CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 1396/06
by Jean McBRIDE
against the United Kingdom

The European Court of Human Rights (Fifth Section), sitting on 9 May 2006 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 23 December 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Jean McBride, is an Irish citizen who was born in 1952 and lives in Castlewellan. She was represented before the Court by Mr G. Hyland, a solicitor lawyer practising in Belfast.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant's son Peter McBride died on 4 September 1992. He was shot dead by two serving soldiers with the 1st Battalion Scots Guards (Guardsmen Mark Wright and James Fisher). On 10 February 1995 Mr Wright and Mr Fisher were convicted of his murder and sentenced to life imprisonment.

At trial both guardsmen had raised a number of defences including self-defence/defence of others and the reasonable use of force to effect an arrest.

In his judgment (which ran to 126 pages) the trial judge (Kelly LJ) rejected all of their defences and convicted the two guardsmen of murder. He said:

> "The whole image of the case most strongly depicted nothing more than that of a cheeky young man after an impudent and improper confrontation with Sergeant Swift running away as hard as he possibly could, running to escape being caught by pursuing soldiers, because of this impropriety and nothing more. That picture did not suggest a young man wandering around the district with a bomb in a bag and then when stopped and checked out for a few minutes running off with it, intending to throw it if need be. Nor did it suggest a plan, even a last minute plan to lead a patrol into a trap or ambush from behind a car. All the evidence underlined the fact that the deceased was running away from his pursuers increasing the distance between them, intent on shaking them off and incidentally increasing the range of any throwing distance of a coffee jar bomb.
>
> As a witness Fisher was far from impressive. He became evasive and then untruthful as soon as he grasped the adverse significance of a point in cross-examination. I have already referred to some of these. His general demeanour when giving evidence did nothing, I am afraid, to lodge with me the possibility that he really believed at any time that he or his comrades were under threat from the deceased or anyone else. In addition his case raised very many improbabilities, the sum of which pointed to the same conclusion.
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> On the issue as to whether Fisher's case is a false one or not, I gain very much assistance from the acts and omissions at the scene itself that immediately followed the shooting by the participants. They are done and said or not done or said by those who participated in the events and when they are said or done they contain a spontaneity and lack of calculation that gives them credibility. And when they are not said or done I attach great significance to that. Accordingly I put the following omissions in this category, the absence of any attempt to recover a coffee jar bomb, the failure by Fisher to mention or warn of its suspected existence to others and the failure by him when asked by the police constable what happened to say something

like ‘he’s got a bomb’. These point strongly to the absence of any belief by Fisher that the deceased was or might have been armed.

The events the accused Fisher had to deal with took place in daylight, on a bright morning in early September, with the suspect on foot retreating from him at all times and increasing the distance between them and over a distance of parts of three streets. It was not a panic situation which required split second decision or split second action, if any action at all. These circumstances must be contrasted with a soldier who is suddenly confronted on a dark night with a danger that advances to him or is directed at him, from the cover of a moving vehicle or a place of concealment. That may be a quite different situation.

As in the case of Fisher, the events of this early September morning did not, or could not, in my opinion have put Wright in any panic situation or in any situation which called for split second reaction. The chase after the deceased was merely to catch and detain. Wright had him under observation for a considerable period and over a comparatively long distance in these circumstances. During all the time Wright had him in his vision, he was running away from Wright and increasing the distance between them. For the greater part of this time, he posed no threat to Wright as Wright admitted. Realising he could not catch him, as he must have done, he could have broken off the chase for he believed Sergeant Swift had taken his name and address. The first shot which Wright believed came from the deceased, did not strike Wright, and after it had been fired, the deceased kept on running. Wright had then time to stop and reflect and take cover in a doorway and allow the deceased, for the time being at least, to get away.

On the totality of the evidence, including my assessment of his credibility, my consequent disbelief of crucial parts of his case of self-defence and the prevention of crime, the numerous improbabilities of the truth of that case that the evidence indicates, I am satisfied beyond reasonable doubt that there was no reasonable possibility that Guardsman Fisher held or may have held an honest belief or indeed any belief that the deceased carried or may have carried a coffee jar bomb or that he was about to be attacked or his life was in danger. Therefore I find the Crown case proved beyond reasonable doubt that his case of the use of necessary force in self-defence or in the prevention of crime was false and made up.

On all the evidence I was satisfied beyond reasonable doubt that there was no reasonable possibility that Wright held or may have held an honest belief or indeed any belief that the deceased fired a gun at him or that his life was or those of his comrades were in danger or had been put in danger by the deceased and that this was the situation when Wright fired his shots.

Each of the accused clearly fired their aimed shots at the deceased with intent to kill or cause him grievous bodily harm. Wright admitted he intended to kill, but Fisher was reluctant to go that far and admitted he intended to cause really serious bodily harm. If it could be said that Fisher and Wright in shooting at the deceased with that intent were each carrying out the command of their sergeant to “Grab him”, that is, to effect his arrest, then I would have no difficulty in concluding that to fire aimed shots at an unarmed man, carrying neither bomb nor gun, was beyond reasonable doubt, unreasonable force. I would hold the same position when there was no reasonable possibility that either Wright or Fisher honestly held the belief that he was armed.

There was no possible justification for either of the accused to shoot at the deceased.”

The guardsmen appealed against their conviction to the NI Court of Appeal. That appeal was dismissed by way of judgment delivered on 15 December 1995. The Court said:

> "We consider that the evidence clearly established that when they fired the appellants were acting in concert and shared a common intention to stop the deceased by shooting him."

Their application for leave to appeal to the House of Lords was refused on 8 March 1996.

In June 1998, the matter of the discharge of Guardsmen Wright and Fisher from the army was referred to an Army Board under Queen's Regulations 9.404(d) which provided that where a soldier had been sentenced to imprisonment by a civil court he should be dismissed unless there were exceptional reasons to retain him. The Board considered that, while it accepted the decisions of the trial and appeal courts, the guardsmen had shown contrition for their action which they admitted was an error of judgment which they very much regretted and having regard, *inter alia*, to the Army's responsibility for their training, their loyalty to the Army and previously unblemished records, found that there were exceptional circumstances justifying their retention in the army.

The guardsmen spent 6 years in custody and after their release from prison, continued to serve as soldiers. In addition, the time spent in custody by them did not, in fact, have any adverse impact on their military careers as it has been included in the computation of various benefits based on time served in the Army.

The applicant brought judicial review proceedings challenging the Army Board decision (*Re Jean McBride's Application for Judicial Review* [1999] NI 299). On 3 September 1999, Mr Justice Kerr found that the reasons given by the Army Board for its decision conflicted with the findings of the trial judge, in particular as it was clear from the trial judge's judgment that the killing was not the result of an "error of judgment" by the two soldiers. He indicated that the matter should be considered afresh.

On 21 November 2000, after receiving written representations from the applicant's solicitors, Amnesty International, the Northern Ireland Human Rights Commission and the Committee for the Administration of Justice and an oral hearing attended by the guardsmen and their lawyers, a differently constituted Army Board decided on 21 November 2000 that the soldiers should not be discharged from the Army. It considered exceptional reasons existed in that:

(a) the guardsmen were relatively young and inexperienced when the incident took place, it was their first tour of duty in Northern Ireland and they had only been there for four months;

(b) the general security situation was tense in the area where the unit had recently suffered casualties including a fatality and they had been advised the situation was high risk;

(c) the army had been responsible for training the soldiers but could not prepare them for every eventuality;

(d) Guardsman Wright had expressed genuine concern for the victim's family and Guardsman Fisher had expressed genuine regret;

(e) neither had a previous criminal record and their conduct in custody after conviction had been exemplary;

(f) the Board were convinced that there would be no repetition, both men having learned a bitter and lasting lesson

(g) both had been utterly loyal to the army during the procedure, clearly wished to serve their country and their commanding officer had spoken highly of them, in particular with reference to their service in operations in Kosovo and Macedonia, in which their personal conduct had been of the highest standard.

This decision was also challenged by the applicant. In the second proceedings (*Re Jean McBride's Application for Judicial Review No. 2*), Mr Justice Kerr found on 17 April 2002 that the Board had been entitled to reach the findings above and that while considerations of the seriousness of their offence and past army practice of discharging offenders militated strongly against retention they did not remove the decision to allow the two soldiers to resume their careers from the range of available options. As regarded the applicant's submissions on Article 2 of the Convention, while doubting that the applicant could claim to be a victim in this regard, he found nothing in Strasbourg jurisprudence to require additional punishment beyond that imposed by due process of law and considered that the two men had been held duly accountable as required by Article 2 of the Convention. The Army decision could not be construed as condonation as the Board made it abundantly clear that it accepted without qualification the trial judge's findings. Nor did he find that the applicant could claim to have been discriminated against under Article 14 of the Convention.

The applicant appealed. On 13 June 2003, the Northern Ireland Court of Appeal gave its decision. The Lord Chief Justice found that reasons (a) to (c) and (g) could arguably be regarded as exceptional reasons, Lord Justice Nicholson considered that only (g) could be regarded as an exceptional reason making it desirable to retain the men in the army, while Lord Justice McCollum considered all the factors relied on would be likely to have existed in the cases of soldiers previously discharged for offences and neither individually or cumulatively amounted to exceptional reasons. In his judgment he stated:

> "[25] ... the use of excessive force resulting in death, is by no means a unique event arising from the activities of security forces. Where death is caused by the use of excessive force by servants of the State, it should be a cause of great public concern. Such events diminish confidence in the maintenance of law and order and endanger the peace of the community if not treated with proper regard by the organs of the State.

> [26] The vast majority of soldiers who have served in Northern Ireland have acted with discipline and restraint often under considerable and deliberate provocation and under constant threat from persons difficult to identify and distinguish from law-abiding citizens. It is no compliment to them if those who have not acted with the same degree of self-control are not treated as lawbreakers, however understanding and sympathetic one might be to the dangers and difficulties of service in Northern Ireland as being capable in itself of amounting to 'exceptional reasons'."
>
> [27] If we consider the circumstances of the offence to discover whether it may be said that there were any exceptional circumstances which might provide a reason for retention of the soldiers, it appears that as against other cases of excessive force resulting in death, there is no exceptional feature which would reflect to the credit of the two soldiers involved in this case.
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> [28] The shooting took place in daylight, there was no confrontation and no confusion at the scene, there was no menacing crowd or mob. The lives of the solders were not under any risk and the trial judge rejected the proposition that they believed that there was any immediate risk to them. Nothing had occurred to justify the use of a lethal weapon."

He went on to say:

> "[41] However, quite apart from the issue of what may constitute exceptional reasons, I find it difficult to comprehend the view of the Army Board that it is desirable to retain Fisher and Wright in army service.
>
> [42] Since a sentence of imprisonment almost invariably results in discharge it is not easy to discern any feature in this case which explains the obvious sympathy and concern which all superior officers concerned have displayed for the situation of Fisher and Wright.
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> [43] The murder of an innocent fellow-citizen should rank as a crime of the greatest magnitude, and one would expect that soldiers who have misused the lethal weaponry with which they are equipped in order to take away a life without justification should be regarded as quite unfitted for further army service.
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> [44] There may be considerations of morale and discipline which make discharge of the soldiers undesirable but if so one would have expected them to have been aired at the hearing of the Army Board or openly expressed in the ruling."

However, he noted that the soldiers had a substantial argument that the army's tardiness in determining the question of their discharge had materially altered their situation and created exceptional reasons for their retention. As the interests represented by the applicant would not be materially affected by the remedy, it should be sufficient to satisfy her and the public concerned that a declaration be made vindicating the objection to the army's decision. He concluded that decisions on what was best for the army and its soldiers were best left to the Army and that it would be an unwise usurpation of power to intervene by mandamus to impose a course of action on Army authorities.

All three judges agreed with the High Court judge's conclusions under Articles 2 and 14 of the Convention.

The Court of Appeal ordered the following declaration:

> "Taken together, the reasons expressed by the Army Board for the retention in Army service of Guardsmen Fisher and Wright in its determination of 21 November 2001 do not amount to exceptional reasons."

The Army did not take any action consequent on the Court of Appeal's ruling. In correspondence to the applicant's solicitors the relevant Minister stated that

> "... the Army Board has no plans to revisit the question of the employment of the guardsmen."

On 29 June 2005, the High Court rejected the applicant's application for judicial review of the Army's failure to act in light of the ruling of the Court of Appeal and to dismiss the soldiers. Mr Justice Weir noted that the Court of Appeal had expressly declined to grant coercive relief and held that the Army were under no legal compulsion to take any further action. There was no indication that the Army had failed to take the entirety of the judgments into account or had failed to understand them and the decision to retain the soldiers in the army remained effective. He refused relief, considering that the application was an impermissible attempt to circumvent the order of the Court of Appeal.

B. Relevant domestic law and practice

The Queen's Regulations for the Army state (at para. 9.404d):

> "A soldier is to be discharged if he has been sentenced:
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> (1) by a civil court or by court-martial to imprisonment (including a suspended sentence, but not a suspended committal) or to detention or to any other form of custodial sentence;
>
> (2) By a court-martial to a period of detention which on confirmation is for 12 months or more.
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> If in the opinion of the commanding officer there are exceptional reasons that make retention of the soldier desirable then the case is to be submitted with valid and explicit reasons to the Director of Manning (Army) Ministry of Defence for a decision. The case is to be forwarded through the immediate superior headquarters with copies going to the next higher headquarters when this has been so directed. Where a case to an immediate headquarters is not supported it should be sent to the next higher headquarters for further comment before being sent to the Director of Manning (Army). Ministry of Defence (M2(A)) should be informed in advance by the commanding officer of any such cases that are controversial or high profile so that, if necessary, direction can be given for the case to be staffed through the full chain of command."

In the period from 1989-1990 to 1999-2000, 2002 officers and men were discharged under QR9.404 while only a total of 28 were retained (i.e. under 1.4% or one case in 72). Information furnished to the High Court by those acting for the Army Board made it clear that no soldier who had been sentenced to an immediate custodial sentence of more than 9 months

imprisonment was retained in the army and no soldier who had been convicted of an offence related to drugs had been retained.

COMPLAINTS

The applicant complained under Article 2 that in failing to discharge the soldiers the Army Board breached the wider duties under Article 2 to reassure the public as to the State's adherence to the rule of law and its lack of tolerance for breaches of the fundamental rights guaranteed under Article 2 and the obligation to ensure the future protection of the right to life of the citizens of the State.

The applicant complained under Article 14 that she had been treated less favourably than those in the situation where a soldier had killed a civilian in Great Britain or where a civilian had killed someone.

THE LAW

1. The applicant complained the decision of the Army to retain the two soldiers was in breach of Article 2 of the Convention which provides in its first sentence:

> "1. Everyone's right to life shall be protected by law."

The Court notes that the applicant did not seek leave to appeal against the decision of the Court of Appeal not to impose a mandatory order on the Army Board and that it is arguable that the later application to the High Court, which was regarded as an attempt to re-open that earlier ruling was not an effective remedy for the purposes of Article 35 § 1 of the Convention, raising a possible issue of compliance with the six month time-limit for the introduction of application. However, it assumes for the purposes of the present application that the applicant has duly complied with the requirements of Article 35 § 1 of the Convention.

The Court's case-law establishes that Article 2 not only prohibits the use of lethal force, save in certain very restricted circumstances, but imposes obligations of a procedural and protective nature. In particular, it is recognised as an essential element of protection of the right to life that an effective investigation must be carried out into the use of lethal force by soldiers or other agents of the State (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, § 161, and *Kaya v. Turkey,* judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the

right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001; *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002). The requirements of effectiveness will necessarily vary with the facts of each case and there is no obligation on the Contracting State to provide any particular mechanism for fulfilling them (see *McKerr v. the United Kingdom*, no. 28883/95, § 159, ECHR 2001-III).

It cannot be in doubt that there was an investigation into the death of the applicant's son which satisfied the above requirements (see also the unanimous views of the domestic courts on this point). The two guardsmen involved in firing the lethal shots were prosecuted and convicted of murder. There were findings by the trial judge that the soldiers had no honest belief that the deceased had been carrying a bomb or posed any risk and that they had had no justification for opening fire. They were punished with sentences of life imprisonment. Not surprisingly, no criticism is made of these proceedings.

The applicant argues, however, that the procedural obligation in Article 2 also required that the soldiers be discharged from the army in order to reassure the public as to the State's adherence to the rule of law and its lack of tolerance for breaches of fundamental rights.

While the role of disciplinary proceedings has been taken into account by the Court in assessing whether a legal system provides adequate protection for the right to respect for life (*e.g.* see *Calvelli and Ciglio*, [GC], no. 32967/96, § 51, ECHR 2002-I, § 51; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004 -...) this has been in cases where it had been argued that criminal law sanctions were not available or applied. In the normal course of events a criminal prosecution is generally the most effective way of fulfilling the requirements of Article 2 (see *McKerr*, cited above, § 134, where, following a criminal trial, it was wider issues of collusion that subsequently raised the need for further investigation; and *Abdulsamet Yaman v. Turkey*, no. 32446/96, dec. 2.11.2004, § 55 concerning effective remedies under Article 13 applicable to the practice of torture and inhuman and degrading treatment by police officers).

The Court is not persuaded that any wider issues arise in the present case. Insofar as the applicant's arguments may imply that the failure to dismiss the soldiers was a condonation of their conduct in breach of the rule of law,

it may be recalled that the domestic courts rejected this argument – see Mr Justice Kerr's judgment of 17 April 2002 where he noted that the Army Board had expressly accepted the trial judge's findings. The mere fact that the soldiers were allowed to rejoin their units after six years in prison cannot, in the Court's view, be regarded as either as a flagrant rejection of the criminal conviction or cynical and retrospective approbation of the soldiers' conduct which could be regarded as capable of undermining the efficacy of the earlier criminal proceedings in providing the appropriate deterrent and retribution.

While reference has also been made to the future protection of citizens, presumably through either continued risk of unlawful conduct by the two soldiers or through a deterioration in attitudes or standards in the armed forces generally, this would appear somewhat hypothetical and speculative and certainly remote in consequence as regards any effect on the rights of this applicant. To the extent concerns might arise as to the composition of the armed forces and existence of appropriate disciplinary regulations and machinery, these would appear to be matters of general policy for public and political debate falling outside the scope of Article 2 of the Convention as applicable in this case.

The Court finds that the procedures adopted in this case complied with the procedural obligation contained in Article 2 of the Convention and that the applicant cannot claim to be a victim of any breach of that provision as regards the decision to retain the two soldiers in the army. It follows that this part of the application must be rejected as incompatible *ratione personae* pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that the retention of the two soldiers in the army violated Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22, and *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 184, § 33).

The Court notes the applicant's contention that a discriminatory difference of treatment arises from the fact that other soldiers convicted of murder have been discharged from the army and that civilians so convicted would no longer be permitted to hold firearms certificates whereas the two soldiers who killed her son were allowed to stay in the army and continue to use firearms. It does not find however that Article 2 is engaged in relation to the decision to retain the soldiers in the army and consequently Article 14 of the Convention cannot come into play either.

It follows that this complaint must be rejected as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President