proceedings. Having referred to his appearance before the Medical Board on 15th April, 2015, and that the Medical Board determined his MCC as 87 XX 111, he then refers to his appeal of that classification to the Director of the Medical Board, Colonel Kerr. He avers that at no point did Colonel Kerr carry out any physical examination of him or hear any oral evidence. He then refers to the decision of Colonel Kerr to uphold the determination of the Medical Board.
27. He refers to the recommendation of Comdt. Murray of 14th September, 2015 that he should be afforded the opportunity to continue his career in the Defence Forces, and the similar recommendation made by Comdt. Clarke of 17th September, 2015. He avers that around the time of the latter report, he was paraded by General Beary and he informed General Beary that he had passed the fitness test. He avers that General Beary congratulated him on having passed the fitness test, and that it was clear to him that at that time General Beary was totally unaware that he had done so. In spite of that, General Beary also recommended his dismissal.

28. He then proceeds to the referral to the decision of General Cotter of 9th August, 2016 in which he states that the Deputy Chief of Staff "*in seven abrupt paragraphs*" recommended my dismissal. Following upon that decision he retained solicitors to prepare a submission on his behalf for the Chief of Staff, Vice-Admiral Mellett. His solicitor in turn instructed counsel who prepared a detailed seven-page submission with exhibits. I will return to this submission separately, below. At the same time as making this submission, his solicitor requested documentation relating to the decision recommending his dismissal and further requested Vice-Admiral Mellett not to make any recommendation to the Minister until that documentation was made available to his solicitors.
29. Notwithstanding this latter request, and his submissions, the Chief of Staff recommended his retirement. The applicant complains that the letter of the Chief of Staff comprises "*nine curt paragraphs*" and that one sentence only is dedicated to the detailed submissions prepared on his behalf in which Vice-Admiral Mellett states "*I have taken into account Lieutenant Whelan's submissions to me in this matter*". The applicant then avers:
- "This summary dismissal of the detailed submissions submitted on my behalf is totally unsatisfactory, and I still do not know what the answer is to the issues I raised in my submissions. In addition, in a situation where my livelihood, reputation and profession is on the line, in my view it cannot be acceptable to dismiss or ignore my submission by means of one brusque sentence. Furthermore, Vice-Admiral Mellett in his letter stated that he had considered the provisions of Defence Forces' Regulation A12 para. 74 (2) which provides that where a Grade X classification is made and this classification is confirmed by the Director of the Medical Corps the member's commanding officer shall initiate action to towards retirement. Again, as with General Cotter, it appears to me that once the Director of the Medical Corps agreed with my medical reclassification by the Medical Board my classification cannot be overturned."*
30. The applicant then proceeds to exhibit three medical reports in support of his retainer in the armed forces. The first is a medical report of his GP, a doctor John Casey. In this report, Dr. Casey states that he could not identify any medical illness that would prevent the applicant from carrying out his duties as a Lieutenant. He noted that the applicant is active and plays rugby and trains about four times a week, and also plays rugby matches at the weekend. He states that the applicant denies any symptoms apart from obesity. He advised the applicant to seek the opinion of an occupational health specialist and an endocrinologist.
31. Following upon these recommendations, the applicant attended a consultant endocrinologist and bariatric physician namely Dr. Francis Finucane, with whom he attended on 20th December, 2016. He exhibits a copy of Dr. Finucane's report of the same date. In his report, noting that the applicant is entirely well apart from anxiety as a result of his impending discharge from the armed forces, he states that the applicant has

no evidence of underlying endocrinopathy or insulin resistance. He states that the applicant weighed 134.6kg, his height was 1.856m, and his BMI was 39.1kg/m sq. He expresses the opinion that BMI in isolation in a case such as this is a relatively poor indicator of long term health status. He states that it is his opinion that the exceptionally high muscular strength of the applicant and his strong swimming ability and overall good health would be much stronger indicators of his longer time health outlook and his physical capabilities as an army officer. He concludes by saying that even at his current weight, it is deeply unfair and irrational to suggest that the applicant's physical capabilities in any domain of professional activity would be impaired by his current body habitus.

32. The applicant also attended with an occupational physician, namely Dr. Martin Hogan, on 6th January, 2017, and exhibits his report of the same date. Dr Hogan states that he is a partner in full-time occupational medicine practice since 1994. He lectures in occupational medicine in University College Cork. He is a fellow of the faculty of occupational medicine of the Royal College of Physicians of Ireland and an associate of the faculty of occupational medicine of the Royal College of Physicians of London. He is a specialist trainer for the faculty of occupational medicine of the Royal College of physicians of Ireland. Dr. Hogan expresses the opinion that the applicant would be medically fit for all occupations which he would assess. In his opinion the applicant's gross strength and general levels of fitness are adequate even for the most demanding of professions.
33. Dr. Hogan says that he reviewed the armed forces medical classifications as per the Administration Instruction A12. Dr. Hogan disputes that BMI is a sufficiently reliable indicator of fitness upon which to make a decision to discharge a person from the armed forces, which can have such fundamental implications on the future of an individual.
34. Moreover, Dr. Hogan submits that even if BMI is used for this purpose, there was a misinterpretation of the information in this case. Referring to the Medical Classification Code, he accepts that Lieutenant Whelan does not fall into grade T, but he states that *"by the definition, for someone to fall into grade X, they would also have to be below a standard lower than grade 4. Grade 4 is defined as personnel with marked impairment or disabilities or medical conditions requiring close medical supervision by a clinical specialist. Several doctors have seen Mr. Whelan and none have suggested that he has a requirement of close medical supervision by a clinical specialist. I cannot see how anybody would say that his condition whatever its significance is below grade 4. On this finding alone, I believe classifying him as a grade X is not alone unjust but against the Defence Forces' own regulations. In my opinion therefore, the classification is incorrect and should be amended"*. This point was also made in submissions sent by the applicant's legal advisors to Vice-Admiral Mellett.
35. The reports of Dr. Hogan and Dr. Finucane were sent to both the respondent (i.e. the Minister for Defence) and the Chief of Staff by letter dated 18th January, 2017. In the same letter they invited the respondent/the Chief of Staff to rescind the decision to recommend the discharge of the applicant, in the light of the contents of these reports.

By letter dated 24th January, 2017 to the applicant's solicitors, a Ms. Anne Howard of the Defence Forces personnel policy branch informed the applicant's solicitors that the director of the Defence Forces medical branch is of the view that there was nothing in the information/reports provided that would lead him to the conclusion that the findings of the medical board were/are in error. The same letter also addresses the applicant's complaint that the respondent had failed to provide documentation requested, and stated that the military authorities had released all documentation requested by or on behalf of the applicant on 9th September, 2016 and invited the solicitors for the respondent to clarify the documents that they consider to have not been delivered. No reply was issued to this letter and these proceedings were brought on 6th February, 2017.

36. The applicant makes one further point in his affidavit which is that due to his medical classification, he is not allowed to do regimental duties, which means that he is not permitted to carry out "*armed duties*". Nonetheless he states that only the week before his grounding affidavit (6th February, 2017) he was tasked with organising and running a day on the shooting ranges for the enlisted men, where soldiers and the applicant fired a number of weapons at targets as part of target practice and general weapons handling training. He avers that he found it puzzling that he is not permitted to carry out armed duties but at the same time he is expected to organise and take part in range firing exercises.

**Submissions on behalf of applicant to Chief of Staff, 19th September, 2016**

37. The following is a summary of the main points made in the submissions:

- (i) There were errors in the résumé prepared by Lt. Col. Ahmad to the medical board. This included a failure to refer to a finding by a consultant endocrinologist that the applicant might well be healthier than a non-fit, normal weight individual. Other errors were also alleged to have been made by Lt. Col. Ahmad in this résumé, and it is submitted that since this forms the basis upon which the medical board was convened, it is unsatisfactory and may have tainted the views of the medical board, and vitiated the subsequent medical board.
- (ii) The applicant was not informed of his right to instruct a legal representative to appear on his behalf at the medical board hearing.
- (iii) There are errors in the report of Colonel Kerr in relation to the appeal of the applicant from the medical board finding. He incorrectly states that at the time of the medical board finding the applicant's weight had returned to 133.8kg when in fact between the period 13th April – 1st May, 2015 it had reduced from 134kg to 125kg. Accordingly, Colonel Kerr's opinion was based on an incorrect reading of the applicant's weight.
- (iv) General Beary acted in error in disregarding the fact that the applicant had passed the fitness test and also in disregarding the positive recommendations made by Comdts. Clarke and Murray. Furthermore, the applicant has conducted a wide

range of duties, which were praised by Comtd. Murray and others in the preceding years.

- (v) General Beary was incorrect in stating that even if the applicant passed the fitness test it would not mean that his medical grading would be upgraded. This is an issue that only a medical officer can decide, and is beyond the expertise of General Beary. It is clear that the applicant was fit enough to deserve an upgraded medical classification.
- (vi) Once the applicant passed his Defence Forces fitness tests, he could no longer be Medical Classification Code X. That medical classification is directly linked to military fitness, and that is apparent from s. 205(1) 6 of DFR A12 which states: *"grade X shall apply to personnel who are not eligible for any other grade and are deemed to be below Defence Forces medical standard with regard to military fitness"*. At a minimum, the applicant should have been reclassified grade 4, although it was submitted that he could meet a higher classification.

#### **Statement of opposition of respondent**

- 38. Firstly, it is admitted that the applicant was referred to a Medical Board in April 2015 and was classified as 87 XX 111 "below Defence Forces' medical standards". It is pleaded that the medical classification was determined following a full clinical examination of the applicant by the appropriate medical personnel in accordance with DFR A12.
- 39. In general terms, the respondent denies that he has acted in an arbitrary and capricious manner, or that he has breached the principles of natural and constitutional justice, or that he has acted *ultra vires* as alleged or at all.
- 40. It is pleaded that the applicant was advised at his initial medical assessment in July 2006 that he should lose weight and was repeatedly advised in the following years that his weight and BMI were matters of concern. Far from contesting this assessment, the applicant continually acknowledged that he needed to address these concerns properly, but he failed to do so.
- 41. The respondent pleads that on three occasions, firstly when appealing the finding of the Medical Board to the Director of the Medical Corps, secondly when making further representations (to General Beary) on 31st July, 2015, and thirdly when making further submissions to the Deputy Chief of Staff on 20th November, 2015, the applicant acknowledged his difficulties in addressing his weight and BMI. On the first of these occasions, the applicant acknowledged that despite having been given significant time, he had failed to remedy either his weight or his BMI and asked for a further seven months to do so. On the second occasion he requested a six-month suspension of his retirement to enable him to reduce his weight and his BMI. The applicant made no representations on either legal or medical grounds on any of these occasions.
- 42. Accordingly, it is further pleaded that having accepted the findings of the Medical Board throughout his appeal and application for retention in service for almost 18 months, the

applicant acquiesced in the findings of the Medical Board and is estopped from objecting to them in these proceedings. Furthermore, the applicant also acquiesced in the manner in which his appeal and application for retention in the Defence Forces were processed.

43. With regard to BMI, the respondent pleads that the Director of the Medical Corps instruction for medical officers was amended in January 2010 to provide expressly that *“subject to the limitations of the system, the Body Mass Index is an effective indicator of body fat and obesity. Personnel with a BMI in excess of 30, unless justifiable by physiological state or body fat measurements will be regarded as obese and graded constitution three and military fitness three or four.”* The respondent pleads that this policy is not binding and that it is expressly recognised in the DMC instructions that each case must be decided on its merits, and the instructions are a guide to expert medical personnel for their assistance.
44. It is then pleaded that the circumstances in which a person with a BMI in excess of 35kg/m<sup>2</sup> (such is the applicant) could nonetheless be assessed not to be clinically obese owing to physiological state or body fat measurements are almost negligible, but will absolutely be identified on physical examination by qualified medical personnel.
45. The respondent pleads that the applicant was given every opportunity throughout his service in the Defence Forces to address his weight and BMI but failed to do so adequately. Moreover, he was given every opportunity to make representations on his own behalf from the time the Medical Board was convened up to and including the decision of Vice-Admiral Mellett. The respondent availed of these opportunities and his representations were considered by the Director of the Medical Corps, his general commanding officer, the Deputy Chief of Staff and the Chief of Staff of the Defence Forces.
46. Furthermore, over and above the requirements of the DFR, the applicant was re-examined by the Director of the Medical Corps in July 2016, at which examination the findings of the Medical Board of April 2015 were confirmed.
47. It is denied that General Beary was unaware of the fact that the applicant had passed his fitness test in October 2015. General Beary requested an independent review of the applicant’s case, and having considered that review and the representations of the applicant and the entirety of his case, General Beary did not recommend that the applicant should be retained in service. In doing so he referred in particular to the fact that the applicant’s inability to participate on a transport young officers’ course demonstrated that the applicant’s medical classification did interfere with the efficient performance of his duties.
48. Similarly, Major General Cotter, having had the applicant medically re-examined on 18th July, 2016, concluded that there was no evidence that the applicant’s medical classification had changed. Having considered the history of his case, his medical classification and the fact that the applicant had either been excused duties or had been on sick leave for 58 days in 2016 and at that stage had yet to complete his fitness test for



the year, Major General Cotter also recommended the applicant's retirement on 29th July, 2016.

49. It was only in the course of making representations to Vice-Admiral Mellett, and when seeking an extension of time for making such representations, that the applicant for the first time sought a copy of the documents relied on in reaching the decision to recommend his retirement from the Defence Forces, and of all policy guidelines. It is pleaded that this request was complied with on 12th September, 2016, on which date all documents relating to the discharge of the applicant were delivered by hand. By letter dated 24th January, 2017, the respondent asked the applicant to specify the documents which he believed remained outstanding. However, rather than engage with this request, the applicant instituted these proceedings. Accordingly, any application for relief based on outstanding documents is premature and inappropriate in all of the circumstances.

#### **Affidavits of the Respondent**

50. Four affidavits were sworn on behalf of the respondent in opposition to these proceedings. The first is an affidavit of Commander John Murphy, Brigade Medical Officer of 1 Southern Brigade, Collins Barracks, Cork. Commander Murphy avers as to his credentials. He is a medical practitioner holding the commissioned rank of Commander in the Defence Forces. Commander Murphy was appointed as Brigade Medical Officer, 1 Southern Brigade in January 2011, and held that position on 20th February, 2015, when he was appointed as president of the Medical Board convened to examine the applicant. The other members of that board were Lt Col Ahmad and Captain Martin Neary. Commander Murphy exhibits a copy of the report of the Medical Board of 16th April, 2015.
51. Commander Murphy avers that at the outset of the proceedings of the Medical Board, the applicant sought to adjourn the proceedings of the Medical Board in view of efforts that he was making to address his BMI. However, in view of the long history of the applicant and the many opportunities given to him up to that point, the Medical Board decided to proceed.
52. Commander Murphy avers that the Medical Board tested the applicant's weight and BMI, and found them to be 133.8kg and 39.8kg respectively. His abdominal circumference was 121cm and his hip circumference was 128cm. He exhibited the presence of a fat apron, a physical sign associated with obesity and accordingly he was assessed as being clinically obese. In view of these findings, it was decided to reclassify the applicant's medical grade to 87-XX-111, which is "*below Defence Forces' standards as set out in DFR A12.*"
53. The second affidavit sworn on behalf of the respondent in opposition to these proceedings was sworn by Colonel Kerr and is also dated 22nd November, 2017. Colonel Kerr provides his credentials. He is licenced to practice medicine in Ireland. He is a member of the Royal College of General Practitioners and a licentiate of the faculty of Occupational Medicine of the Royal College of Physicians of Ireland and a fellow of the faculty of Sports and Exercise Medicine of the Royal Colleges of Physicians and Surgeons in Ireland. He is a member of the faculty of Military Medicine in Ireland. He holds a masters' medical

science degree in sports and exercise medicine. He is entered on the specialist divisions of the medical council's register of medical practitioners in (1) general practice, (2) occupational medicine and (3) sports and exercise medicine. He has over 29 years' experience in the practice of military medicine and at the date of swearing of his affidavit his appointment was that of Director Medical Branch (formally Director of the Medical Corps).

54. While swearing his affidavit in opposition to the statement of grounds of the applicant, Colonel Kerr avers that he wishes to respond in particular to the medical reports filed on behalf of the applicant as exhibited by the applicant in his affidavit.
55. Colonel Kerr rejects the medical reports submitted on behalf of the applicant. Insofar as those reports are based on factual matters, he says that they appear to be based upon facts supplied by the applicant as regards his medical history and levels of activity, and he questions the applicant's candour in regards the information supplied by him to Dr. Casey. For example, Dr. Casey reports that the applicant denies any symptoms apart from obesity, but the applicant has a history of anxiety referred to by his own solicitor in the submissions to Chief of Staff.
56. Colonel Kerr also queries the candour with which the applicant reported on his health to Dr. Finucane. Dr. Finucane states that the applicant never "*had an issue passing his fitness tests*", but Colonel Kerr says that it is apparent from another affidavit sworn on behalf of the respondent, that of Terrence White (which I refer to below), that the applicant failed fitness tests on five occasions between 2008 and 2016. Colonel Kerr also notes that at the time of his examination by Dr. Finucane on 20th December, 2016, the applicant's BMI had again increased from 35 in September 2015, to 39.1.
57. Colonel Kerr avers that the applicant gave a similarly misleading history of his fitness test results to Dr. Hogan. Colonel Kerr queries the expertise of Dr. Hogan to comment on the matter in which the applicant's medical classification was determined. He avers that it is not apparent that Dr. Hogan has any practical experience of the working environment in a military context, and that it has been recognised since October 2015 that military medicine is a speciality area of medicine in its own right. He rejects, in some detail, the criticisms of the medical classification system of the Defence Forces. He addresses the risks posed to personnel by obesity in the context of serving members of the Defence Forces. He avers that persons with a BMI of 25 – 29.9 are considered to be overweight, while those with a BMI of 30 – 34 are considered to be obese, and those with a BMI of 35 – 39.9 are defined as being severely obese. He says that it is well established that obesity is associated with increased incidences of cardiovascular and ischaemic heart disease, diabetes and certain cancers and arthritis. He addresses the complications that can flow from obesity in the field of military operations and in particular in the event of trauma in the field and avers that elevated BMI can give rise to equivocal or confusing results where there is excessive abdominal fat. For this reason, in the context of those serving in the military, elevated BMI will impinge on the medical classification code for reasons other than fitness.

58. He further avers that there are additional effects of obesity which negatively impinge on the occupational military environment, such as the ability to fit easily and quickly into compact and confined spaces can be compromised with potential impacts in an operational setting on both the individual and the mission. He avers that a higher level of fitness is required for military life than for any civilian occupation. He therefore queries Dr. Hogan's conclusion that the applicant would be medically fit for all occupations which Dr. Hogan would assess and summarises that Dr. Hogan could have no experience of the military environment to conclude that the applicant is fit for the Defence Forces.
59. Colonel Kerr avers that it is medically accepted that individuals who exhibit a very high level of cardiovascular fitness can mitigate the increased risk of a higher BMI and this is reflected in the MCC which gives non-binding guidance that those personnel with the BMI in the range of 30 – 34.9 and who exhibit a grade one in the cardiovascular element of the fitness test may be considered to have physiologically justified the award of a constitution of grade one or two as appropriate. However, once an individual's BMI exceeds 35, then abdominal girth becomes an irrelevance insofar as arithmetically and anatomically it is almost impossible the same should not be high.
60. Colonel Kerr avers that no one isolated test is an adequate substitute for an overall medical examination by an experienced physician, which is of course what takes place in the Defence Forces and would have taken place in the case of the applicant. He avers that he does not give binding instructions to medical officers in carrying out their duties: any medical examination and classification must be evidence based and in conformity with their expert professional opinion. He avers that inherent in the awarding of a Medical Classification Code is an informal or moral duty of care by which the Defence Forces are bound towards their service members in the case of those who exhibit an increased risk of cardiovascular disease. The Defence Forces should not further compound the hazard by inappropriate tasking, including by extending the service of a member of a particular age who is no longer sufficiently physically fit to undertake the range of duties of a member of the Defence Forces. He avers that this was the conclusion reached with regard to the applicant. [Counsel for the applicant submitted that there is no evidence of this conclusion]
61. Colonel Kerr concludes his affidavit by stating that:

*"I believe that it is vital and it would be expected that members of the Defence Forces – especially but not only enlisted men and/or those not in staff positions – should not be obese and should have a level of physical and military fitness to serve as soldiers in the field if required. I am alarmed that these proceedings would appear to put this principle into doubt for the future."*

62. Colonel Kerr exhibits to his affidavit a document entitled DMC Instruction for Medical Officers Number Four – Application of Medical Classification System. This document is dated 14th November, 1997. Paragraphs 1 – 3 state as follows:

1. The following epitome has been drawn up to assist medical officers and medical boards in the classification/reclassification of personnel indicating the usual effect upon gradation of common disabilities and diseases.
  2. The statements are not intended to bind the medical officer or medical board to place the officer or soldier in the suggested grade, for it is recognised that each case must be decided on its merits. They are to be regarded as a guide to medical officers and medical boards to assist them, insofar as it is possible, to ensure uniformity in the classification of personnel throughout the Defence Forces and will be taken in conjunction with "*Medical Classification*" DFR A12 paras. 70 – 74.
  3. Where the suggested grades refer only to numerical grades this does NOT preclude the award of T or X grades when the nature or severity of the condition warrants such action.
63. In the same document, at para. 36 the following is stated in relation to obesity:

*"Subject to the limitations of the system, the Body Mass Index (BMI) is an effective indicator of body fat and obesity. Personnel with a BMI in excess of 30, unless justifiable by physiological state or body fat measurements will be regarded as obese and graded constitution three and military fitness three or four. Personnel with a BMI in excess of 35, unless justifiable by physiological state or body fat measurements will be investigated and advised that failure to reduce their weight to give them a BMI of 35 or less within twelve (12) months will lead to a classification X.*

"

64. This text appears in a 1997 document, exhibited, but it is also recorded, in absolutely identical terms, as an amendment to the 1997 document, introduced on 24th March, 2010. It seems likely therefore that this para. became effective as of the latter date. Neither party commented on affidavit as to whether or not the applicant was advised as required by this para. to reduce his weight in order to give him a BMI of 35 or less within 12 months, in order to avoid an MCC of X. However, in the course of submissions during the hearing, the applicant submitted he was never so advised and this was not disputed.
65. Commandant Terrence White of Second Brigade Transport Company, the commanding officer of the applicant since 8th July, 2016, also swore an affidavit to verify the statement of opposition herein. Some of this affidavit is of particular relevance and assistance in relation to the history of the applicant in the Defence Forces and it is worth quoting this part of the affidavit in full, commencing at para. 5:

*"5. I say that applicant joined the Defence Forces in July 2006, at which time he was noted to have a BMI of 33. I say that he was advised that he should lose weight and return for further assessment, and I beg to refer to a copy of his medical examination sheet dated 12th July, 2006, upon which marked with the letters 'TW1' I have signed my name prior to the swearing hereof.*

6. *I say that, while still a cadet, the applicant struggled with his fitness and was placed on probation as he did not pass the Defence Forces fitness test as laid down in training instruction 5/2007. Having passed the test on the 21st day of June, 2007, his probation period was terminated, and I beg to refer to a copy of a report in his progress at this time by his commanding officer, Lt. Col. Colum Campbell, dated the 14th day of August, 2007, upon which marked with the letters 'TW2' I have signed my name prior to the swearing hereof.*
7. *I say, however, that following his commission in January 2008 the applicant's fitness levels did not improve. I say that each member of the Defence Forces is required to undergo an annual fitness test, which is in three parts – (i) Push ups and sit ups, (ii) 3.2km run, and (iii) a loaded march in fatigues with a backpack weighing 15kg over a set course of 10km, to be conducted within 6 weeks of the date of parts i and ii. I say that in lieu of the run in part ii, a member may be allowed to complete a swim or bicycle ride where a military doctor certifies a temporary inability to complete the run. I say that the record of the applicant's fitness tests demonstrate that, during all his commission to service in the Defence Forces, he has not completed the full fitness test including the run in part ii. The only occasion on which he completed the modified test to include the swim was on the 12th day of October, 2015, and prior to that he completed parts i and ii of the modified test on the 25th day of August, 2010. Other than these dates, however, he failed his annual fitness test on the following dates: -*

*23rd September, 2008,*

*8th November, 2011;*

*28th September, 2012;*

*19th November, 2012 and*

*19th June, 2013.*

*And I beg to refer to a printout of these tests upon which marked with the letters 'TW3' I have signed my name prior to the swearing hereof.*

8. *I say that in 2012 his fitness levels were considered to be a matter of 'grave concern' accordingly it was decided to refer the applicant for an immediate medical assessment, and I beg to refer to a copy of a report of the Director of Defence Forces' training dated the 26th day of January, 2012, upon which marked with the letters 'TW4' I have signed my name prior to the swearing hereof.*
9. *I say that in his annual report AF 451C for 2010/2011 the applicant was advised by his then commanding officer, Commandant Kevin Campion, that his fitness levels were unacceptable, and I beg to refer to a copy of this report dated the 15th day of March, 2012, upon which marked with the letters 'TW5' I have signed my name*

*prior to the swearing hereof.*

10. *I say that the applicant's fitness levels did not improve over the following year, and as noted in his annual report AF 451C for 2011/2012, he was advised that he may be found unsuitable for continued service in the Defence Forces. Far from disputing this assessment, the applicant accepted it and indicated his determination to address this issue and to progress it to an acceptable standard of fitness. I beg to refer to a copy of this report dated the 13th day of December, 2012, upon which marked with the letters 'TW6' I have signed my name prior to swearing hereof.*
11. *I say that in his 2014 annual report AF 451, the applicant again noted that he continued to struggle with his personal fitness, and indicated that he hoped to address it that year. I beg to refer to a copy of this report dated the 19th day of January, 2015, upon which marked with the letters 'TW7' I have signed my name prior to the swearing hereof.*
12. *I say that due to ongoing concerns with his fitness, in 2014 the applicant was referred by Commandant Brian Carley to Lt. Col. Ahmed, and I beg to refer to his affidavit when produced.*
13. *I say that, as the foregoing makes clear, the applicant had a long standing difficulty with his personal fitness which he fully recognised. I further say that he was warned that this could have an impact on his continued service in the Defence Forces and (as he also recognised) he was given every opportunity to address his problems. Additional assistance was given to include:*
  - (a) *Additional time to train during working hours from the time he was commissioned to date*
  - (b) *Access to subject matter experts within the Defence Forces with regard to mental health, health nutrition and weight loss techniques*
  - (c) *He underwent a health related fitness assessment course for three weeks, from the 13th day of April to the 1st day of May, 2015. This course was funded by the Defence Forces and was during work hours. The applicant lost approximately 8kg.*
14. *Following the decision of the Medical Board on the 15th day of April, 2015, the applicant appealed by letter dated the 18th day of May, 2015. In doing so, it is clear that the applicant was not disputing the merits of the decision or seeking to suggest in any way that it was in error. On the contrary, he waived his entitlement to make any legal or medical representations and said that he wholly understood the issues with his BMI which, he acknowledged, had been a constant obstacle for him and which he had failed to address notwithstanding a 'significant amount of time given'. In support of his appeal, the applicant instead committed to*

*addressing his BMI and outlined the efforts he was making to do so. In the circumstances, he sought a seven-month suspension of the decision of the Medical Board to enable him to follow through in those commitments. I beg to refer to a copy of his letter upon which marked with the letters 'TW8' I have signed my name prior to the swearing hereof."*

66. The remainder of Commandant White's affidavit deals with events subsequent to the hearing of the Medical Board, which I have already summarised above.
67. Given its significance, it is worthwhile to quote an extract from the appraisal report of the applicant dated 13th December, 2012, referred to in para. 10 of the affidavit of Commandant White:

*"Lt. Whelan has not applied himself in any meaningful way (third year) to the attainment of his degree. This is also replicated in his approach and attitude to passing his fitness test. Lt. Whelan is approaching an obese state and despite numerous HRFA's he has yet to pass the basic level of fitness for an officer of his age.*

*Lt. Whelan is a very warm and congenial young man. However I feel that he may have some underlying issues. He agrees with everything I and former (Commandant Champion) OC USAC say about his performance and that he will improve his situation yet unfortunately to date has been unable to advance. I advised Lt. Whelan should his fitness state not improve, he may potentially be found unsuitable for continued service in the Defence Forces."*

The applicant then acknowledged the contents of this report and in his own handwriting states: *"I acknowledge and accept the above comments. I am determined to address the issues outlined both physical and personal/academic and I am confident in progressing to an acceptable standard of fitness, and completing my academic studies."*

**Affidavit of Lieutenant Colonel Ahmad**

68. Lieutenant Colonel Ahmad avers that he is licensed to practice medicine in Ireland as a registered medical practitioner and that his qualifications include an MSc in Occupational Health. Prior to joining the Defence Forces he had 14 years' experience in the fields of medical, surgical, accident and emergency and orthopaedic medicine. As of the date of his affidavit his appointment was that of Senior Medical Officer, 2 Brigade, since 2008, predominately carrying out occupational medical duties in Ireland and abroad.
69. Lieutenant Colonel Ahmad avers that he first saw the applicant in 2014, following a referral by Commandant Carley and owing to ongoing concerns about the fitness of the applicant. The applicant was physically examined and advised to address his obesity/BMI issues as soon as possible in order to enable him to perform safely full regimental duties. He avers that when he examined the applicant on 22nd May, 2014, his BMI was 38 and he was accordingly deemed unfit for regimental duties. He avers that he discussed this with the applicant and explained to him that if he did not reduce his BMI below 30 within

six to eight weeks, then he, Lt. Col. Ahmad would recommend the convening of a Medical Board to assess his suitability for continued service in the Defence Forces.

70. He says that the applicant was given as much latitude as possible. When reviewed on 11th August, 2014, the applicant's BMI had reduced to 36.7, and on 18th December, 2014, it had reduced to 36. Because his efforts over the previous two years had been unsuccessful in reducing his BMI as required, and because he had also failed his fitness tests as a result of which he had been unable to carry out his full regimental duties (armed 24 hour regimental duties appropriate to his age/rank and appointment), Lt. Col. Ahmad recommended that a Medical Board should be convened. He then addresses the convening of the Medical Board, its decision and the appeal of the applicant, as well as the subsequent submissions made by the applicant to General Cotter, who decided that the applicant should be re-examined to determine if he had managed to continue the progress that he made previously. Lt. Col. Ahmad avers that he examined the applicant on 18th July, 2016, and found his weight to be 130.2kg and his BMI 37.6. He exhibits a copy of his report. He avers that when he reviewed the applicant in July 2016 it was clear that his situation had not improved since the Medical Board in April 2015; and while it appeared from his record that he had made some improvements in the meantime, this progress had been lost by the time of the re-examination of the applicant in July 2016. Accordingly, he saw nothing to alter the classification of the Medical Board of April 2015.

#### **Replying affidavit of the applicant**

71. The applicant rejects any suggestion by Colonel Kerr that he may not have been candid in the information that he provided to Dr. Hogan. Furthermore, he rejects the suggestion of Colonel Kerr that only those medical professionals who are trained in "*military medicine*" are in a position to question the decision of the Director of the Medical Corps. Such an approach, he submits, would operate to exclude the expertise of Dr. Hogan, one of the foremost experts in occupational medicine in the country who performed a full medical examination of the applicant, reviewed his medical file and read all the related Defence Forces' regulations prior to writing his report.
72. The applicant rejects the suggestion that those with abnormal BMIs are limited in the range of tasks that they can undertake in a military environment. This only occurred, in the case of the applicant, because he was restricted by the Defence Forces in the activities that he was permitted to undertake, and not because he was unable to undertake the same.
73. The applicant then proceeds to aver that he passed his fitness test in 2015, and also attended an eight week course at Croi, an organisation set up to fight cardiac disease. He avers that before, during and after that course it was made clear that he demonstrated none of the precursors for cardiac disease, diabetes or other obesity related illnesses.
74. As regards the duty of care owed by the Defence Forces to the applicant, he avers that he had no difficulty completing all tasks allotted to him on a day-to-day basis in the Defence Forces which included allegedly "*inappropriate taskings*" such as the relatively physical participation in annual range practices.



75. In reply to the affidavit of Commandant White, the applicant avers that he completed fitness tests in August 2009 and August 2010, in full, to include the terrain walk. He also avers that it was not correct to say that he had not completed a fitness test since 2010, because he competed a fitness test in 2015. He takes issue with other matters referred to by Commandant White, but they are not germane to this decision.
76. As regards the affidavit Lt. Col. Ahmad, the applicant avers that he joined the Defence Forces with a BMI of 33, and was deemed physically fit and capable of entering an officer cadetship with the Defence Forces with that BMI. Accordingly, he does not know where Lt. Col. Ahmad derived a figure of BMI below 30, which he informed the applicant he would have to achieve within six to eight weeks, at the time that he first examined the applicant.
77. Referring to the review of the applicant by Lt. Col. Ahmad in July 2016, he avers that he informed Lt. Col. Ahmad that he had recently passed the Defence Forces' fitness test, but that Lt. Col. Ahmad replied by saying that even if the applicant ran across Europe the next day it would not matter. Moreover, he referred to an exhibit of Lt. Col. Ahmad in which it is stated that "*chronic inability to perform regimental duties*" and "*chronic inability to achieve required physical parameters to enable him to pass his fitness test*" were given as the reasons for the determination of the Medical Board. The applicant argues that despite his subsequent passing of the fitness test, it appears that the decision of the Medical Board is essentially unimpeachable.

### **Submissions of the parties**

#### *Submissions on behalf of the applicant*

78. It is submitted that the applicant has not been provided with any adequately detailed reasons why his health is such that his retirement is required. It is submitted that his medical classification is irrational. The classification of the applicant of Grade X, for both his constitution and his military fitness means that his fitness is lower than personnel with marked impairments, disabilities or medical conditions (as regards his constitution) and that his fitness was lower than personnel capable of only restricted duties. All of this means that his physical condition is such that it is *worse* than someone suffering from a marked impairment. At the very least the applicant must satisfy a grading of Grade 4, and his MCC ignores the various expert reports that he has provided.
79. It is further submitted that the DMC Instruction for Medical Officers Number 4, Application of Medical Classification System, a document drawn up to assist medical officers and Medical Boards is unclear and contradictory. So, for example diabetics can be graded as a constitution two or three, personnel who are carriers of hepatitis b or c or HIV or personnel with ischemic heart disease can all be graded as constitution three or four, whereas an officer who is overweight, such as the applicant, receives a lower classification.
80. Colonel Kerr justified the classification of the applicant on the grounds that obesity may lead to other conditions, but these other conditions themselves are given a grading three or four at most, and this is illogical.

81. It is submitted that the Defence Forces has adopted a rigid and unbending policy as regards the applicant's grading. In circumstances where the applicant has passed the fitness test subsequent to his assessment by the Medical Board, it makes no sense that his fitness grading remains at X. This suggests that the medical fitness finding is impossible to overturn.
82. While the applicant accepts that the Defence Forces may fix minimum standards for fitness for members, it is submitted that the requirements cannot be irrational or arbitrary. Reliance is placed on the evidence adduced by the applicant that use of BMI cannot be conclusive as to the fitness of an individual and his ability to carry out his functions. It is submitted that the respondent has relied on a statistical metric rather than an analysis of the applicant's own physical fitness. In doing so the respondents have fettered their discretion. The applicant relies upon the decision of Finlay P. in *Re: NA*, a solicitor, in which he stated: "*What the authority must not do is refuse to listen at all*".
83. It was only during these proceedings, in the course of exchange of pleadings, that the applicant became aware of para. 32 of DMC Instruction for Medical Officers Number 4, which concludes with the statement that "*personnel with a BMI in excess of 35, unless justifiable by physiological state or body fat measurements will be investigated and advised that failure to reduce their weight to give them a BMI of 35 or less within twelve (12) months may lead to a classification of X.*" This is very different to what was said to the applicant by Lt. Col. Ahmad when he first examined the applicant on 22nd May, 2014, when he advised the applicant that if he did not reduce his BMI to below 30 within the next six to eight weeks a Medical Board would be convened. Had the applicant been aware of the consequences of a BMI in excess of 35, and that he would have 12 months within which to reduce it to 35 or below that measurement, he might well have addressed his problems differently. Moreover, in July of 2015, the applicant was very close to having a BMI of 35 and he could have made an appropriate submission to the Director of the Medical Corps (Colonel Kerr) in the context of his appeal to Colonel Kerr. That said, the applicant accepts that he was aware that if a member of the Defence Forces has a BMI in the range of 30 – 35 it is necessary to undergo a calliper test before completing a fitness test and if it is over 35 a person will not be permitted to complete the fitness test.
84. The applicant did not know that the directions of Lt. Col. Ahmad were outside the scope of the guidelines and had he known this he would have submitted to the Medical Board, and later, to Colonel Kerr, that this was an unreasonable and irrational request. He should have been told to ensure that he reduced his BMI from 38 to 35 over 12 months.
85. Moreover, Lt. Col. Ahmad's directions were quite possibly not achievable at all, and probably not without causing risk to the health of the applicant. In proposing such an unrealistic target, Lt. Col. Ahmad made it less likely that the applicant could sustain the effort to achieve a more realistic target.
86. It is submitted that the applicant does not even know for certain if the decision leading to the recommendation for his dismissal was based upon his BMI, because he has not been

given all documentation leading up to the decision to recommend his dismissal. He has been given his medical file only. The regulations themselves say that factors other than BMI should be taken into account, but the applicant has been left with the impression that only BMI was taken into account.

87. Colonel Kerr, the Director of the Medical Corps, did not undertake any clinical examination of the applicant before upholding the findings of the Medical Board. The applicant submits that this is impermissible and relies upon the decision of Noonan J. in *Bennett v. Minister for Defence* [2015] IEHC 23. In that case Noonan J. considered para. 66(2) of DFR A12, which concerns the duty of a Medical Board when dealing with an appeal from a medical officer. In that case, referring to Regulation 66(2) of the DFR which states: "Routine classification or reclassification to any grade, other than Grade X, of members of the Defence Forces shall be carried out by a medical officer of the Medical Corps. The decision of the medical officer may be appealed to the appropriate command medical officer who shall convene a Medical Board to classify or reclassify the officer or enlisted person concerned", Noonan J. stated at paras. 46 and 47:

*"46. Thus, it appears to me that the Board must adopt the same approach to classification as that required of a medical officer at first instance. It must assess the officer or enlisted person concerned as he presents to the Board at the time he so presents.*

*47. If therefore at the time of examination by the medical officer, the person concerned was suffering from some malady or did not possess the requisite level of fitness which resulted in a particular grade being achieved, and by the time the Medical Board was convened had recovered from such malady or improved his or her level of fitness, it would be absurd to suggest that the Medical Board could not have regard to those changed circumstances. This is also consistent with Regulation 67, which provides that the President of the Medical Board may secure the opinion of a medical officer specially qualified in a particular branch of medicine if necessary to assist in classification."*

88. In that case Noonan J. quashed the decision of the Medical Board stating:

*"It seems to me the Board fell into error in adopting this approach. Quite apart from the issue of not examining the applicant, it was obliged to consider all the evidence before it on the 23rd August, 2012 in order to classify the applicant and not merely to conduct a paper exercise of determining, as an appellate court might, whether the evidence before the lower tribunal sustained its conclusions."*

89. The applicant relies on this decision in support of his argument that there is an obligation on medical officers in the Defence Forces to consider all the relevant evidence before making a medical classification pursuant to DFR A12. In particular, it is submitted a clinical examination is required to ensure that the classification made by a Medical Board or medical officer is still correct.

90. It is submitted that this flaw continued up the chain of command, and afflicted the decisions made by Brigadier General Beary, Major General Cotter, and Vice-Admiral Mellett, all of whom in their decisions, make explicit reference to the decision of Colonel Kerr to uphold the findings of the Medical Board.
91. The applicant also queries the appeal procedures followed after the decision of Colonel Kerr. He submits that the legal basis for the procedure is not clear. He refers to para. 74(2) of DFR A12, which I have quoted at para. 8 hereof. He submits that there are two possible interpretations of this regulation, one of which is that the finding of medical Grade X is unimpeachable and final. In that case the “*ad hoc*” appeal procedure provided to the applicant was either beyond the legal powers of the Defence Forces or without legal foundation. And in that case all of the appeals of the applicant to Generals Beary, Cotter and Vice-Admiral Mellett were in vain because they did not have any legal power to overturn the finding of the Medical Board.
92. Alternatively, it is submitted that it is implicit as a matter of natural and constitutional justice that there is an appeal process and that senior officers can overturn the findings of the Medical Board. But if that is so, this does not accord with the approach adopted either by General Cotter or Vice-Admiral Mellett who explicitly referred to para. 74(2) of DFR A12 in their decisions and appear to consider that they were bound by that regulation to retire the applicant.
93. If it is the case that the DFR fails to provide an appeal mechanism from the finding of the Director of the Medical Corps, it is submitted that the DFR are unconstitutional and/or in breach of the applicant’s rights to fair procedures.
94. The applicant also submits that he has repeatedly requested all documentation that led to the decision to recommend his discharge, but that he has still not received all such documentation. While he was provided with documentation mainly comprising an extract from the Defence Act, 1954, DFR A12 and A15, official communications to the applicant himself, fitness results and the official record of the Medical Board hearing, the applicant considers that there must be other documentation available that would assist the Court in assessing the procedure adopted by the respondent.
95. Finally, the applicant takes issue with the decision of Vice-Admiral Mellett, or at least that part of the decision in which he says simply that he had taken into account the applicant’s submissions, but without explaining why the submissions were rejected. It is submitted that Vice-Admiral Mellett did not rationalise any of his conclusions, and as a matter of natural justice the applicant is entitled to know why his submissions were rejected. The applicant refers to a number of authorities regarding the adequacy of reasons given by decision makers. Firstly, he refers to *de Blacam* in which he states:

*“From the standpoint of the person affected, it is, however, just as important that the decision maker ‘consider’ the case, in other words, that the decision maker should think about it and then come to a reasoned conclusion based on what he has heard. So far as the law is concerned, it is axiomatic that a decision maker must in*

*any case give proper consideration to it, and if it can be shown that, for whatever reason, he has not done so, there is no question but that the decision (or at least one adverse to the applicant) is liable to be quashed. The fact that the case law says so little about the decision-maker's obligation to consider probably reflects the simple realities, first, that the obligation is self-evident, and secondly, that proof of non-compliance with it is bound to be difficult. That said, one way of ensuring that a decision maker has in fact considered the case is to insist that he give reasons for his decisions."*

96. The applicant also relies upon the decision of Murray CJ. in *Meadows v. Minister for Justice, Equality & Law Reform* [2010] IESC 3, in which case the Chief Justice said, at paras. 93 & 94:

*"93. An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*

*94. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

97. The applicant also refers to the decision of Hogan J. in *AP v. Minister for Justice, Equality & Law Reform* in which he held that:

*"It is elementary law that a decision maker exercising statutory powers cannot generally rely on material not disclosed to the applicant, at least absent exceptional circumstances"*.

98. It is submitted that there were no such exceptional circumstances in this case, and that the Chief of Staff has failed to give proper consideration to the submissions of the applicant and to give reasons for his decision to reject those submissions. This is particularly so where the applicant's livelihood, reputation and profession is in the hands of the Chief of Staff. For these reasons, it is submitted that the decision of the Chief of Staff to recommend the applicant's retirement should be quashed. It is appropriate to observe however, that such relief is not actually sought by the applicant in these proceedings.

#### *Submissions of the respondent*

99. Firstly, it is submitted that, declaratory relief aside, the only Order sought in these proceedings is one against the Minister and that is an Order restraining the Minister recommending the dismissal and/or retirement of the applicant pursuant to the provisions of the Defence Forces' Act, 1954. The applicant does not seek an Order of *certiorari* quashing any of the decisions of which he complains. The Court is being asked, in effect, to restrain the dismissal of the applicant in circumstances where it is not being asked to

quash the order of Vice-Admiral Mellett. Nonetheless, if the relief sought were granted, the Minister could not proceed to dismiss the applicant.

100. It is further submitted that every decision taken by the applicant's superiors, save for the very last decision taken by Vice-Admiral Mellett, is beyond challenge (i.e. out of time for challenge). It is further submitted that no evidence was led as to why these proceedings were not brought sooner, and no excuse was advanced by the applicant in this regard.
101. All of this means that the declarations sought by the applicant are sought in a vacuum – none of the decisions made by the applicant's superiors will be quashed, but yet, if the applicant obtains the relief that he seeks, the Minister will be precluded from acting on the recommendation of the Chief of Staff.
102. It is submitted that if the applicant was dissatisfied with his medical grading, he should have challenged it at the time. There is a review procedure available and in this regard the respondent refers to para. 214 of Administrative Instruction A12 referred to at para. 7 and this is the procedure that the applicant followed in appealing the decision of the Medical Board to Colonel Kerr.
103. It is submitted that the applicant had a lengthy and admitted history of medical problems which he repeatedly committed, but failed to address. Given the continued failure of the applicant to meet that Defence Forces' fitness requirements, even if there were procedural effects in the decision making process (which is denied) there is authority for the proposition that relief should not be granted. It is submitted that the procedure adopted was one which gave the applicant every opportunity not only to address his fitness problems, but also to address the merits of the decision to discharge him. The fact that the applicant did not do so, is not due to any procedural failure on the part of the respondent, but is due to the continuous failure of the applicant to meet the standard of fitness required for service in the Defence Forces.
104. The respondent submits that the rules regarding medical classification, and the action to be taken following such classification, identify two distinct stages. The first is under rule 66 which is the medical classification stage. At that point if any appeal from the Medical Board fails, the medical classification becomes final. The next phase, under rule 72(2) is concerned with ascertaining whether, notwithstanding the medical classification, his superior officers up to the Chief of Staff are of the view that his medical classification does not interfere with his ability to carry out his duties. Those superior officers are not medically qualified and cannot alter the medical classification. It was open to the applicant to challenge the decision of the Medical Board, or the rejection of his appeal by the Medical Board Director by judicial review, but he failed to do so.
105. The respondent relies on the decision of the Supreme Court in *Mellett v. Minister for Defence* [2014] IESC 33. In that case, the applicant sought judicial review on a number of procedural grounds of the decision not to extend her service in the Defence Forces in view of her repeated failure to meet the required standard of fitness. She claimed that she had not been furnished with her extension of services file on which the decision had been

based, and that the refusal had been based on insufficient evidence, and in particular that the respondent had not engaged with the recommendation of her immediate superior officers to afford her further time to undergo the fitness test, which for a variety of reasons she had been unable to take. In the Supreme Court, Fennelly J. held that any procedural complaints made by the applicant could not obscure the central fact that she had for several years been unable to attain the required level of fitness for services in the Defence Forces. At paras. 49 and 50 he stated:

*“49. The nature of the appellant’s claim is necessarily narrowly constrained by the circumstances of the case. The fact of central and overwhelming importance was that the appellant had been unable to reach army fitness standards, a fact of which she was fully aware. She had endeavoured to reach the required standards without success. She had, as a result, been finally and definitively refused an extension of service. There was no discretion to decide otherwise: there was no discretion to extend her service. She was, at the best, in the anomalous position of a person serving in the Defence Forces without engagement. It was not at all surprising that the Defence Forces should not wish to retain personnel who were in this irregular status.*

*50. All the procedures must be looked at in the light of the underlying fact that the appellant was, for several years, unable to reach the required standards and that she was fully aware of that fact. She was aware of the fact that her service was not extended for that reason. She was made aware of the intention to move to have her discharged and the reason for it.*

106. At para. 52 he stated:

*“The rules of natural justice do not go so far as to require the affected person to be informed of all facts and details surrounding the decision. In the present case, the appellant was herself, in any case, fully aware of the circumstances in which she was unable to make herself fit. It was perfectly open to her to make any submissions she thought relevant.”*

107. The respondent also relies upon the decision of Dunne J. in *Dunne v. Minister for Defence* [2011] IEHC 383. In that case, after her initial five-year term of engagement, the applicant sought to extend her service in 2005 but failed the required fitness test. For a variety of reasons beyond her control, she was unable to take the fitness test in 2006, 2007 and 2008. In 2008, she was overweight and had a BMI above the maximum permitted, and she failed a further test in 2009 for the same reason, following which she was discharged.

108. In her proceedings, the applicant claimed that the respondent had failed to provide her with a tailored fitness programme and adequate assistance to achieve the necessary reduction in her weight and BMI, and also that the Defence Forces did not comply with the timelines in the Defence Forces’ training instructions, so as to permit her to be tested

again. In refusing the relief sought, Dunne J. stated that the training instructions were guidelines only which could not curtail the discretion of a commanding officer not to extend her service. Dunne J. also observed that judicial review is a discretionary relief and that even if there had been a breach of fair procedures she would have refused the relief sought in view of the continued failure of the applicant to pass the required fitness tests. She stated, in the final paragraph of her judgment:

*"It is clear that the applicant is someone who has an exemplary record with the Defence Forces and is also someone who is very anxious to remain a member of the Defence Forces. However, when one examines all of the matters... it appears that over a significant period of time, every possible opportunity was given to the applicant by the Defence Forces to overcome the difficulty she had in relation to weight, BMI and fitness. It has to be borne in mind that the first fitness test was failed in 2005, and the applicant served without engagement as a result of the failure to pass the annual fitness test until her discharge in August 2009, a period in excess of four years. She was given every practical facility in terms of time to facilitate her to pass the fitness test. At the end of the day, the applicant struggled unsuccessfully to meet the necessary requirements to continue as a serving member of the Defence Forces. In all of the circumstances outlined in this case, I could not exercise my discretion to grant judicial review, even if I had been satisfied that there was a breach of fair procedures or natural justice."*

109. These decisions, it is submitted, establish that the Defence Forces have a wide discretion to discharge members who fail to attain the necessary standards of fitness.
110. In this case, it is submitted that the applicant was afforded an opportunity to make representations as to why he should be discharged at each and every stage of the process. Not only that, when he appealed the decision of the Medical Board to the Director of the Medical Board (Colonel Kerr) he made it clear that he was not disputing the merits of the decision of the Medical Board and deliberately chose not to make any legal or medical representations, and instead sought a seven-month suspension to allow him further time to address his BMI and his weight.

**Submissions of respondent in response to submissions of applicant**

111. It is submitted by the applicant that the decision of the respondent failed to engage with the merits of the submissions of the applicant and the medical reports on his behalf, in breach of his right to fair procedures.
112. In response to this, it is submitted on behalf of the respondent that, at each and every stage of the process which resulted in his discharge, the applicant was afforded an opportunity to make representations as to why he should not be discharged. Moreover, for almost a year and a half after the initial decision of the Medical Board in April 2015, the applicant made no suggestion that the decision was wrong on either legal or medical grounds, but simply sought further time.



113. The respondent went so far as to have the applicant re-examined in July 2016, notwithstanding that there was no provision for such examination in the DFR. This was done in recognition of the progress the applicant had made in 2015.
114. The detailed legal and medical submissions on behalf of the applicant in September 2016 were considered in the light of latitude that had been given to the applicant up to that point in time. As explained by Colonel Kerr, the function of the medical classification system is to identify individuals who may be at risk working in the military environment, as defined by those working in the speciality area of military medicine. The MCC is not rigid and inflexible. Provision is made to allow members with a high BMI who have increased levels of cardiovascular fitness to remain in the Defence Forces, but the applicant was not considered to be such an exceptional case. As Commandant White avers, during all his service, the applicant had been unable to complete the full fitness test which includes a 3.2km run. He only ever passed a modified form of the test and it was this modified test that he passed in October 2015. He failed his annual fitness tests in 2008, 2011, 2012 and 2013.
115. The medical reports submitted on behalf of the applicant do not raise an issue of fact, but rather a difference of medical opinion. If the applicant wished to challenge the medical opinion of Colonel Kerr, he should have cross-examined Colonel Kerr for this purpose. That this is necessary is established by a number of authorities, including *Fitzgerald v. Minister for Defence & Or.* [2002] IESC 57, the decision of the High Court in *Mellet v. Minister for Defence* [2013] IEHC 98 and also by the decision of Noonan J. in *Bennett v. Minister for Defence* [2015] IEHC 23. In *Fitzgerald*, Fennelly J. stated, at pp. 13 and 14 of his judgment:

*"In my view, it is the designated experts and they alone that should perform the function of assessing constitution grades for military personnel in accordance with criteria provided within the ordained regulatory regime. It is, of course, the case that decisions of Medical Boards are amenable to judicial review. However, I venture to suggest that the hurdle of irrationality will be a high one."*

116. In the High Court decision in *Mellet*, Kearns P. commented, at p. 14:

*"Although the applicant contested this evidence in her affidavits, it was at all times open to her to cross-examine the makers of the affidavits stating to the opposite effect that she had ample time and opportunity to get fit but this option was one she ultimately chose not to pursue."*

117. While the applicant submits that he did not receive sufficient reasons for his discharge from the Defence Forces, it is submitted that the reasons were at all times known and obvious to the applicant. This is apparent from the applicant's own submissions throughout the process. Moreover, he accepted these reasons, and sought time to address the same. In *Mellet* a similar criticism was made of the reasons given in the

decision of the then Chief of Staff. In his decision in the High Court, Kearns P. stated, at p. 15:

*“So, although Major-General Boyle did not give reasons to explain why he did not ultimately follow Brigadier General Aherne’s said recommendation, I am satisfied that it was unnecessary for him to give a detailed exposition on why the recommendation was not followed in circumstances where he had all the relevant material and thus could make a properly informed decision.”*

118. The respondent also relies upon the decision of Clarke J. (as he then was) in *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] 2 IR 669 where he stated the following at para. 71:

*“Where, for example, an adjudicator makes a decision after a process in which both sides have made detailed submissions it may well, as Fennelly J. pointed out in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 IR 297, be that the reasons will be obvious by reference to the process which has led to the decision such that neither of the parties could be in any reasonable doubt as to what the reasons were. But it seems to me that, in a case where any party affected by a decision could be in any reasonable doubt as to what the reasons actually were, it must follow that adequate reasons have not been given.”*

119. In relation to the complaint of the applicant that he has not been furnished with all documentation underlying the decision of the respondent, it is submitted that the applicant sought his medical file by way of Freedom of Information request made on 13th May, 2016, and that file was delivered to his solicitors on 20th October, 2016. He had also received documentation in relation to his case from the military authorities on 12th September, 2016. The respondent relies also on the letter of Ms. Howard, referred to above, sent to the solicitors for the applicant just prior to the issue of these proceedings, requesting the applicant to identify such documentation as he claims he has not received.
120. This issue also arose in *Mellet* and was addressed by Fennelly J. at para. 51 – 52 as follows:

*“51. So far as the EOS [extension of service] file was concerned, she was not entitled by any statute or under the Defence Forces’ Regulations to access the file. There is no general right under the rules of natural justice to access to the entire file of the decision maker...”*

*52. The rules of natural justice do not go so far as to require the affected person to be informed of all the facts and details surrounding the decision. In the present case, the appellant was herself, in any case, fully aware of the circumstances in which she was unable to make herself fit. It was perfectly open to her to make any submissions she thought relevant. In my view the complaint relates to a matter of fine detail. I do not believe that the appellant was deprived on the benefit of fair*

*procedures. I would reject this ground."*

121. The respondent also denies that there has been a fixed and rigid policy with regard to the medical classification of the applicant. The respondent points to the numerous opportunities afforded to the applicant over the years to address his BMI and fitness issues. Following upon the determination of the Medical Board, General Beary sought a further opinion regarding the applicant's condition from Commandant Clarke, which he was not obliged to do. Then in July 2016 the applicant was afforded a further medical examination, which is not provided for in the DFR, but which was nonetheless considered appropriate in the circumstances.
122. Moreover, there is a discretion built into the DMC Instructions (which in themselves provide non-binding guidance on the operation of the DFR relating to medical matters) but the applicant was found to be an unsuitable candidate for the exercise of that discretion.
123. Finally, the respondent submits that it is incorrect to say that the DFR make no provision for an adequate or proper system of appeal and/or regrading of medical status. The Administrative Instruction A12 provides for making of representations to the Director of the Medical Board who is obliged to consider all written representations arising out of the reclassification of the medical status of the person concerned. That occurred in this case, and Colonel Kerr upheld the decision of the Medical Board. Thereafter, the applicant was afforded the opportunity to make representations to General Beary, Major-General Cotter and Vice-Admiral Mellett. However, it is submitted that any medical classification can only be made by suitably qualified medical practitioners, while the final decision to discharge a member of the Defence Forces is made by more senior officers who are not medically qualified. Those officers cannot regrade the medical classification previously determined, given their lack of qualifications. Instead, what the DFR allow for is for non-qualified officers to permit a member to remain in service, notwithstanding his/her medical classification, and provided they are satisfied that whatever representations are made give them sufficient grounds to do so.
124. The respondent distinguishes the case of *Bennett v. Minister for Defence* on the facts. In that case, the applicant's medical classification had been based not on his current condition at the time of his initial medical examination, but on his history of absenteeism on medical grounds. When he appealed his classification to a Medical Board, the Board felt itself bound by the findings of the initial medical examination, instead of conducting an examination of its own. In this case, the Medical Board did conduct its own examination, and its classification of the applicant was based on its findings and not on his medical history. Furthermore, the investigation subsequently conducted by Colonel Kerr occurred a very short time after the Medical Board examination, and in his representations to Colonel Kerr, the applicant accepted the findings of the Medical Board and asked for more time to address those findings. In his submissions to Colonel Kerr, the applicant also set out the up-to-date position regarding his weight and his BMI.

### Discussion and decision

125. It is appropriate to start with the reliefs claimed by the applicant. The applicant does not seek Orders quashing either the decision of the Medical Board, or the subsequent decision of the Director of the Medical Board, Colonel Kerr, affirming the decision of the Medical Board. This is hardly surprising given that the proceedings were not issued until 6th February, 2017, and those decisions were taken, in the case of the Medical Board on 15th April, 2015, and in the case of the decision of Colonel Kerr, on 11th June, 2015. Inevitably, this means that the medical classification of the applicant remains undisturbed.
126. The applicant seeks a declaration that insofar as the DFR fail to provide for an adequate or proper system of appeal and/or regrading of medical status, the DFR are *ultra vires* and contrary to the provisions of the Defence Act, 1954. However, the applicant does not really explain what he means when he says that the DFR fail to provide for an adequate or proper system of appeal. There is certainly room for improvement in the DFR, but it is clear that persons affected by decisions of the Medical Board are entitled to make representations to the Director of the Medical Board. This is apparent from Administrative Instruction A12, para. 214 (J). Under para. 214 (J) the DMB is obliged to consider all written representations made by or on behalf of an officer or enlisted soldier who was reclassified by the Medical Board to "*below Defence Forces' medical standards*" within 28 days of receipt of same, together with the Medical Board report and relevant medical documents which were put before the Medical Board, and to complete a specified form and to notify immediately the officer commanding the officer or enlisted soldier concerned of his or her decision. This is a procedure that envisages a reversal of the decision of the Medical Board, even if it does not say so expressly. However, it is clear that Colonel Kerr considered that it was open to him to reverse the decision, if appropriate, because at the end of para. 3 of his decision of 11th June, 2015, he states: "*The patient presents no medical evidence or case in his appeal which warrants a reversal of the Board's opinion*". The procedure therefore has the characteristics of an appeal, even if it is not expressly so described.
127. In any case, this issue seems to be somewhat academic in circumstances where the applicant in this case, while availing of the opportunity to make representations to Colonel Kerr, did not seek to overturn the decision of the Medical Board. At para. 4 of this decision, I set out paragraphs 4 and 11 from the applicant's appeal to the Director of the Medical Board dated 18th May, 2015. Other paragraphs are also relevant, and to retain the context I will set out paragraph 4 again:
- "3. *I will not be including in this appeal representations from either legal or medical bodies on my behalf, as I am entitled to do under DFR A12 Part 6 para. 74 as I believe that the issue is resolvable and I accept personal responsibility for the resolution of the same.*
4. *I wholly understand the issues with my consistently high BMI in both my personal, professional and indeed medical status and furthermore I understand the potential*

*outcomes for my career of the classification "X" in light of the above circumstances. The issue of my high BMI and difficulties with weight have been a constant obstacle for me for the last number of years and despite a significant amount of time given I have failed to remedy the same.*

5. *My continued failure to significantly lower my weight/BMI over this period despite a variety of approaches has been both a great hindrance and frustration to me personally and professionally. I am aware of both the standards and appearance expected of a young officer in the Defence Forces and I am keenly aware that in my current physical state I am failing on both the above points.*

6. *Notwithstanding the above situation and the indeed (sic) rationale behind my medical classification I strongly believe in my ability following a new found approach, resources and indeed attitude to overcome my longstanding weight issues and meet the required DF standards."*

128. Apart from the appeal to Colonel Kerr as Director of the Medical Board, the applicant was invited to make further representations to General Beary, his commanding officer. It is not clear to me what process was being followed in inviting the applicant to make such representations. The DFR, A12, para. 74(2) simply says that where a member on classification or reclassification is found by a Medical Board and confirmed by the Director, Medical Corps to be Grade X, he or she shall be regarded as being unfit for service with the Defence Forces and his or her commanding officer shall initiate action towards retirement, relinquishment of commission or discharge as the case may be. There is no provision for an appeal or the making of representations at this point. The Administrative Instruction A12 document at para. 214 (K) contains a statement that for further action on the part of the commanding officer, "*see administrative instruction part 10*". Perhaps more procedures are set out in that instruction, but that was not opened or made available to the Court.

129. The same comments apply in relation to the subsequent representations which the applicant was invited to make, first, to Major-General Cotter, and secondly, Vice-Admiral Mellett. As each decision was made, the applicant was advised of his entitlement to make representations up the chain of command arising out of that decision. It is unclear what powers the officers up the chain of command had as regards the decision made by the officer below, save only to the extent that there was no question of interfering with the medical classification of the applicant after the decision of Colonel Kerr. Any decisions thereafter could only relate to the decision to recommend the discharge of the applicant from the Defence Forces, arising out of his medical classification.

130. The regulations do provide for some flexibility in that Regulation 74(3) provides that if the person affected by the Grade X classification is employed in a capacity in which the disability or disabilities which occasioned his or her being graded X does not interfere with the efficient performance of his or her duties, his/her commanding officer may forward an application for the retention of the person concerned in the Defence Forces, to the

adjutant General who, in the case of an officer, may recommend to the Minister for Defence that such officer be not retired or be not required to relinquish his or her commission immediately.

131. It is clear that the applicant's legal representatives were as puzzled by these procedures as I am, because they addressed the issue in their written submissions. They submit that para. 74(2) of the DFR is open to two interpretations, one being that a finding of medical Grade X is indeed final and unimpeachable, in which case the procedures followed after the determination of Colonel Kerr had no legal basis. This would mean that the submissions and expert reports submitted by the applicant to senior officers were submitted in vain and that neither of Generals Beary or Cotter nor Vice-Admiral Mellett had any power to overturn the final finding of the Medical Board.
132. The alternative interpretation they argue for is that an appeal process is at least implicit as a matter of natural and constitutional justice, and that senior officers can overturn the findings of the Medical Board. I cannot agree with this submission. Firstly, none of those officers have the medical competence to overturn the findings of the Medical Board. Secondly, nowhere in Regulation 74 or in any of the other regulations is such a power, expressly or implicitly, conferred on any person other than the Medical Board and the Director of the Medical Board, following a review. There is some discretion reserved by Regulation 74, which I have referred to above, i.e. that a member of the Defence Forces may be retained where the disability giving rise to his grading of X does not interfere with the efficient discharge of his or her duties.
133. The applicant then further argues (but does not plead the same in exact terms) that insofar as the regulations fail to provide an appeal mechanism from the finding of the Director of Medical Corps, the regulations are unconstitutional and/or in breach of the applicant's right to fair procedures. This argument is reflected at para. D (11) of the statement of grounds whereby the applicant seeks a declaration that the respondent breached the applicant's rights in failing to provide a means of overturning the Director of Medical Corps classification of the applicant. While seeking a declaration to this effect, they do not advance any legal arguments or cite any authorities to support a claim for such relief.
134. The Director of the Medical Board, Colonel Kerr, made his decision based upon (1) the decision of the Medical Board and (2) the representations made by the applicant, in which he accepted the medical classification and asked for further time to address the same. It is inconceivable that a person could be afforded such relief having in the first place accepted the decision of the Medical Board. Moreover, this acceptance persisted right up to the point that the applicant made submissions to Vice-Admiral Mellett
135. At para. D (2) of the statement of grounds the applicant seeks a declaration that the failure by the respondent to provide sufficient reasons for the decision to dismiss the applicant breached his entitlement to fair procedures and constituted a breach of statutory duty, and/or was *ultra vires* and/or breached the Defence Forces' Regulations. To begin with, no breaches of statutory duty of the DFR are particularised. The decision

to dismiss the applicant from the Defence Forces followed upon the decision of the Medical Board to reclassify the medical grading of the applicant. Once a person has been designated Grade X, the consequences are clearly set out in Regulation 74 of the DFR. The options available are limited. The dismissal of the applicant from the Defence Forces flowed as a consequence of his medical classification and as such, the reason for his discharge is obvious.

136. The applicant claims that his entitlement to fair procedures has been breached under a number of headings. He is in particular aggrieved that the respondent did not address his detailed submissions or engage with the medical reports procured by the applicant after the decision of Vice-Admiral Mellett. (Paras. D (4) and D (5) of the statement of grounds). Only the former can relate to the decision of Vice-Admiral Mellett, as the latter were submitted after his decision but before addressing that, it is of some importance to consider what went before the decision of Vice-Admiral Mellett. The applicant had the opportunity to make any submissions that he wished to make to the Medical Board itself, and he made no medical representations to that Board, and instead sought time to address his acknowledged weight difficulties and BMI. Then, on appeal to Colonel Kerr, and at a time when he was fully aware that his medical classification, in relation to constitution and fitness, had been changed to X in each case, he took the same approach. In other words, he acquiesced in his medical classification on two occasions. None of this could be said to be a denial of fair procedures. The applicant persisted with this approach in his representations to General Beary and again in his representations to Major-General Cotter. There is no absence of fair procedures on the part of the respondent in any of this. On the contrary, it appears the respondent afforded the applicant the opportunity to make representations up the chain of command that are not provided for in the DFR.
137. All of that said, in circumstances where Commandant Murray and Commandant Clarke both recommended to General Beary that the applicant be afforded the opportunity to continue his career in the Defence Forces, it would have been preferable for General Beary to explain his reasons for not accepting those recommendations. He might also have explained why he did not consider that the fact that the applicant had passed the fitness test (or, more accurately, the qualified fitness test) did not warrant a decision favourable to the applicant. Likewise, it would have been better had Major-General Cotter said more than that he had "taken into account" the appellant's appeal to him, and the same applies to the decision of Vice-Admiral Mellett.
138. But it is clear from the authorities relied upon by the respondent in relation to the giving of reasons that this is not always necessary. As Clarke J. (as he then was) observed in *EMI Records (Ireland) Limited v. Data Protection Commissioner* : "[it may well be]... that the reasons will be obvious by reference to the process which has led to the decision such that neither of the parties could be in any reasonable doubt as to what the reasons were." Taken together with the decision of Kearns P. in his decision in *Mellett*, where he said it was unnecessary for detailed reasons to be provided in circumstances where the decision maker had all the relevant material and thus could make a properly informed decision. All of those factors were present in this case.

139. Insofar as no explanation is given as to why Vice-Admiral Mellett did not accept the medical opinions put forward on behalf of the appellant, this is something of a red herring. These medical reports were provided long after the applicant had accepted that both his weight and BMI posed a risk to his career in the Defence Forces. They were presented long after the decisions of both the Medical Board and Colonel Kerr and well outside the time within which applications to quash those decisions could be advanced. Most significantly of all, the medical reports were submitted after Vice-Admiral Mellett had made his decision. Furthermore, it was not open to Vice-Admiral Mellett to alter the medical classification of the applicant on foot of these reports, or otherwise, because he has neither the jurisdiction nor the competence to do so. It seems to me that the extent of the competence of Vice-Admiral Mellett at this point was to decide whether or not to affirm the recommendation to the Minister that the applicant should be discharged from the Defence Forces.
140. A good deal of the argument at the hearing of these proceedings was devoted to the rationality or otherwise of the applicant's medical classification and his fitness to discharge his duties. No doubt this was done in the hope of persuading the Court that the decisions of the Medical Board and Colonel Kerr were irrational, but those decisions are not impugned by these proceedings other than in a general way by pleading that the respondent failed to engage with the medical reports provided by the applicant on the issues of his medical constitution and fitness. Moreover, it is clear from the authorities relied upon by the respondent that where there is a difference of medical opinion, this is not something that can be decided by a court on affidavit evidence, and it is necessary for the person raising the issue to cross-examine the witness or witnesses who disagree with the evidence relied upon by the decision maker.
141. It is not difficult at all to understand the frustration that the applicant must have felt when, having passed the fitness test, his medical classification remained the same. It would certainly seem rational that his fitness classification should have been elevated above Grade X. But it would not follow from that his constitution grading of X would be altered and a grade of X in either category gives rise to the possibility of his discharge from the Defence Forces. It also appears from the affidavit of Commandant White that the fitness test that the applicant passed in 2015 was a modified fitness test i.e. he partook of a swim rather than a run because of an inability to partake in the latter.
142. The applicant presented a very persuasive case to the effect that neither his constitution nor his fitness had impeded his duties in the Defence Forces and that the medical classification of X was illogical and irrational, having regard in particular to medical classifications 3 and 4. But constitution and fitness can readily be seen to fall outside the medical issues addressed by Grades 3 and 4. If a person does not have either or both of the constitution and fitness required of a professional soldier then how can he or she expect to remain in the service of the Defence Forces? To the extent that others with specific disabilities may be allowed to do so that is a concession that may appear anomalous when set against the draconian forced discharge of a person such as the applicant from the Defence Forces, but the anomaly does not of itself mean that the



consequence flowing from a gradation of X is irrational or illogical. But in any case, this is something of an aside, because the regulations provide as they do, and while the applicant also seeks a declaration that they are *ultra vires*, no legal authority has been cited for this Court even to consider the making of such a declaration.

143. I quoted extensively above from the affidavit of Commandant White because I believe that the passages quoted, more than anything else in these proceedings, make it clear why the applicant cannot succeed. While the applicant was allowed into the Defence Forces with a BMI of 33, it was made plain to him from an early stage, and acknowledged by him, that his condition and fitness were problematic and could result in his discharge from the Defence Forces if not satisfactorily addressed. He was quite literally allowed years to address these matters, and he acknowledged that he had to do so, but unfortunately it proved to be too difficult for him. It is particularly unfortunate in the light of all the other very positive information regarding the applicant both as a person and as an officer. The extracts that I have quoted from the affidavit of Commandant White could lead no objective observer in any doubt that (a) the applicant, from a very early stage of his Defence Forces' career, was made aware of the seriousness of the issues raised by his BMI and weight and (b) that the applicant was afforded numerous opportunities to address these issues over several years, (c) that the applicant had failed to pass all but two of his annual fitness tests in the Defence Forces, and that those tests that he had passed were modified tests because he could not partake in the run and (d) that his condition was such that it had to some extent at least impaired his ability to discharge his duties in the Defence Forces.
144. I have considered whether or not the apparent failure on the part of the respondent to comply with paragraph 32 of DMC instruction for Medical Officers number 4 is of sufficient significance to influence the outcome of this decision. That paragraph requires that personnel who are found to have a BMI in excess of 35 should be advised that failure to reduce their weight to give them a BMI of 35 or less within 12 months may lead to a classification of X, unless the BMI is justifiable by physiological state or body fat measurements. This issue was not pleaded by the applicant because he did not become aware of it until this instruction was exhibited in the affidavit of Col. Kerr in the course of the proceedings. I have described it as an "apparent failure" because it is not dealt with in the pleadings but at the hearing of these proceedings the Respondent did not deny that there had been a failure to so advise the applicant. On balance, I have taken the view that the failure to comply with this instruction is not of sufficient significance to alter the outcome of these proceedings because of the knowledge that the applicant at all times had as to the significance of his weight and BMI for his future in the Defence Forces.
145. Moreover, the chief relevance of this issue dates back to the time when Lt. Col. Ahmad first examined the applicant on 22nd May, 2014, when he advised the applicant that he needed to reduce his BMI to 30 within a period of 6 to 8 weeks. That may well have been an unrealistic target, but the applicant was again allowed latitude and Lt. Col. Ahmad did not ask for the convening of a medical board until January 2015. Moreover, even if the target was unrealistic, the applicant clearly responded to the pressure and had reduced

his BMI to 36 by 18th December, 2014, but that is still above the limit of 35 set by paragraph 32 of the DMC instruction. For these reasons, and also because the applicant fully accepted the decision of the Medical Board, I do not think that this issue can serve to alter the outcome of these proceedings.

146. Finally, in relation to the applicant's complaint that he was not given all documentation giving rise to the recommendation for his discharge, this Court was not given copies of the requests for that documentation, and there seems to be a dispute between the parties as to what was requested and what was provided. This dispute appears to have finished with the last letter sent on behalf of the respondent to the solicitors for the applicant enquiring as to what documentation it was claimed had not been delivered. No reply was given to this letter, and nor was this expanded upon on behalf of the applicant at the trial of these proceedings. In these circumstances, it is impossible for this Court to adjudicate upon whether or not relevant material in the possession of the respondent was not delivered to the applicant or his solicitors. Moreover, this is, I think, a matter that would more appropriately have been dealt with by discovery. In any case I think that the authorities relied upon by the respondent in relation to the disclosure of materials make it plain that there is no general entitlement under the rules of natural justice to access the entire file of the decision maker.
147. Notwithstanding the very significant sympathies I feel for the applicant, I regret that he has not established any basis upon which this Court could grant any of the declarations sought and the proceedings must be dismissed.