

APPROVED

[2024] IEHC 370



THE HIGH COURT
JUDICIAL REVIEW

2024 785 JR

BETWEEN

KEVIN DONOHER

APPLICANT

AND

MINISTER FOR DEFENCE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 July 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to apply for judicial review. The Applicant seeks to restrain the implementation of a decision to discharge him from the Irish Defence Forces (Naval Service). The decision to discharge appears to be predicated on medical grounds. The term “*appears*” is used deliberately in circumstances where one of the grounds of judicial review

NO REDACTION REQUIRED

is that no formal reasons for the decision had been provided. The application for judicial review is urgent in that the date of discharge is 9 July 2024.

2. For the reasons explained herein, leave to apply for judicial review is granted.

LEGAL TEST GOVERNING LEAVE APPLICATION

3. The legal test governing an application for leave to apply for judicial review has recently been considered by the Supreme Court in *O'Doherty v. Minister for Health* [2022] IESC 32, [2022] 1 I.L.R.M. 421. The Chief Justice, O'Donnell C.J., explained at paragraph 39 of the judgment that the threshold to be met is that of arguability:

“[...] The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that. While, inevitably, individual judges may differ on the application of the test in individual cases at the margins, the test itself is clear. This test – it must be stressed – is solely one of arguability: it is emphatically not a test framed by reference to whether a case enjoys a reasonable prospect of success, still less a likelihood of success. Any such language obscures the nature of the test and may on occasion lead to misunderstanding, appeal and consequent delay.”

4. The Chief Justice also confirmed (at paragraph 40) that the same threshold test pertains irrespective of whether the application for leave is made *ex parte* or is made on notice to the respondent.
5. It follows, therefore, that in assessing the merits of the grounds of judicial review pleaded, the High Court must do so by reference to the low threshold of arguability.
6. The approach to be taken in respect of time-limits is somewhat different. Order 84 of the Rules of the Superior Courts indicates that the question of

whether the leave application has been made within the time-limit prescribed is a matter which should normally be decided at the leave stage. If it is obvious that the leave application is out of time, then the judge hearing the leave application may properly refuse leave on this basis. This is so notwithstanding that the grant of leave does not necessarily preclude these issues from being revisited at the full hearing. In a complex case, the judge subsequently hearing the substantive application for judicial review may be prepared to revisit the question of delay having had the benefit of arguments from the respondent.

DISCUSSION

7. The relevant procedures to be applied where it is intended to discharge a member of the Permanent Defence Forces are set out in a document entitled “‘A’ *Administrative Instructions Defence Forces Part 10*”. The following general principle is stated at §447:

“Where it is intended to apply for the discharge of a member despite his wish to remain in the PDF, it is considered to be in the interest of fairness of procedures that he should be informed of: –

- a. The statutory reason for the proposed discharge.
- b. The grounds upon which the proposed application is based.

The member shall then be given seven days, within which he may make such representations 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 was discharged, alleging breach of his natural or constitutional rights.”

8. The documentation which is to be served in the case of a proposed discharge is identified at §448. The “*statutory reasons*” for discharge are then set out at §449.

These include, relevantly, circumstances where a member's fitness falls below the "*Defence Forces Medical Standards*".

9. It appears from §450 that there is an obligation upon the Commanding Officer to take the following action where an application to discharge is to proceed. The Commanding Officer:

“[...] shall then parade the member concerned, and inform him/her of the following: –

- (1) The statutory reason for the proposed discharge;
 - (2) The essential facts and findings alleged to constitute the reason for the proposed discharge;
 - (3) That he may, within 7 days after receiving notice of the intention to discharge him make such representations as he may think fit, orally or in writing, to the Commanding Officer, in relation to the proposed discharge.
- d. Following the expiration of the 7 day period, the member shall again be paraded, and is representations, if any, obtained. Oral representations shall be taken down in writing, and the member shall be required to sign the record of such representations.
- e. The Commanding Officer shall then complete AF 97B at Part 3, (listing the enclosures), and forward it with full supporting documentation, through the normal channels to GOC Brigade/Formations (who shall, if appropriate, forward it to the D COS (Sp), through OIC Enlisted Personnel Selection).”
10. §453 provides that the authorised officer shall make their decision, having considered the submission made by the Commanding Officer, the Brigade Commander (if applicable) and the representations, if any, made by the member concerned.
11. It is not apparent from the papers before the High Court on the leave application that this procedure has been properly followed in the present case.

12. Insofar as one can tell, the proposal to discharge the Applicant is grounded upon the determination of a Medical Board on 11 September 2023. The determination consists of a recommendation that the Applicant be given a “*Grade 3*”. Although not stated in the Medical Board’s determination, the Applicant has explained on affidavit that “*Grade 3*” is defined as follows:

“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.”

13. The Applicant has further explained that he was informally given to understand that this grading was recommended because of concerns relating to the condition of his liver, and, in particular, his diagnosis of having a condition of “*fatty liver*”.
14. The Applicant was “*paraded*” by his Commanding Officer on 25 October 2023 and informed that—by reason of the fact that the medical category given to him by the Medical Board was below the Defence Forces Medical Standards required for extension of service—the “*administration*” of his discharge would be pursued. It seems that the Applicant had been told orally that he had a right of appeal. The Applicant duly submitted an appeal on 31 October 2023.
15. It appears that the Applicant was not informed of the result of this appeal until April 2024. In the interim, the Applicant arranged to be examined by a consultant hepatologist. The consultant hepatologist subsequently provided a report dated 31 January 2024 which indicated that the Applicant had no significant health impairment. The report also offered the opinion that this would equate to “*Grade 1*” on the Defence Force’s scale. The Applicant avers that he submitted this report to the military authorities. This submission occurred

a number of months after the Applicant had submitted his appeal in respect of the proposed discharge (31 October 2023).

16. The Applicant was again “*paraded*” before his commanding officer on 16 April 2024 to inform him that the Deputy Chief of Staff had approved the application to discharge him. The Applicant was subsequently informed on 28 April 2024 that his date of discharge from the Naval Service had been set for 9 July 2024. The Applicant was also directed to apply for annual leave which would bring him up to the date of discharge.
17. The Applicant’s solicitor then engaged in correspondence with the Department of Defence. This correspondence raised the concern that there had been no indication given that the Deputy Chief of Staff had an opportunity to review the report of the consultant hepatologist.
18. The first substantive response which was sent to the Applicant’s solicitors by the Department of Defence was on 10 June 2024. This letter refers to the procedure before the Medical Board and states that a decision of the Medical Board is “*final*”. As correctly observed by the Applicant’s solicitor in his subsequent letter, this letter of 10 June 2024 does not deal with the “*core issue*” identified in the earlier correspondence. The ultimate decision on whether or not to discharge the Applicant resides with the authorised officer, not with the Medical Board.
19. A more meaningful response was provided by the Department of Defence on 14 June 2024. The point is made that the Deputy Chief of Staff is required to follow the “*laid down discharge application and authorisation procedure*” and that the findings of the Medical Board form part of that process. This point may well prove too much at the substantive hearing of the judicial review proceedings. It is precisely because the Deputy Chief of Staff is *required* to

follow the prescribed procedure that there are arguable grounds that the decision-making process in this case may be unlawful. The prescribed procedure requires that a member, whom it is proposed to discharge, must be informed of (a) the statutory reason for the proposed discharge, and (b) the grounds upon which the proposed discharge is based. It is further provided that the person making the decision on whether or not to discharge must consider the representations, if any, made by the member concerned. It is not apparent from the papers that these requirements were complied with. In particular, there is no contemporaneous explanation as to what status had been afforded to the report of the consultant hepatologist. If, for example, the report was not considered because same was not submitted within time, then it is surprising that the rejection of the report as inadmissible was not immediately notified to the Applicant.

20. Having regard to all of the foregoing, I am satisfied that the Applicant has met the modest threshold governing an application for leave to apply for judicial review.

CONCLUSION AND PROPOSED FORM OF ORDER

21. The Defence Forces' own regulations warn that the failure to observe the general principle of fair procedures may lead to litigation by a member who is discharged. Regrettably, it appears that this warning may not have been heeded in the present case. Subject to the very real caveat that this judgment is delivered in the context of a leave application, with the attendant low threshold of arguability, the decision-making process followed by the Defence Forces in this case does not appear to have adhered to the prescribed procedure. The prescribed procedure is not onerous, but it is one which must be complied with.

22. It is surprising that much of the communication with the Applicant in respect of his procedural rights appears to have been oral rather than in writing. For example, the formal record of 25 October 2023 does not inform the Applicant of his right of appeal. This procedural deficiency may stem from the quaint notion of a member being “*paraded*” before their commanding officer, with a partial record of what was said at that encounter being reduced to writing subsequently. It would be preferable that a member be given a written statement setting out, in clear and intelligible language, his or her procedural rights. This written statement should indicate any time-limits applicable to the exercise of those rights. Failure to set out the member’s procedural rights in writing runs the risk of otherwise avoidable litigation, with all the attendant cost and delay.
23. The Applicant is granted leave to apply for judicial review for the reliefs sought at paragraphs (d) (1) to (4), (7) and (9), upon the grounds pleaded at paragraph (e), of his statement of grounds.
24. The proposed discharge is scheduled to take place on 9 July 2024. Counsel has informed the High Court that the Minister for Defence has indicated, in correspondence, his consent to any order staying the Applicant’s discharge subject to the leave application being granted and subject to the assignment of an early hearing date for the substantive application for judicial review.
25. I propose to grant a *temporary* stay on the discharge of the Applicant from the Defence Forces for a period of 21 days. The State respondents may apply to set aside or vary the stay on three clear days’ notice to the Applicant’s solicitors. In the event that an early hearing date for the substantive application for judicial review is available, the stay can, presumably, be extended on consent.

26. The proceedings will next be listed in the Judicial Review List on Tuesday 9 July 2024. This will allow the parties an opportunity to apply to the presiding judge in the Judicial Review List (Hyland J.) for an early hearing date. The Applicant is to serve a full set of papers on the Office of the Chief State Solicitor by close of business on Monday 8 July 2024. This will be deemed good service on all three respondents.

Appearances

Declan Harmon for the applicant instructed by O'Regan Little