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IN THE COURT MARTIAL
APPEAL COURT

Case No: 2023/03882/B3
[2023] EWCA Crim 1625



Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 20th December 2023

B e f o r e :

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE CHEEMA- GRUBB DBE

MR JUSTICE SWIFT

R E X

- v -

B

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Mr J Hugheston-Roberts and Mr J Kwong appeared on behalf of the Applicant

Commodore J Farrant appeared on behalf of the Service Prosecution Authority

Mr M Bolt appeared on behalf of the Intervenor, the Court Administration Officer

J U D G M E N T
(Approved)

Wednesday 20th December 2023

LORD JUSTICE HOLROYDE:

1. The applicant faces trial before a Court Martial on 11 charges alleging controlling or coercive behaviour and offences of sexual and physical violence against his former partner, a woman to whom we shall refer as "C". He seeks an extension of time in which to apply for leave to appeal against a ruling made by Judge Advocate Legard in preliminary proceedings on 19th September 2023. The applications have been referred to the full court by the Registrar.

2. C is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the alleged offences.

3. We shall consider at the conclusion of this hearing whether any further reporting restriction is necessary.

4. We need not go into any detail about the facts giving rise to the charges. For present purposes it is sufficient to note that each of the charges alleges an offence contrary to section 42 of the Armed Forces Act 2007, of committing an offence contrary to the relevant statutory provisions.

5. All of the offences are alleged to have been committed during a period of about two years between 1st March 2018 and 31st March 2020. Throughout that period both the applicant and C were serving in the armed forces and were accordingly persons subject to Service law. Most of the alleged offences are said to have occurred when they were off duty, and it is not suggested that the relevant events had any adverse operational effect on the Service. Moreover, C left the Service in about April 2022, and the applicant was discharged from the Service in

June 2023. In those circumstances the applicant contends that the Court Martial Board which tries him should be composed of civilian members, rather than military officers.

6. It is necessary to summarise features of the procedural chronology, all of which occurred during 2023. On 18th May the Service Prosecuting Authority directed that the applicant be tried by a Court Martial on the 11 charges. We understand that, the decision having been made on behalf of the Director of Service Prosecutions to lay those charges, the charges themselves were served upon the applicant by his Commanding Officer, together with an indication that he would be required to surrender at a place and time to be notified to him.

7. On 12th June the applicant was, as we have said, discharged from the Service. On 23rd June, a plea and trial preparation hearing took place, but was adjourned without the applicant having been arraigned.

8. On 28th August, the applicant made a written submission to the court, stating the reasons why he contended that he should be tried by a civilian Board. It was not suggested that the charges should be tried in a civilian court. It was submitted that, although a serving member of the Regular Forces at the time of the relevant events, the applicant had become an ex-serviceman by the time the proceedings against him commenced. It was further submitted that the charges were essentially domestic in nature, that there were no operational reasons why the Board should include military officers, and that there would be an appearance of bias if a civilian under Service law was tried by a Board comprising military officers.

9. On those grounds, the applicant applied to Judge Advocate Legard for an order pursuant to Rule 49(2)(c) of the Armed Forces (Court Martial) Rules 2009, giving a direction to the Court Administration Officer that the lay members should all be civilians.

10. A further case management hearing was held on 12th September. It was adjourned, without arraignment of the applicant, to await the Judge Advocate's ruling on the written application. The Judge Advocate gave a preliminary indication that if the law permitted him to do so, he was minded to grant that application. He further indicated that he was unpersuaded by the submissions as to apparent bias. A number of directions were given, including as to further written submissions on both sides on the issue on the composition of the Board.

11. In compliance with those directions, on 15th September the respondent lodged a skeleton argument indicating that if the applicant was entitled in law to make his application, the respondent did not oppose it.

12. The applicant later lodged a written response to those submissions; but before he had done so the Judge Advocate, overlooking the timetable set in the directions which had been given, issued a written ruling, dated 19th September. Having considered the relevant statutory provisions, he felt that he had no power to direct the Court Administration Officer ("CAO") to specify a civilian-only Board. That, he ruled, was a matter for the CAO. The Judge Advocate therefore dismissed the application. He found that it was unnecessary for him to determine the issue of when the proceedings commenced.

13. The applicant subsequently made a written request to the CAO for the Court Martial Board to be composed solely of civilians. That request was refused. The CAO's decision cannot be, and is not, the subject of this application.

14. In early November the applicant lodged a Notice of Appeal to this court against the Judge Advocate's ruling of 19th September. Rule 50 of the Armed Forces (Court Martial) Rules 2009 gives this court power to hear an appeal against any order or ruling made by the Court Martial in preliminary proceedings. However, the Notice of Appeal was filed 50 days after the time

limited for doing so had expired. Having considered the explanations given for the delay, we grant the applicant the necessary extension of time.

15. The applicant was arraigned at a further case management hearing on 30th November. He pleaded not guilty to all charges. His trial is currently fixed for hearing on 8th January 2024.

16. Mr Hugheston-Roberts and Mr Kwong submit on behalf of the applicant that the Judge Advocate fell into error in ruling that he had no power to direct the CAO to specify a Court Martial Board composed solely of civilians.

17. The Grounds of Appeal invite this court to consider three questions:

(1) Do Judge Advocates have the power to rule on the constitution of the Board in general?

(2) What is the proper interpretation of "commencement of proceedings" under Rule 33(5) of the Armed Forces (Court Martial) Rules 2009?

(3) Did the Judge Advocate have the power to order a purely civilian board for the Court Martial of the applicant?

18. In his oral submissions, Mr Hugheston-Roberts has helpfully confirmed that no challenge is now made to the decision of the Judge Advocate rejecting the submissions of apparent bias.

19. The appeal is opposed by Commodore Farrant on behalf of the respondent.

20. Written submissions have also been made on behalf of the CAO, who seeks leave to

intervene in this appeal. Like the Court of Appeal Criminal Division, this court has an inherent jurisdiction to regulate its own procedure, which extends to a power to receive written or oral submissions from an intervenor. Guidance helpfully issued by the Registrar in July 2020 rightly makes clear that the court will rarely permit intervention. We are, however, persuaded that in the circumstances of this case the written submissions of the CAO will assist the court to have a fuller understanding of the issues. We therefore agree to consider those written submissions and to take them into account in reaching our decision.

21. The Grounds of Appeal and the written and oral submissions of all counsel, for which we are grateful, require us to consider a number of issues. We begin by setting out the statutory framework. Part 5, Chapter 2 of the Armed Forces Act 2006 contains provisions relating to the powers of a Commanding Officer in certain circumstances to charge a person with a Service offence which may be tried summarily, and the power of the Director of Service Prosecutions to charge, or to direct the bringing of charges, in cases which have been referred to him.

22. Part 7 of the 2006 Act contains provisions relating to trial by the Court Martial. Importantly for present purposes, this part of the Act includes section 155 which, so far as material, states:

"155 Constitution of the Court Martial

(1) In the case of any proceedings, the Court Martial is to consist of —

(a) a judge advocate; and

(b) three or, in the case of proceedings of a prescribed description, six other persons ('lay members').

(2) But Court Martial rules may provide that, in the case of proceedings of a prescribed description, there are to be —

...

(b) no lay members.

(2A) In the case of proceedings where the number of lay members would (but for this subsection) be three, a judge advocate may, in accordance with Court Martial rules, direct that the number of lay members is to be four.

(3) In the case of proceedings where the Court Martial consists of a judge advocate and lay members —

(a) a prescribed number of the lay members must be officers, warrant officers or OR-7 ranks qualified for membership under section 156 and not ineligible by virtue of section 157; and

(b) the rest must be officers so qualified and not so ineligible.

(4) Subsection (3) is subject to any provision made by Court Martial rules.

(5) The judge advocate for any proceedings is to be specified by or on behalf of the Judge Advocate General.

(6) The lay members for any proceedings are to be specified by or on behalf of the court administration officer.

..."

23. The officers who are qualified for membership of the Court Martial and those who are ineligible in certain circumstances are defined in sections 156 and 157 of the 2006 Act.

24. Section 363 of the 2006 Act establishes the position of a CAO for the Court Martial to be appointed by the Defence Council. The role was created as a response to a ruling of the European Court of Human Rights in *Findlay v United Kingdom* [1997] 24 EHRR 22, as to a lack of impartiality and independence in the Court Martial. The explanatory notes to the 2006 Act indicate that the CAO "is responsible for administrative matters such as listing cases and notifying witnesses of hearings". The notes further explain that the power of appointment of the CAO is vested in the Defence Council in order to "establish his independence from the chain of command".

25. The Secretary of State is empowered by section 163 of the 2006 Act to make rules with respect to the Court Martial. For present purposes we focus on the Armed Forces (Court Martial) Rules 2009. We shall refer to these solely by the numbers of the rules concerned.

26. By Rule 2, so far as material:

"Interpretation: proceedings and parties

2.— (1) Unless otherwise stated, any reference in these Rules to proceedings includes —

- (a) preliminary proceedings,
- (b) trial proceedings,
- (c) sentencing proceedings,
- (d) variation proceedings,
- (e) appellate proceedings,
- (f) activation proceedings, and
- (g) ancillary proceedings,

but does not include the exercise of any power of the court otherwise than at a hearing.

(2) In these Rules—

...

'preliminary proceedings' means any proceedings of the court held for the purpose of arraigning a defendant on a charge or giving directions, orders or rulings for the purpose of trial proceedings;

...

'trial proceedings' means proceedings for the trial of a charge by the court (including proceedings authorised by an order of the Appeal Court under section 19 of the 1968

Act), and does not include sentencing proceedings;

..."

27. By Rule 15(1):

"The court administration officer must exercise his functions (other than that of specifying the lay members for any proceedings) subject to any direction given by a judge advocate."

28. Part 4, entitled "Members of the Court", contains provisions as to the circumstances in which there shall be no lay members of the Court Martial, as to the number and agenda of lay members required in particular proceedings, and as to persons ineligible to act as lay members in certain circumstances. Any party to the proceedings may object to any lay member on any reasonable ground. If such an objection is made to a Judge Advocate and upheld by him, the Judge Advocate shall discharge the lay member: see Rule 35.

29. As to civilian members of the Court Martial, Rule 33 provides in material part:

"Civilians

33. – (1) For proceedings to which this rule applies, each of the lay members must be either —

- (a) a person not subject to service law who is qualified for membership under paragraph (2) and not ineligible by virtue of rule 32; or
- (b) an officer or warrant officer who would be qualified for membership under section 156, and not ineligible by virtue of section 157 or rule 32, if this rule did not apply;

and subsection 155(3) shall not apply in relation to the proceedings.

(2) For proceedings to which this rule applies, a person not subject to service law is qualified for membership of the court unless —

- (a) he is aged under 18, or has reached the age of 70, at the commencement of the proceedings;
- (b) he is not a United Kingdom national;
- (c) he is a mentally disordered person;
- (d) he is disqualified for jury service;
- (e) he is a member of the Military Court Service; or
- (f) he is on the staff of the Service Prosecuting Authority.

...

(5) This rule applies to —

- (a) trial proceedings, if any defendant is not subject to service law at the commencement of the proceedings;

..."

30. Purely for convenience, we shall refer to the two categories of person mentioned in Rule 33(1) as "civilians" and "officers" respectively.

31. We have reflected on the detailed submissions which we have received as to the true meaning of those various provisions. Our conclusions are as follows.

32. So far as the constitution of the Court Martial is concerned, the general rule in section 155(1) of the 2006 Act is that in any proceedings the Court Martial will consist of a Judge Advocate and a number of lay members. That general rule is subject to any provision in the rules that there are to be no lay members in proceedings of a prescribed description. In the present case it is common ground that the general rule applies and that accordingly the Court

Martial before which the applicant is tried will include lay members. Where, as in this case, the Court Martial includes lay members, the general rule in section 155(3) of the Act is that the lay members shall be officers. That general rule is, however, subject to any provision made by rules; and relevant provision is made by Rule 33 of the Armed Forces (Court Martial) Rules 2009. Rule 33 applies to a number of situations in which the accused was not subject to Service law at the commencement of the proceedings. Where Rule 33 applies, each of the lay members must be either a person not subject to Service law, who is qualified for membership and not ineligible, or an officer or warrant officer who is qualified and not ineligible. By Rule 33(5)(a) the proceedings to which the rule applies include "trial proceedings if any defendant is not subject to Service law at the commencement of the proceedings". We draw attention to the fact that the paragraph speaks of "the commencement of the proceedings", not "the commencement of the trial proceedings", or "the commencement of those proceedings".

33. Two questions then arise. We must first consider whether this applicant is within the category of a defendant who is "not subject to Service law at the commencement of the proceedings". If he is not, then Rule 33 has no application; the general rule in section 155(3) of the 2006 Act applies, and the lay members must all be officers. If he is, however, then Rule 33 applies, and the lay members may be civilians or officers, or a mixture of the two.

34. The second question which we would then have to consider is whether the decision as to the composition of the Board of lay members is a decision for the Judge Advocate or for the CAO.

35. As we have noted, Rule 2 of the 2009 Rules defines references in those rules to "proceedings" as including various types or stages of proceedings, one of which is trial proceedings. It is, in our view, clear from the use of the word "includes" that the list in paragraphs (a) to (g) of that Rule is not exhaustive. Moreover, the only express exclusion from

the meaning of "proceedings" is the exclusion relating to the exercise of any power of the court otherwise than at a hearing.

36. It follows, in our view, that the focus must be on the ordinary meaning of the word "proceedings", which is capable of including the whole of the criminal proceedings from the time when the Director of Service Prosecutions, acting under section 121 of the 2006 Act, charges or directs the charging of a defendant, and by virtue of section 122 the charge is allocated for trial in the Court Martial.

37. It further follows that we are unable to accept the submission that the reference in Rule 33(5)(a) to "the commencement of the proceedings" must mean either the preliminary proceedings hearing at which a defendant is arraigned, or the trial hearing itself. As this case illustrates, a significant period of time may elapse, and there may be several hearings, before a defendant is arraigned. There may, in different circumstances, be early hearings at which a defendant is not present to be arraigned, for example because he has absconded. There may, for one reason or another, be a lengthy delay before any hearing at all takes place.

38. We can see no reason why it cannot be said that "the proceedings" have commenced when a defendant's case has been allocated for trial in the Court Martial, but there has not yet been a hearing, or the defendant has not yet appeared before the Court Martial, or the defendant has not yet been arraigned. Indeed, it seems to us that the contrary interpretation for which the parties contended gives rise to a substantial risk of arbitrary distinctions being drawn according to the date when a hearing is first convened.

39. Those reflections lead us to conclude that the proceedings against this applicant commenced when he was charged on 18th May 2023. He was at that time subject to Service law. He is not therefore within the category of defendant to whom Rule 33(5)(a) refers. Rule

33 has no application to his case. The general rule in section 155(3) of the 2006 Act applies and the lay members at his Court Martial must all be officers.

40. We next consider the submissions as to the respective roles of the Judge Advocate and of the CAO in relation to the constitution of a Court Martial which includes lay members. In our view, section 155 of the 2006 Act and the provisions of Part 4 of the Rules draw a distinction between a decision as to the composition of the Board, and the identification of the individuals who will make up that composition. The former, including decisions as to the number of lay members and decisions as to whether the lay members must or may include civilians as well as, or in place of, officers, is a decision for a Judge Advocate to make. The latter, involving the selection at random of persons included in the relevant Panel or Panels of prospective lay members is a decision for the CAO.

41. That interpretation is, we think, consistent with the use in section 155(5) and (6) of the word "specified", which connotes the selection or identification of an individual or individuals from a particular category. Consistently with the independence of his role, the CAO is not subject to any direction by a Judge Advocate when performing his function of specifying the individuals who will make up the appropriate constitution of a Board of lay members.

42. It follows that in a case where the legislation requires there to be lay members but permits the lay members to be officers, civilians or a mixture of the two, a Judge Advocate must give a direction as to the category or categories from which the individual members are to be selected. That direction will be binding on the CAO, who must then specify members from the category or categories directed by the Judge Advocate. If made in preliminary proceedings, the Judge Advocate's direction may be appealed, pursuant to Rule 50 of the 2009 Rules. But the specifying of the individual lay members will be a matter exclusively for the CAO.

43. Drawing these threads together, we conclude:

(1) If Rule 33(5)(a) had applied to this case it would have been necessary for the Judge Advocate to give a direction as to whether the lay members should all be civilians or should all be officers, or should be a mixture of civilians and officers. The Judge Advocate therefore fell into error in deciding that he had no such power.

(2) However, Rule 33(5)(a) did not apply to this case because the applicant was subject to Service law when the proceedings were commenced.

(3) The lay members must therefore all be officers, to be specified by the CAO.

44. The essential ruling of the Judge Advocate was that the application to him to direct the CAO to specify a civilian-only Board failed and was dismissed. Although we have found that the route by which the Judge Advocate reached that decision was flawed, the decision itself was correct, because in the circumstances of this case the 2006 Act requires that all the lay members must be officers.

45. We readily accept that the appeal has raised arguable issues. But for the reasons we have given, there can be no successful appeal. We therefore grant the applicant the necessary extension of time and grant him leave to appeal, but we dismiss his appeal.

46. It will be for the CAO to specify the officers who will be the lay members. We hope it will be possible for that to be done promptly so that the trial may proceed on its scheduled date.

(There followed a short discussion on the reporting of the proceedings)

(The court retired to confer)

LORD JUSTICE HOLROYDE:

47. In all the circumstances we are not persuaded that the court has any power to postpone publication of the judgment. We therefore make no order in that regard under section 4(2) of the Contempt of Court Act 1981. But nor do we direct expedition in the preparation of the transcript. The date of the hearing means in practical terms that the transcript is not going to be prepared and approved by the court before the start of next term, which will be after the trial has begun – and in all probability after it has ended.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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