FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Record No: 292/2021

Edwards J. **Neutral Citation Number [2023] IECA 88**

Noonan J.

Faherty J.

Between/

NIALL ROBINSON

Appellant

-AND-

THE MINISTER FOR DEFENCE, THE ATTORNEY GENERAL AND IRELAND

Respondents

Judgment of Mr Justice Edwards delivered on the 17th of April 2023.

Introduction

1. This is an appeal against the judgment of the High Court (O'Regan J.) delivered on the 22nd of October 2021 and the consequent Order of the 4th of November 2021 (perfected on the 5th of November 2021) refusing an application brought by the appellant by a Notice of Motion dated the 20th of December 2019 seeking diverse orders against the respondents by way of judicial review, and awarding costs to the respondents as against the appellant, leave to apply for judicial review having been granted by the High Court on the 16th of December 2019.

Background:

2. The Defence Forces are comprised of the Permanent Defence Force (which in turn consists of three services, namely the Army, the Air Corps and the Naval Service) and the Reserve Defence Force (comprising the Army Reserve, formerly known as the FCA, and the Naval Service Reserve, formerly known as An Slua Muirí). Defence Forces personnel, both commissioned and non-commissioned, in the Army, the Air Corps, and the Army Reserve, hold army ranks (or equivalent); while those in the Naval Service and the Naval Service Reserve hold naval ranks.

3. The appellant, Mr. Robinson, is a Sergeant (otherwise "Sgt") assigned to the Air Corps as a Senior Airborne Radar Operator ("SARO") Instructor. At the time of the High Court judgment, the appellant's Defence Forces career spanned more than 21 years. He had applied for, and was refused, a promotion to Flight Sergeant (otherwise "FSgt") SARO, a Non Commissioned Officer ("NCO") position within the Air Corps the holder of which enjoys a rank equivalent to a Company Sergeant (otherwise "Coy Sgt") in the Army. Being dissatisfied with the basis on which he had been refused promotion, and considering it to have been legally infirm, the appellant initiated these judicial review proceedings.

4. Before considering the basis of his application in more detail it is necessary to outline the legislative and regulatory framework within which the controversy arises.

Relevant legislation / regulations / administrative instructions

5. Section 84, sub-section (1) of the Defence Act 1954 (i.e. "the Act of 1954"), as amended, provides:-

"*(1) The Minister or any officer authorised by him in that behalf may promote—*

(a) any man holding a non-commissioned army rank to a higher substantive non-commissioned army rank,

> *(b) any man holding a non-commissioned naval rank to a higher substantive non-commissioned naval rank.*"

6. Section 26 of the Act of 1954 provides that the Minister may make regulations, not inconsistent with that Act, in relation to all or any of the matters mentioned in the Fourth Schedule thereto. The Fourth Schedule contains a long list of the matters in respect of which regulations may be made under s. 26, including *inter alia* the appointments to be held by officers and men; the examination of members of the Defence Forces as to proficiency in military subjects and as to their general educational or technical qualifications, and the granting of certificates of proficiency, and; the classification of men by reference to particular ranks or grades of ranks, qualifications or appointments. It also provides for the making of such regulations, "*concerning any other matter or thing which is not otherwise expressly provided for by or under this Act and which, in the opinion of the Minister, is necessary for securing the good government, efficiency and internal control and management of the Defence Forces or for carrying out and giving effect to this Act*".

7. In a measure aimed at securing the good government, efficiency and internal control and management of the Defence Forces, and at carrying out and giving effect to the Act of 1954, the Minister, by means of regulations made under s. 26 of the Act of 1954, established a classification of measures by which members of the Defence Forces would either be bound and required to adhere to, alternatively informed as to and guided by, as the case might be, in the context their military service. The regulations in question were Defence Force Regulations S.1. (i.e "DFR S.1.").

8. Under DFR S.1. such measures would fall into three categories, namely (1) Defence Force Regulations (of which DFR S.1. was itself an example); (2) Administrative Instructions authorised by and issued pursuant to Defence Force Regulations, providing for such matters (other than those required to be made or prescribed in Defence Force Regulations) which

"*require to be or are convenient to be published for the general information and guidance of members of the Defence Forces*", and; (3) General Routine Orders, which are defined as "*dealing with such matters (other than those prescribed in Defence Force Regulations or provided for in Administrative Instructions) which are published for the general information and guidance of members of the Defence Forces.*"

9. In the justiciable controversy that arises for determination in this litigation, we will be primarily concerned with 'A' Administrative Instructions Part 10, (i.e. "'A' Admin Instr Pt.10" or "the relevant Administrative Instructions") which state internally that they are required to be read in conjunction with Defence Force Regulations A10 ("DFR A10") and General Routine Orders 43/1955 (i.e. "GRO 43/55") concerning personnel matters. As regards GRO 43/55, however, while alluded to here for completeness, they contain nothing of relevance to the issues that require to be addressed on this appeal and it will be unnecessary to further reference them.

10. DFR A10, however, are relevant to the extent that they are the Defence Force Regulations pursuant to which the relevant Administrative Instructions were issued. Further, they provide in para. 42 (1) thereof that:

> "*Promotion from the rank of Corporal to the rank of Sergeant will be made by the Deputy Chief of Staff (Support) or the Director, Personnel Section to fill vacancies in the Establishments (subject to any notification under subparagraph (2)). A Corporal, however, may be promoted to the rank of Sergeant because of meritorious service for distinguished conduct. <u>Promotion above the rank of Sergeant will also be made by the Deputy Chief of Staff (Support) or the Director, Personnel Section to fill vacancies in the Establishments.</u> Recommendations for promotion will be made on Army Form 235A. An appropriate entry covering the promotion and date of effect shall be published in Routine Orders without delay.*"

[Emphasis by underlining added]

11. Annex Y to ‘A’ Admin Instr Pt.10 is entitled “*NCO PROMOTION CANDIDATES ESSENTIAL ELIGIBILITY QUALIFICATIONS*”. It comprises a table laid out in four columns labelled “*1. Current Rank*”, “*2. Vacant Rank*” “*3. Essential Qualifications Required for NCO Promotion*” and “*4. Remarks*”, respectively. A note to the user of the table instructs that:

> “*NCO's of the rank/s listed in Column 1 will be eligible to be considered for promotion to the rank listed in Column 2, provided they possess the essential qualifications listed in Column 3 and*
>
> 1. *They possess the skill/trade/profession as listed in appendix 1 to Annex X A Admin Instr Part 10, to compete for promotion to the next higher rank in that particular skill/trade/profession.*
> 2. *Have successfully completed the relevant career course pertaining to the rank.*”

12. What is at issue here is the section of the table relating to the current rank of Sergeant (or equivalent), and the vacant rank of Company Sergeant (or equivalent (in this instance Flight Sergeant within the Air Corp)). The pertinent remarks in Column 4 are of no relevance in terms of the justiciable controversy that requires to be determined, and it is unnecessary to allude to them. However, of central relevance are the essential qualifications for the promotion, specified in Column 3. These are specified as being:

> “*1. Have successfully completed a Senior NCO Course approved by the General Staff.*
>
> *OR*
>
> *Have reached a satisfactory standard of training as certified by the Corps Director concerned.*
>
> *AND*

2. *SGT who possess qualifications in one of the trades listed in Appendix 1 to Annex X and who do not have a Senior NCO course completed are solely qualified to fill a trade vacancy listed in Appendix 1.*
3. *Have medical Classification of:*

   Under 40 YY 11534
   Over 40 YY 22534".

13. Finally, as there will be reference to it later in this judgment, it is appropriate to note the terms of s. 114 of the Act of 1954 dealing with redress of wrongs. It provides (to the extent relevant):

> *"(2) If any man thinks himself wronged in any matter by any officer, other than his company commander, or by any man he may complain thereof to his company commander, and if he thinks himself wronged by his company commander either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof in the prescribed manner to the Adjutant-General, who, if so required by the man, shall report on the matter of the complaint to the Minister who shall inquire into the complaint and give his directions thereon.*
>
> *(3) Every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of, and shall in every case inform the complainant in the prescribed manner as to what action has been taken in respect of the matter complained of.*"

<u>*The Promotion Competition at Issue.*</u>

14. The procedures used by the Permanent Defence Force for promotion of members within the organisation were briefly outlined by Lieutenant Colonel ("Lt. Col.") Ridge in his affidavit sworn on the 7th of January 2021 verifying the facts contained within the respondents' statement of opposition:

"*3. I say that, at this stage of my affidavit, it would be of assistance to the Court to give a brief explanation of the procedures used by the Permanent Defence Forces for promotion of members within the said organisation. The legislation governing promotion is set out at Section 84 of the Defence Acts 1954 – 2015. When a promotion competition is launched, members are notified of same by way of a Promotion Competition document ("PC document"), which sets out the eligibility criteria that must be met by a candidate to be considered for each particular promotion. If a member meets the criteria as set out in the PC document they are sent forward for an interview and if successful, they are then placed on the order of merit. When a vacancy requiring that particular member's skills becomes available and depending on one's position on the order of merit, one will then be promoted to that position. It should be noted that the composition of the criteria for any particular promotion is composed by Deputy Chief of Staff (Support) in line with the aforementioned legislation.*"

15. On the 24th of July 2019, the Defence Forces issued a Promotion Competition document inviting applications for promotion to certain positions within the Defence Forces. Therein, specifically at para. 5, it described the "*Essential Qualifications to be Eligible for Interview for Company Sergeant*" as consisting of

"*a. Qualifying Course*

(1) Have successfully completed a Senior NCO Course approved by the General Staff.

OR

(2) Have reached a satisfactory standard of training as certified by the corps director concerned.

AND

(3) Sergeants who possess qualifications in one of the trades listed in Appendix 1 to Annex X (Tech 3-6) and who do not have a Senior NCO Course completed are solely qualified to fill a trade vacancy listed in Appendix 1.

b. Service

(1) Have served in the lower rank for at least three (3) years on closing date for application for the competition."

16. As can be seen, the "*Essential Qualifications*" specified in the Promotion Competition invitation were substantially a reiteration of the "*Essential Eligibility Qualifications*" set down in respect of NCO promotion from a current rank of Sergeant to Company Sergeant as described in the relevant Administrative Instructions.

17. In August 2019, the appellant made an application for promotion to the rank of Flight Sergeant pursuant to the Promotion Competition document. The appellant maintains that he met all the criteria for promotion to the rank of Flight Sergeant, save for the fact that he had not completed a Senior NCO course.

18. On the 27th of August 2019, a Commandant ("Comdt.") O'Grady at Air Corp Headquarters wrote to the appellant's Commanding Officer ("CO") informing him that the appellant was not eligible for consideration for promotion to Flight Sergeant as he did not

meet "*the Essential Qualifications as per Para 5 a. of Ref 1 (qualifying course) and therefore cannot be deemed eligible for interview for Coy Sgt/FSgt.*"

19. On the 10th of September 2019, the appellant wrote to the Department of Defence by e-mail seeking confirmation that he had reached a satisfactory standard of training to fill his current role as Sergeant SARO Instructor as certified by the Corps Director. It is not clear from the papers submitted to the Court if he received any direct response to this e-mail.

20. Be that as it may, by a letter dated the 23rd of September 2019 addressed (per a plain copy exhibited by the appellant) to "*Chief of Staff through Officer Commanding No 1* [*Operations Wing*]", the appellant intimated a wish to make an application pursuant to s. 114 of the Act of 1954 for redress of wrongs, citing "*an unfair and unjust decision by Comdt O'Grady ACHQ to deny me the opportunity to interview for Coy/Sgt/FSgt despite meeting the qualifying criteria*". He further complained that "*unfair practice and procedures*" had taken place, and characterised what had occurred as *"mal-administration by the relevant military authorities."*

21. It should be observed that the Officer Commanding No. 1 Operations Wing (otherwise "OC No. 1 Ops Wing") , through whom the copy letter which was exhibited was purportedly addressed, was not the appellant's immediate commanding officer. That was his Squadron Commander, a Comdt. Byrne. The Officer Commanding No. 1 Operations Wing, a Lt. Col. Walsh, was rather his Unit Commander, who ranked above his Squadron Commander in the chain of command. Strictly speaking, per s. 114 of the Act of 1954, the complaint should have been addressed to his immediate commanding officer in the first instance, and addressing it to his Unit Commander would have represented an irregularity. However, there is reason to suspect the letter may have been amended before being submitted because a Comdt. Hynes, a Military Investigating Officer who in due course investigated the complaint, refers in his report dated the 24th of October 2019 to the complaint as being

"dated 25 Sept 2019 at 15.30 hours", and states that it was furnished by the appellant to Comdt. Byrne on the 26th of September 2019. I will come back to this momentarily, but it is desirable before doing so to record another event in the chronology.

22. On the 24th of September 2019, the appellant also wrote a joint letter, in conjunction with two colleagues who had similarly been deemed ineligible for interview for possible promotion, addressed to their Corps Director, being the General Officer Commanding (otherwise "GOC") Air Corps, who was Brigadier General O'Connor, outlining their circumstances and stating, "*we respectfully seek clarification that we have reached a satisfactory standard of training as certified by you as per Para 5, Part 2 as a matter of urgency*".

23. As was required by military protocol, this joint letter, although addressed to the GOC, was not transmitted directly to him but rather was passed up to him through the appropriate chain of command. Unbeknownst to the appellant at the time, the appellant's Squadron Commander, the aforementioned Comdt. Byrne, through whose hands as a link in the chain of command the joint letter was required to pass, affixed a cover letter authored by him to the joint letter to the GOC before passing it up the chain. In this cover letter, Comdt. Byrne expressed his view that the completion of a senior NCO course was an essential requirement for promotion to the rank of Flight Sergeant, and that the appellant should not be permitted to enter the promotion competition on the basis that he had not completed such a course.

24. Returning to the intended s. 114 complaint, the aforementioned report of the Military Investigating Officer, Comdt. Hynes, indicates that, upon receiving the appellant's s. 114 application, "*Comdt Byrne informed Sgt Robinson that he could expect a reply from the GOC to his letter* (Ref G) *on the morning of the 27 Sept 2019. At Sgt Robinson's request, Comdt Byrne held his application for Redress of Wrongs until Sgt Robinson's receipt of the GOC's response the next morning, the 27 Sep 2019.*"

25. The GOC replied in writing to the said joint letter on the 26th of September 2019. Again, in accordance with the previously mentioned military protocol, his reply was passed back down the chain of command, initially passing through the hands of the appellant's Unit Commander, the OC No 1 Ops Wing, to the appellant's Squadron Commander, and was ultimately received by the appellant at some point on the 27th of September 2019. Therein, the GOC refused to certify that the appellant had reached a satisfactory standard of training to be eligible for promotion to the rank of Flight Sergeant. The GOC wrote:

> "*While I am satisfied that the SARO personnel meet the additional requirements as specified in Annex XYZ, they do NOT meet the essential qualifications in Annex Y. They have NOT completed a Senior NCO Course, nor have they been certified as having reached a satisfactory standard of training. It is my policy, that apart from those instances where the exigencies of the service require it, all personnel should complete the Senior NCO Course prior to promotion to Senior NCO rank.*"

26. The appellant was paraded before Comdt. Byrne on the morning of the 27th of September 2019 and handed the GOC's said letter. He was urged by Comdt. Byrne to take some time to carefully read it and then to confirm his intended course of action. He did so, and subsequently decided that his s. 114 Redress of Wrongs application, which was being temporarily held in abeyance, should at that stage be formally submitted.

27. On the 2nd of October 2019, Comdt. Hynes was appointed Military Investigating Officer to investigate the appellant's complaints.

28. In a letter dated the 2nd of October 2019 sent by the appellant's solicitor to the respondents, the appellant contended that the GOC should have certified him as eligible for promotion on the basis that he had attained a satisfactory level of training. On the 9th of October 2019, the respondents replied by letter stating *inter alia*,

"*2. GOC Air Corps deems that the acceptable standard of training is the completion of a Senior NCO Course, which Sgt Robinson has NOT completed.*"

29. Comdt. Hynes issued his report on the 24th of October 2019. Therein, he rejected the appellant's complaints and opined that he was not entitled to redress. Comdt. Hynes further expressed the opinion that it was not possible to accommodate the appellant's request to be allowed to sit for interview. This report was forwarded to the GOC Air Corps, who accepted it, and his decision in that regard was then communicated to the appellant, by being passed down through the chain of command.

30. The appellant's application for redress of wrongs having been rejected, he then complained to the Ombudsman for the Defence Forces (i.e. "the Ombudsman"). His complaint was duly considered by the Ombudsman, who reported on the 4th of December 2019. The Ombudsman concluded:

"*DISCUSSION, ANALYSIS and DECISION*

14. The Complainant acknowledges that he has not completed a Senior NCO's Course (as specified in Annex Y of "A" Admin Instr Pt.10). He maintains however that he satisfies the alternative to the Senior NCOs Course, namely he has reached a satisfactory standard of training.

15. It is evident that the completion of the Senior NCO's course carries with it the assumption that a satisfactory standard of training has been achieved. The alternative eligibility criteria of having reached a satisfactory standard of training requires an objective assessment 'certified by the Corps Director'. Such an assessment is, it is assumed, based on, inter-alia, reports and information provided to the Director by individuals of sufficient seniority and with appropriate expertise and who are thereby in a position to assess the Complainant's level of training, knowledge and expertise.

16. *In the absence of any evidence to suggest that this assessment of the Complainant's level of training has not been undertaken in an objective and fair manner it would be inappropriate for me as Ombudsman for the Defence Forces to determine that assessment to be unfair or otherwise insufficient. I do not have such evidence and I therefore cannot uphold the complaint in this respect. The fact that the Complainant did not receive the recommendation of his Unit Commander is in any event fatal to his complaint.*

17. *It is appropriate to emphasise that the criteria in question requires, EITHER completion of a senior NCO course OR certification that a satisfactory standard of training. In this respect it is noteworthy that in his letter of 26 September 2019 addressed to Lt Col Walsh OC No 1 Ops Wing the GOC states:-*

> *'It is my policy, that apart from those instances where the exigencies of the service require it, all personnel should complete the Senior NCO Course prior to promotion to Senior NCO rank.'*

While an expression of a preference for completion of a Senior NCO Course is understandable it is nonetheless the position that Annex Y clearly provides for the two alternative qualifying criteria, and any policy suggesting that one of the qualifying criteria is to preferred or that one should only feature in exceptional circumstances would clearly be in conflict with that provision.

18. *Having regard to the fact that the Complainant failed to qualify because a satisfactory standard of training had not been achieved and while accepting that this decision deems the Complainant not to be eligible for this competition it remains the position, in the interests of natural justice, that the Complainant be advised as to the aspects of his training identified as having*

fallen short of satisfactory. He is entitled to be provided with such information in exactly the same way as a person who has failed in an examination or test is entitled to be advised as to the reasons for such failure.

RECOMMENDATION

19. I recommend that a suitably qualified and experienced officer provide the complainant with information as to those aspects of his training which were deemed to fall short of what was required in respect of this Promotion Competition."

31. Having been unsuccessful both in seeking redress of wrongs pursuant to s. 114 of the Act of 1954, and also in persuading the Ombudsman for the Defence Forces to uphold his complaints, the appellant commenced the present proceedings.

The Judicial Review Proceedings

32. On the 16th of December 2019, counsel for the appellant successfully applied *ex parte* to the High Court (before Meenan J.) for leave to apply for judicial review seeking the following reliefs:-

"*1. An Order of certiorari quashing the decision of the General Officer Commanding, Air Corps, a servant or agent of the Respondents, dated the 26th of September 2019, to refuse to certify the Applicant as having reached a satisfactory standard of training to qualify for consideration for promotion to the rank of Flight Sergeant Senior Sensor Airborne Radar Operator Instructor, 101 Squadron.*

2. If necessary, an Order of mandamus directing the General Officer Commanding, Air Corps, a servant or agent of the Respondents, to consider the Applicant's individual level of training in order to assess whether the Applicant satisfies the criteria for promotion to the rank of Flight Sergeant Senior Sensor

Airborne Radar Operator Instructor, 101 Squadron, as set out a paragraph 5a(2) of the Promotion Competition document, and in Administrative Instruction Part 10.

3. If necessary, an Order of certiorari quashing the decision of the Respondents, their servants or agents, not to consider the Applicant for promotion to the rank of Flight Sergeant Senior Sensor Airborne Radar Operator Instructor, 101 Squadron, on the basis that the Applicant did not meet the qualifying criteria set out in the Promotion Competition document, and in Administrative Instruction Part 10.

4. If necessary, an Order of mandamus directing the Respondents, their servants or agents, to consider and interview the Applicant in respect of promotion to the rank of Flight Sergeant Senior Sensor Airborne Radar Operator Instructor, 101 Squadron.

5. If necessary, an Order of mandamus directing the Respondents, their servants or agents, to amend the Order of Merit in respect of promotions within the Permanent Defence Force, once it has been published, to include the Applicant, once he has been interviewed and considered for promotion to the rank of Flight Sergeant Senior Sensor Airborne Radar Operator Instructor, 101 Squadron.

6. If necessary, an Order of certiorari quashing the decision of the Applicant's Commanding Officer not to recommend him for promotion within the Permanent Defence Force.

7. A Declaration that Administrative Instruction Part 10, and the Promotion Competition document promulgated thereunder, require the relevant corps director to consider each candidate for promotion individually, in order to satisfy himself as to whether they should be certified as having reached a satisfactory standard of training to be eligible for promotion within the Permanent Defence Force.

8. An interim and/or interlocutory injunction prohibiting the Respondents, their servants or agents, from promoting any member of the Permanent Defence Force to

the rank of Flight Sergeant Senior Sensor Airborne Radar Operator Instructor, 101 Squadron, pending the determination of the within proceedings, or further order of this Honourable Court.

9. Damages.

10. Such further or other order as this Honourable Court shall deem fit.

11. The costs of, and pursuant to, these proceedings."

33. The permitted grounds of application were those set out in detail at "E" in the Statement Required to Ground Application for Judicial Review, which grounds included claims that the GOC, as a servant or agent of the respondents, in determining that no training other than the completion of a Senior NCO course was satisfactory for eligibility for promotion to the rank of Flight Sergeant had adopted a fixed and inflexible policy, and had unlawfully fettered the discretion afforded to him by 'A' Admin Instr Pt.10 . It was contended that this constituted an error of law on the part of the respondents and that in so acting they had acted irrationally and *ultra vires* their powers pursuant to the Defence Acts 1954 – 2007 and the regulations made pursuant thereto. It was also alleged that the respondents had conducted the 2019 NCO Promotion Competition in a manner which was contrary to the instructions and express policy governing the competition, and that in doing so they had acted unlawfully and *ultra vires* their powers and in doing so had denied the appellant fair procedures.

34. It was further alleged that the GOC had treated the appellant's ineligibility for consideration under para. 5a(1) of the Promotion Competition as dispositive of whether he was eligible to be considered under para. 5a(2). In doing so, it was said that the GOC took into account irrelevant considerations and acted irrationally and/or unreasonably in the circumstances.

35. Further, it was said, the "*cover letter*" attached by Comdt. Byrne to the joint letter sent to the GOC on the 24th of September 2019 constituted an unauthorised or irregular submission

in the context of the Promotion Competition and in any case took into account irrelevant factors and was an irrational and unreasonable interference in the process. In permitting this intervention, the respondents were said to have failed to vindicate the appellant's right to fair procedures and to natural and constitutional justice, and were said to have acted unlawfully and *ultra vires* their powers.

36. It was further complained that both the GOC as agent of the respondents, and the respondents themselves, had erred in law in their interpretation of the Promotion Competition document and 'A' Admin Instr Pt.10, which interpretation permitted the appellant to be disqualified from consideration for promotion on the basis that he could not meet the qualification criteria in para. 5a(2) merely on the basis that he had not met the qualification criteria in para. 5a(1), notwithstanding that these were expressed to be alternatives.

37. Further, it was claimed that the appellant had a legitimate expectation that his eligibility for promotion would be assessed according to the criteria set out in para. 5a of the Promotion Competition document and as set out in Annex Y to 'A' Admin Instr Pt.10.

38. The application for judicial review, which was opposed by the respondents, was heard before the High Court (O'Regan J.) on the 5th of October 2021, and the appellant was unsuccessful.

The Judgment of the High Court

39. In her judgment delivered on the 22nd of October 2021 the High Court judge set out the background to the case and the procedural history of the litigation, before proceeding to consider the various authorities to which she had been referred in argument. These included, *Rowland v. An Post* [2017] IESC 20; *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403; *Breen v. Minister for Defence* [1994] 2 I.R. 34; *Carrigaline Community TV Broadcasting & Ors v. Minister for Transport & Ors* [1997] 1 I.L.R.M. 241; *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642; *Farmleigh Limited v. Temple*

Bar Renewal Limited [1999] 2 I.R. 508; *Mishra v. Minister for Justice* [1996] 1 I.R. 189; *McAlister v. Minister for Justice* [2003] 4 I.R. 35; *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, and; *McCarron & Ors v. Kearney & Ors* [2010] IESC 28.

40. The curial part of her judgment then runs from paras. 35 to 46 inclusive and she deals with the issues arising under the headings "*Fixed and inflexible policy*", "*Irrelevant considerations*", "*Individual circumstances*" and "*Legitimate expectation*".

Fixed and inflexible policy

41. In regard to the claim based upon a fixed and inflexible policy, the High Court judge felt that the decision of the GOC of the 26th of September 2019 had to be looked at in context. In particular, regard was to be had to the query which arose in the letter of the 24th of September 2019 (being the joint letter sent by the appellant and his rtwo colleagues to the GOC).

42. The decision in the letter of the 26th of September 2019 which it was sought to impugn stated that it was the author's policy that apart from those circumstances where the exigencies of the service required it, all personnel should complete a senior NCO course prior to promotion. The High Court judge noted that the appellant's Statement of Grounds did not in fact mention or otherwise consider "*the exigencies of the service*", notwithstanding that it appeared to be the case that the request by him of the 24th of September 2019 had its sights on this policy. The appellant's letter addressed "*the exigencies of the service*" insofar as it referred to the potential retirement of the existing flight sergeant, and the potential consequences of a vacancy in such an essential operational position.

43. In the High Court judge's view, *"paragraph E13 of the Statement of Grounds incorrectly records the decision of the 26 September 2019 by failing to make any reference whatsoever to the actual policy identified."* She considered that this lapse was such that it

was not possible in the context of the proceedings before her to determine whether or not the policy actually recorded could be considered a rigid inflexible policy or not.

44. Further, the High Court judge regarded it as being significant that there had been no submission in the letter of the 24th of September 2019 as to how the training and experience of the three personnel involved could be certified, nor did the letter highlight any differential in training as between the three applicants. It therefore appeared to her to be the case that the application was made on the basis that the training and experience of the appellant and his colleagues spoke for itself, with no requirement for additional submissions or argument. In the High Court judge's view there had been no engagement with the possibility of such training and experience being of a standard which might equate or closely mirror the senior NCO course.

45. For those reasons the High Court judge concluded that the appellant had not discharged the burden on him "*to establish that it was a fixed and inflexible policy operated by the GOC in the current circumstances, or that the decision might be considered irrational or unreasonable*".

Irrelevant considerations

46. Insofar as it was complained that the GOC followed, or was otherwise influenced by, the CO's cover letter, the High Court judge concluded that there was no evidence in the decision of the 26th of September 2019 to support such a contention. That decision had referred to the GOC's policy.

47. Furthermore, the High Court judge considered that it was clear from the Statement of Grounds that in advance of the communication of the 24th of September 2019 the appellant was aware of his CO's views, and indeed of the fact that the GOC shared such views as to the necessity of having a senior NCO course (although clearly the NCO's views were tempered by "[...] *apart from those instances where the exigencies of the service require it* [...]"). In

those circumstances O'Regan J. was not satisfied that the appellant had established that the GOC took into account irrelevant considerations.

Individual circumstances

48. In respect of the appellant's complaint that his individual circumstances were not taken into account, the High Court judge noted that the letter of the 24th of September 2019 had not pointed to any differential in the individual circumstances of any of the letters three authors. Moreover, she again reiterated that no representation was made by the appellant as to his training. Furthermore, at para. 4 of the decision, the GOC had stated, relative to the F.Sgt/SARO position, "*I appreciate their high level of training and their specialist skill set.*"

49. In the circumstances the High Court judge concluded that the appellant had not discharged the burden of establishing that his circumstances were not taken into account.

Legitimate expectation

50. The High Court judge then addressed the legitimate expectation argument. She noted that the argument was to the effect that, as there is an "*or*" between paras. 5a(1) and 5a(2), the para. 5a(2) requirement should by definition be something other than a requirement to have a senior NCO course, and should in fact relate to a standard referable to the training and experience of the individual applicant as opposed to the exigencies of the service.

51. In the High Court judge's view, given the content of the application made within the letter of the 24th of September 2019 (in particular that the only argument advanced was that there would be a likely vacancy that would urgently require to be filled consequent upon the possible forthcoming retirement of the current flight sergeant) and the fact that no complaint about reliance upon the "*exigencies of the service*" was raised in the Statement of Grounds, the appellant had not discharged the burden of establishing that he had a legitimate expectation in respect of procedures that had in fact been breached.

Submissions on behalf of the Appellant

52. For convenience, the submissions received will be summarised under suitable headings.

Fixed and inflexible policy / fettering of discretion

53. The appellant maintains that the trial judge erred in determining that the Statement of Grounds, in the context of the application made by the appellant for certification as eligible for promotion to the rank of Flight Sergeant, did not accurately set out the discretion exercised by the GOC, and that as a result the court was simply unable to determine whether that discretion had been exercised lawfully or not. In that regard, the appellant contends that the Statement of Grounds sets out the appellant's case correctly and precisely, as required by Order 84 RSC. The discretion in respect of which the appellant sought judicial review was correctly described as *"the discretion afforded to [the GOC] by AI 10 and the terms of the Promotion Competition"* Accordingly, the appellant did not challenge the discretion of the GOC to determine whether the "*exigencies of the service*" warranted the certification of the appellant as eligible for promotion, as no such discretion existed.

54. The appellant submits that the GOC did in fact fetter his discretion in an unlawful manner, by determining that only the completion of a Senior NCO Course was sufficient for eligibility for promotion to the rank of Flight Sergeant. It was suggested that this is a question which it was open to the trial judge to resolve, and that it is clear that the discretion afforded to the GOC by 'A' Admin Instr Pt.10 and the Promotion Competition document was fettered in respect of the refusal of the GOC to consider any "*alternative standard of training*" in lieu of the completion of the Senior NCO Course. In his written submissions, the appellant cited *Dunne v. Donoghue* [2002] 2 I.R. 533, *Holland v. Governor Of Portlaoise Prison* [2004] 2 I.R. 573; *Breen v. Minister for Defence* [1994] 2 I.R. 34; *McCarron v. Superintendent Kearney* [2010] 3 I.R. 302 and *Carrigaline Community Television Co Ltd v. Minister for*

Transport [1997] 1 I.L.R.M. 241 as providing support for his position, and each of those cases has been carefully considered.

Appellant's individual circumstances and trial judge's reliance on non-submission re qualifications

55. Issue is also taken with the trial judge's conclusion that the appellant's claim was prejudiced by his failure to make a detailed submission to the GOC in respect of his qualifications. The point is made that no such argument was advanced by the respondents in their Statement of Opposition. Further, it was the uncontested evidence of the appellant, as set out at para. 4 of his supplemental affidavit sworn on the 5th of February 2021 that the record of his training and experience was available at all material times to the GOC. No further information was sought at any time by the GOC in that regard. Further, the rules of the Promotion Competition did not require the appellant to make any such detailed submission. In the appellant's submission, it was fundamentally unfair for the High Court judge to hold his failure to make such a submission against him. Moreover, it was clear from the nature of the policy adopted by the GOC that such a submission would not have availed the appellant in any event as the GOC's position was that only completion of A Senior NCO Course was sufficient, save where the exigencies of the service require otherwise. The point is also made that it is not pleaded in the Statement of Opposition that the appellant should have made, or was required to make, a detailed submission in that regard. The appellant also seeks to emphasise that while the "*exigencies of the service*" might require the promotion of a candidate who does not possess a Senior NCO Course, the fundamental point is that there is no "*alternative standard of training*" which the GOC will accept. That point is conceded by the respondents in their Statement of Opposition, a matter on which the appellant places reliance.

Alleged failure by trial judge to address issues / conflation of issues including taking into account irrelevant considerations

56. It is complained that the trial judge failed to address, or incorrectly conflated, a number of issues raised by the appellant with the result that the appellant's case in respect of a number of heads of claim was simply not dealt with or determined. In particular, the trial judge failed to address the issue that the GOC's "*policy*" was clearly at variance with that of the first named respondent, and; that the GOC took into account irrelevant factors in treating the appellant's failure to qualify for promotion under para. 5a(1) of AI A.10 and the Promotion Competition document as dispositive of whether the appellant was qualified under para. 5a(2) thereof.

57. In his written submissions, the appellant refers to *Doyle v. Banville* [2018] 1 I.R. 505 which sets out the principles to be considered in respect of the engagement by judges at first instance with the disputes before them. Particular reliance is placed on the following passage from the judgment of Clarke J. (as he then was):

> "*Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost.* [...] *To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred.*"

Reference is also made in this context to *Betty Martin Financial Services Ltd v. EBS DAC* [2019] IECA 327 (para. 40); *Law Society v. Callanan* [2018] 2 I.R. 195 (pp. 222-223) and *Bank of Ireland Mortgage Bank v. Heron* [2015] IECA 66 (paras. 16-23), as further supporting the proposition that a court's judgment must engage adequately with the parties' respective arguments.

58. It is further complained, in the context of the claim that regard was had to irrelevant considerations, that the trial judge had erred in neglecting the respondents sworn evidence, as

set out in the affidavit of Lt. Col. Patrick Ridge, sworn on the 21st of January 2021, that the GOC had considered Comdt. Byrne's representations, and, thus, had failed to give due weight to the effect of those representations on the decision-making process of the GOC. It was further submitted in this context that the respondents were at all material times under an obligation to act fairly in their assessment of the appellant's application for promotion to the rank of Flight Sergeant, and to afford him the benefit of fair procedures. The appellant says that in circumstances where the GOC chose to give weight to the squadron commander's representations, it was incumbent on the GOC to give the appellant a chance to respond to the assertions made by Comdt. Byrne, but he was not afforded that opportunity. The appellant relies upon *State (Williams) v. Army Pensions Board* [1983] I.R. 308, and *OO v Minister for Justice* [2004] 4 I.R. 426 in this context. Further, the appellant contends that para. 11 of the Statement of Opposition indicates that the GOC was acting under the dictation of Comdt. Byrne in respect of his decision. Para. 11 is pleaded in terms that:

> "*It is admitted that the Applicants squadron commander, Commandant Byrne, a servant or agent of the Respondents, attached a covering letter to the Applicant's letter to the GOC indicating that in the view of Commandant Byrne, the completion of a senior NCO course is an essential requirement for promotion to the rank of Flight Sergeant, which the GOC agreed with. Therefore, the GOC refused to certify the Applicant as having reached a satisfactory standard of training to be eligible for promotion to the rank of Flight Sergeant*".

59. As stated earlier in this judgment the trial judge determined, based on a reference in the GOC's decision to his appreciation of the appellant's level of training and skills, that the appellant had not discharge the burden of establishing that his individual circumstances had not been taken into account. The appellant says that this interpretation of the GOC's decision

was incorrect, not least because the stated policy adopted by the GOC in this case precluded any consideration of the appellant's individual circumstances.

Legitimate expectation

60. It is submitted by the appellant that the trial judge mischaracterised the nature of the legitimate expectation upon which the appellant sought to rely and did not apply the law correctly in seeking to determine whether any such expectation existed or had been breached by the respondents.

61. The appellant argues that the respondents had promulgated a Promotion Competition which was clear in its terms, and which permitted the appellant to be considered for promotion to the rank of Flight Sergeant, provided that he had met all of the specified qualifying criteria. The criteria specified envisaged that he would qualify, even if he had not completed a Senior NCO Course, provided he met a "*satisfactory standard of training*". In promulgating these criteria, the respondents are said to have induced a legitimate expectation on the part of the appellant that his training and experience would be considered as an alternative to the completion of a Senior NCO Course, and that he would be considered for eligibility for promotion notwithstanding the fact that he had not completed such a course. It was submitted that the appellant's standard of training is exceptionally high, as demonstrated by his sworn evidence and the documents exhibited by him.

62. It was further submitted on behalf of the appellant that the promulgation of 'A' Admin Instr Pt.10 and the Promotion Competition document meets the requirement for the establishment of a legitimate expectation set out in *Glencar Exploration plc v. Mayo County Council (No 2)* [2002] 1 I.R. 84 at 162-163. The appellant maintains that 'A' Admin Instr Pt.10 clearly constitutes a representation to the appellant as a member of a limited and identifiable class of persons, upon which he acted in entering the promotion competition, and/or which forms a part of the relationship or transaction between the parties. It was said

that the representation was clear and unambiguous, and it would now be unjust for the respondents to resile from it in circumstances where the appellant has been rendered ineligible for a promotion which, if the respondents were held to their representation, he might obtain. In this context the appellant further referred to *Abrahamson v. Law Society* [1996] 1 I.R. 403; *Fakih v. Minister for Justice* [1993] 2 I.R. 406; *Power v. Minister for Social and Family Affairs* [2007 1 I.R. 543; *Curran v. Minister for Education* [2009] 4 I.R. 300, and; *Morrisey v. Minister for Defence* [2018] IEHC 672.

Incorrect interpretation of 'A' Admin Instr Pt.10

and the Promotion Competition document

63. In addressing the meaning of the relevant provisions of 'A' Admin Instr Pt.10 and the Promotion Competition document, it is submitted that para. 5a of 'A' Admin Instr Pt.10 envisages a situation in which a prospective candidate for promotion to the rank of Flight Sergeant can satisfy the qualification requirements for promotion to the rank *either* by the completion of the Senior NCO Course, *or* by having "*reached a satisfactory standard of training*". It is further submitted that, by virtue of the wording which indicates that the "*satisfactory standard of training*" is an alternative to having completed a Senior NCO Course, it is clear that it is irrational, illogical and an unlawful ordering of the scope of the provisions to remove the second alternative by an official deeming that the only acceptable standard of training is to have completed a Senior NCO Course. It is submitted that the express listing of the Senior NCO Course at para. 5a(1) is clearly intended, and must be understood, to exclude that qualification from the assessment of a satisfactory standard of training set out at para. 5a(2). The appellant suggests that any possible ambiguity as to the meaning and effect of paragraph 5a may be resolved by the application of the canons of statutory interpretation. Where the respondents have seen fit to set out the existence of satisfactory standard of training separately to the completion of a Senior NCO Course as a

way of meeting qualification requirements for promotion, effect should be given to the words used in a way that does not render them tautologous or superfluous. In that regard, the appellant referred to the judgment of Egan J. in *Cork County Council v. Whillock* [1993] 1 I.R. 231, where, with respect to statutory construction, the late learned judge stated:

> "*There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or to say anything in vain.*"

64. The appellant has submitted that in this case, the inclusion of the Senior NCO Course is a sufficient qualification for promotion at para. 5a(1) of both 'A' Admin Instr Pt.10 and of the Promotion Competition document, and its subsequent absence from para. 5a(2) in both documents, clearly indicates that the completion of a Senior NCO Course is not to be considered as "*a satisfactory standard of training*" within the meaning of para. 5a(2). The appellant maintains that in misinterpreting the relevant provisions of both 'A' Admin Instr Pt.10 and the Promotion Competition document in the manner in which he did, the GOC misdirected himself and failed to apply the clear and unambiguous policy of the respondents. In addition, the GOC erred in law in his interpretation of the relevant provisions.

65. It is further argued that the GOC erred in law and breached the appellant's right to fair procedures by taking into account matters not expressly provided for at para. 5a(2) of 'A' Admin Instr Pt.10 and of the Promotion Competition document, i.e., any matters other than whether the "*standard of training*" achieved by individual candidates for promotion and whether that standard was "*satisfactory*". The appellant relies upon *State (Cussen) v. Brennan* [1981] I.R. 131 in this context, to which due consideration has been given.

66. The appellant further takes issue with the finding that the actual policy identified in the GOC's decision was incorrectly recorded at para. E 13 of the Statement of Grounds.

There was no dispute between the parties as to the terms of the GOC's decision. The issues in the case were apparent from the pleadings, and detailed written submissions were provided by both sides. The trial judge therefore had before her sufficient materials, says the appellant, to ascertain the nature of the dispute, and to resolve it in favour of one or other of the parties.

67. The point is further made by the appellant in his written submissions that the Statement of Opposition delivered by the respondents did not raise as a ground of opposition that the appellant had incorrectly recorded the decision of the GOC, and he refers to *Balchand v. Minister for Justice* [2016] 2 I.R. 749 as being authority for the proposition that a trial judge is not permitted to go beyond the issues raised by a Statement of Opposition in determining a judicial review.

68. Further, it is contended by the appellant that the trial judge mischaracterised the claim made by the appellant at para. E 13 of the Statement of Grounds. The point is made that the paragraph in question is pleaded as follows (with emphasis added by the appellant):

> *"The GOC, as servant or agent of the Respondents, has determined that no training other than the completion of a Senior NCO Course is satisfactory for eligibility for promotion to the rank of Flight Sergeant. In doing so, the GOC has adopted a fixed and inflexible policy, and has unlawfully fettered the discretion <u>afforded to him by AI 10 and the terms of the Promotion Competition</u>. The adoption of a fixed and inflexible policy constitutes an error of law on the part of the Respondents, and in so acting, the Respondents have acted irrationally and/or unreasonably in all the circumstances, and have acted ultra vires their powers pursuant to Defence Acts 1954 – 2007, and the regulations made pursuant thereto"*

69. It was submitted that the first sentence of para. E 13 correctly states that the GOC determined that no training other than completion of the Senior NCO Course was satisfactory for eligibility for promotion. The fact that the GOC, in his decision, indicated that there was

an entirely extraneous consideration, that of the "*exigencies of the service*", which might cause him to consider promoting a candidate who had not completed the Senior NCO Course, does not alter the fact that the GOC's determination in respect of a satisfactory level of training is correctly described in para. E 13. It is submitted that the first sentence must also be read in light of the GOC's actual discretion, as set out in the second sentence of para. E 13.

70. It was further submitted that the second sentence of para. E 13 states that, in reaching the view described in the first sentence thereof, the GOC fettered his discretion; but importantly, the discretion which the appellant claims was fettered is not a discretion to be exercised by the GOC at large, but rather is the specific discretion afforded to him by para. 5a of both 'A' Admin Instr Pt.10 and the Promotion Competition document, i.e. a discretion to determine whether a candidate's "*standard of training*" is "*satisfactory*" for certification as eligible for promotion to Flight Sergeant. The discretion under challenge is not a discretion which concerns "*the exigencies of the service*" in any way. The GOC's reference to this extraneous matter does not change the nature of the discretion actually under challenge.

71. The appellant also takes issue with the High Court judge's contextualisation of the GOC's decision by way of reference to a purported or inferred submission by the appellant as to the "*exigencies of the service*". It is contended that there was only a passing reference to the imminent retirement of the current Flight Sergeant, and that it was being imbued with a significance that ought not be attached to it. The point is made that the appellant had no way of knowing prior to the 26th of September 2019 that the GOC operated a policy which involved consideration of the exigencies of the service.

72. While *AP v. DPP* [2011] 1 I.R. 729 and *Babington v. Minister for Justice* [2012] IESC 65 endorse the need for precise pleading in a Statement of Grounds, the appellant maintains that he had satisfied the criteria set out in those decisions.

73. In further support of the contention that his pleadings were adequate, the appellant points out that para. E 8 of the Statement of Grounds records the operative part of the GOC's decision verbatim, and he referred to the remarks of Fitzgerald J. in *Mahon v. Celbridge Spinning Co Ltd* [1967] I.R. 1 to the effect that the purpose of pleading is to define the issues between the parties, to confine the evidence at trial to matters relevant to those issues and to ensure that the trial proceeds to judgment without either party being taken at disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. It is submitted by the appellant that it was certainly open to the trial judge on the pleadings before her to consider whether the GOC had unlawfully fettered his discretion or whether, as the respondents contend, his discretion was not fettered.

Submissions on behalf of the Respondents

74. It is proposed to adopt the same sub-headings in summarising the respondents' submissions as were used with respect to the appellant's submissions.

Fixed and inflexible policy / fettering of discretion

75. The respondents submit that the trial judge was correct in ruling that the appellant incorrectly recorded the GOC's decision of the 26th of September 2019 in his Statement of Grounds, and that the appellant further failed to refer to the actual policy identified and ignored the reference in the GOC's decision to "*the exigencies of the service*". The respondents argue that the appellant should not be permitted raise the point that "*the exigencies of the service*" relate to "*an extraneous matter which has nothing to do with the appellant's standard of training*" as the appellant did not refer to this point in his Statement of Grounds nor did he argue it before the High Court. Furthermore, the respondents refute the appellant's submission that it was not open to the learned trial judge to have determined that the GOC's decision was incorrectly recorded or that it was not possible for her to determine whether the GOC's policy was fixed or inflexible without the respondents having pleaded

this in their Statement of Opposition. On this point, the respondents submit that the burden lay with the appellant to establish the basis upon which he was entitled to the reliefs he has sought in these proceedings, as opposed to there being any onus on the part of the respondents to object to the inadequacy of the appellant's Statement of Grounds.

76. The respondents further argue that the key issues at the heart of the case were addressed by the trial judge. The reference to the "*exigences of the service*" was an important aspect of the GOC's decision, contrary to the appellant's submissions, as it was indicative of the GOC having not adopted a fixed and inflexible policy. The respondents submit that it was implicit in the GOC's decision that the GOC was not required by the exigencies of the service to depart from his general policy requiring applicants for promotion to have completed a Senior NCO Course. In respect of this general policy, the respondents submit that the GOC was entitled to form the view that a "*satisfactory standard of training*" under paragraph 5a(2) of the Promotion Competition document required the successful completion of the Senior NCO Course by an applicant for promotion, unless the exigences of the service required otherwise. The respondents note that this view was formed in the light of the nature of the rank of Flight Sergeant. The respondents drew the Court's attention to the first affidavit of Lt. Col. Ridge as providing an understanding of the purpose of para. 5a(2) of the Promotion Competition document and a brief description of the skills required for the rank of Flight Sergeant. Further to this, the respondents drew the Court's attention to the supplemental affidavit of Lt. Col. Ridge answering the averments in the supplemental affidavit of the appellant regarding his level of training and experience. The respondents also noted that the appellant made no submission at any stage to the effect that his level of training and experience equated to or closely mirrored the Senior NCO Course which he did not complete.

77. The respondents draw the Court's attention to a number of authorities relevant to the issue of the adoption of a fixed and inflexible policy by decision-makers. The respondents submit that this body of jurisprudence makes it clear that it is permissible – and indeed will often be sensible and reasonable – for a decision maker to set down guiding principles or policies to guide them in the exercise of their discretion. General policies and guiding principles are not prohibited, so long as the decision maker is open to departing from the policy in cases of exception. In support of this argument the respondents referred to *Mishra v. Minister for Justice* [1996] 1 I.R. 189, where Kelly J stated at p. 205:

> "*In my view there is nothing in law which forbids the Minister upon whom the discretionary power [...] is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or set of fixed rules does not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant.*"

78. The respondents further referred to *Carrigaline Community Television Broadcasting Ltd. v. Minister for Transport & Ors* (previously cited), a case relied upon by the appellant, in particular to the following passage from the judgement of Keane J. in that case, at p. 284:

> *"In the case of this and similar licensing regimes, the adoption by the licensing authority of a policy could have the advantage of ensuring some degree of consistency in the operation of the regime, thus making less likely decisions that might be categorised as capricious or arbitrary. But it is also clear that inflexible adherence to such a policy may result in a countervailing injustice. The case law in both this*

jurisdiction and the United Kingdom illustrates the difficulties in balancing these competing values."

The respondents submitted that this is authority for the proposition that prohibited adherence to a fixed and inflexible policy is distinguishable from permissible guidance by policy in circumstances where a decision-maker is willing to depart from their general policy in exceptional circumstances.

Appellant's individual circumstances and trial judge's

reliance on non-submission re qualifications

79. The respondents submit that the appellant, in applying for the promotion competition, was responsible for proving that he had attained a satisfactory standard of training within the meaning of para. 5a(2). They repeat an earlier observation that at no point did the appellant make a submission to the effect that his standard of training and experience equated to or closely mirrored the Senior NCO Course, which the appellant was entitled to do when making his application or in his correspondence with the GOC. The respondents further submit that the appellant had not discharged the burden of establishing that his individual circumstances were not taken into account by the GOC in considering the appellant's application. The respondents argue that it is clear from the text of the GOC's letter of 26th of September 2019 that the GOC had an awareness of the appellant's training and skills. The respondents refute the appellant's submission that the reference to "*their high level of training and their specialist skillset*" in the GOC's letter was "*merely of a generic nature and a nicety, and not indicative of any consideration of the appellant's level of training*" and the respondents observe that the appellant does not provide evidence to support this assertion. Lastly, the respondents submit that it was implicit in the GOC's decision that, even in circumstances where the exigencies of the service require it, the GOC still has to assess

whether the standard of training and experience of an individual applicant who has not completed a Senior NCO Course is sufficient in order to be certified.

Alleged failure by trial judge to address issues / conflation of issues including taking into account irrelevant considerations

80. In respect of the claim that irrelevant considerations were taken into account the respondents submit that in the context of the promotion competition, it was "*reasonable and advisable*" for the GOC to have regard to representations made by someone under whom an individual applicant for promotion has worked prior to any consideration of that applicant for promotion. In this regard, the respondents say the views of Comdt. Byrne could not be considered irrelevant matters or considerations and accordingly there was nothing unusual about his views being passed up the chain of command. The respondents submit that the GOC, in having regard to Comdt. Byrne's views, was not acting under dictation by Comdt. Byrne, and that the taking into account of Comdt. Byrne's views by the GOC did not fetter the GOC's discretion. The respondents further submit that the trial judge was correct in rejecting an argument advanced by the appellant that the respondents in their Statement of Opposition admitted that the GOC relied upon the views of Comdt. Byrne and that such views formed the basis of the GOC's decision. In this regard, the respondents endorse the trial judge's interpretation of the Statement of Opposition and of the verifying affidavit of Lt. Col. Ridge.

81. The respondents further submit that there was no want of fair procedures arising from a purported failure to inform the appellant of Comdt. Byrne's cover letter, or in failing to invite representations from the appellant in circumstances where there was no requirement for the GOC to do either. The respondents submit that the decisions in *State (Williams) v. Army Pension Board* [1983] I.R. 308 and *OO v. Minister for Justice* [2004] 4 I.R. 426 are

distinguishable as the respective situations in those decisions are not analogous to those in the present case.

Legitimate expectation

82. The respondents submit that the regulating documents relating to the promotion competition did not indicate that the "*satisfactory standard of training*" must be lower than the standard provided by the Senior NCO Course. As such, they submit, there was no expectation created by these regulating documents that a lower standard of training would suffice for an individual applicant to be deemed eligible for promotion. The learned trial judge was correct in determining that the appellant had not discharged his burden of establishing a breach of the legitimate expectation he contends, for no such expectation arose. Furthermore, the respondents submit that the legitimate expectation actually created by the regulating documents, that the appellant would have his standard of training considered by the GOC, was fulfilled.

Incorrect interpretation of 'A' Admin Instr Pt.10
and the Promotion Competition document

83. The respondents submit that the GOC did not incorrectly interpret 'A' Admin Instr Pt.10 and the Promotion Competition document. They submit that the GOC had a discretion to exercise under para. 5a(2) to decide whether to certify that a given applicant had reached a satisfactory level of training for the position to which the promotion competition related. They maintain that the applicant had not demonstrated that the GOC took into account irrelevant factors in exercising that discretion. It was also not correct, they said, to characterise what the GOC did as treating para. 5a(1) as dispositive of whether the appellant qualified under para. 5a(2). In the respondent's submission, the GOC was entitled to form a view as to what he regarded was a satisfactory level of training for eligibility for the

promotion competition, and he formed that few and indicated his approach in his decision of the 26th of September 2019.

Analysis and Decision

84. It seems to me that regardless of any policy considerations that the GOC may have had in mind and which he may have allowed himself to be influenced by, he was obliged to correctly interpret and apply 'A' Admin Instr Pt.10 and the Promotion Competition document. In my assessment, these documents create clear alternative routes for the satisfaction of the qualification requirements for promotion to the rank of Flight Sergeant. These documents make it clear that a prospective candidate for promotion to the rank of Flight Sergeant can satisfy the qualification requirements for promotion to the rank *either* by the completion of the Senior NCO Course, *or* by having *"reached a satisfactory standard of training"*. The appellant is right in saying that effect must be given to the words used, and that it must be presumed that words used were not intended to be superfluous. I refer back to paras. 12 and 15 respectively of this judgment which set out the relevant clauses in each document. The stated qualification requirements in both documents are expressed as alternatives, reflected by the use of the word "*OR*" in both instances. Moreover, there is nothing in either of them to indicate that the alternative of qualifying on the basis of having reached a *"satisfactory standard of training"* is one that will only be available where *"the exigencies of the service require it"*. I am satisfied that in interpreting 'A' Admin Instr Pt.10, and the Promotion Competition document, as though that were the case, the GOC misinterpreted the discretion afforded to him and in doing so acted on foot of an error of law. Accordingly, he and, through his agency, the respondents, acted *ultra vires* their powers under the Defence Acts 1954-2007 and the regulations made pursuant thereto. It is notable that the submissions filed by the respondent singularly failed to engage in any meaningful

way with the legal interpretation issue, preferring instead to justify the GOC's actions on a policy basis.

85. I am satisfied that the appellant is also correct in his contention that insofar as the GOC was motivated by policy considerations, he applied a fixed and inflexible policy and, thus, unlawfully fettered his discretion. It is manifest that the GOC approached the appellant's application on the basis that the appellant's inability to qualify under para. 5a(1) was dispositive of the question as to whether he had the required qualifications. The GOC was not prepared in the circumstances of the case to entertain the possibility that the appellant might have reached a satisfactory standard of training. The GOC, as the Corps Director, was in a position to certify whether or not the appellant had a satisfactory standard of training following a fair assessment of the appellant's individual circumstances, but, notwithstanding having been requested to do so in the letter of the 24th of September 2019, he failed to do so. In that regard, I consider the critical issue to be the GOC's unwillingness to entertain, even as a possibility, that in the circumstances of the case (i.e. where the exigencies of the service did not require it) a satisfactory standard of training for the role for which promotion was being sought could have been achieved other than by completion of a Senior NCO's Course. This unwillingness was tantamount to the adoption of a fixed and inflexible policy and, hence, the unlawful fettering of the discretion afforded he GOC by the relevant administrative instruction and the Promotion Competition document.

86. I am not, however, satisfied that the appellant has sufficiently made out a case that the GOC, in expressing agreement with the unsolicited views of Comdt Byrne, had allowed himself to be inappropriately influenced by an extraneous party. I would uphold the findings of the trial judge in regard to the involvement of Comdt Byrne. The mere expression by the GOC of agreement with the views of Conor Byrne does not, per se, imply that the GOC abdicated his responsibility to independently decide upon the appellant's promotion

application. To have expressed agreement with a third party's view does not automatically equate with having been influenced by those views. Moreover, I do not consider that para. 11 of the Statement of Opposition is properly to be construed as an admission that the GOC was inappropriately influenced by Comdt Byrne. It goes no further than confirming that the GOC was in agreement with unsolicited views received by him, and that, those being the views of the GOC, he refused to certify the appellant as having reached a satisfactory standard of training to be eligible for the promotion being sought.

87. I am, however, persuaded that for the GOC to have allowed himself to be influenced by the exigencies of the service did amount, having regard to the express terms of the relevant Administrative Instructions and the Promotion Competition document, to the taking into account of an irrelevant consideration.

88. Further, I believe that the appellant has made a persuasive case that the terms of the relevant Administrative Instructions and the Promotion Competition document did induce in him a legitimate expectation that fair consideration would be given to whether he qualified for promotion on the basis of having reached a satisfactory standard of training in lieu of the completion of a Senior NCO Course, and that the GOC's unwillingness to consider his eligibility for promotion on that basis breached that legitimate expectation.

89. I respectfully disagree with the trial judge that the appellant's pleadings were insufficient or inadequate to enable him to succeed in seeking relief by way of judicial review. In my assessment, the appellant's Statement of Grounds, read as a whole, make clear beyond peradventure what the appellant's complaints were. As was pointed out by the appellant in his submissions, the very first sentence of para. E 13 asserts that the GOC determined that no training other than completion of the senior NCO course was satisfactory for eligibility for promotion. It must, as has been suggested, be read in the light of the GOC's actual discretion which is correctly set out as being the discretion afforded to him in both the

relevant Administrative Instructions and the Promotion Competition document. The appellant is right in saying that the GOC's reference in his letter of the 26th of September 2019 to the *"exigencies of the service"* would not have changed the nature of that discretion.

90. Further, I am of the view that the trial judge attached too much significance to the fact that the appellant made no representations to the GOC in respect of his qualifications in the letter of 24th of September 2019. If the GOC had rejected an application to be considered on the basis of the alternative standard of training because he had received no submissions with respect to qualifications, that would be an entirely different matter. However, it appears uncontroversial that the GOC would have had ready access to the appellant's military and training record. There is nothing to suggest that in an application for promotion an applicant is required to make submissions as to his or her record and experience. The point is also validly made by the appellant that even if such a submission had been made it manifestly would not have availed him having regard to the GOC's inflexible policy that, save where the exigencies of the service require otherwise, only completion of a Senior NCO Course was sufficient for qualification notwithstanding that no such limitation or restriction on the alternative route for qualification is expressed in either the relevant Administrative Instructions or the Promotion Competition document.

91. In conclusion, I would allow the appeal and be disposed to receive short additional written submissions from the parties concerning which amongst the reliefs claimed by the appellant in Part D of his Statement of Grounds should be included in the final Order.

92. Further, with regard to costs, my provisional view is that as the appellant has been entirely successful, he is entitled to the costs of the appeal against the respondents, and also to the costs in connection with the hearing at first instance before the High Court, the amount of which shall be determined by adjudication in default of agreement. If the respondents wish to contend for an alternative order, they will have liberty to deliver a written submission

within 14 days of the date of this judgment. The appellant will have a similar period to respond likewise. In default of such submission being received, an order in the terms proposed will be made.

93. Written submissions confined to the form of the order should not exceed 1000 words. However, submissions covering both the form of the order and costs (in the event that the indicative costs order is being contested) may extend to a maximum of 2000 words in aggregate.

Noonan J: I agree with the judgment of Edwards J.

Faherty J: I also agree.