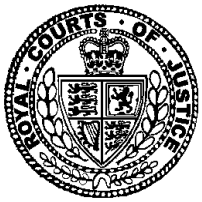

Neutral Citation Number: [2022] EWCA Crim 469

Case No: 202101839 B1

IN THE COURT MARTIAL APPEAL COURT
ON APPEAL FROM THE MILITARY COURT CENTRE AT BULFORD
JUDGE MCGRIGOR, ASSISTANT JUDGE ADVOCATE GENERAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2022

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HON MR JUSTICE JAY
and
THE HON MR JUSTICE HOLGATE

- -

Between:

SEAN KEVIN CANNING
(Formerly Lance Corporal, now Signaller) **Appellant**

- and –

THE CROWN **Respondent**

- -
- -

Richard Whittam QC and Tom Wilkins (instructed by **the Registrar of the Court Martial Appeal Court**) for the **Appellant**
Oliver Glasgow QC and Captain James Farrant RN (instructed by **The Service Prosecuting Authority (United Kingdom)**) for the **Respondent**

Hearing date: 15th December 2021

- -

Approved Judgment

Dame Victoria Sharp, P:

Introduction

1. On 17 May 2021 in the Military Court Centre at Bulford, Judge McGrigor, Assistant Judge Advocate General (the AJAG)) presiding, the appellant, then Lance Corporal Sean Canning of the 10th Signal Regiment, 251 Squadron pleaded guilty to the offence of disobedience to a lawful command contrary to section 12(1)(a) of the Armed Forces Act 2006 (the 2006 Act). On the same day he was sentenced to service detention of 90 days, suspended for 9 months, and to reduction in rank to Signaller.

2. The appellant pleaded guilty following re-arraignment, after a ruling made by the AJAG on an application of no case to answer. He appeals against conviction with the leave of the single judge.

3. This appeal raises an issue about the relationship between military discipline and the provisions of domestic law which apply to service personnel. In particular, whether a military command to the appellant was unlawful for the purposes of section 12 of the 2006 Act because compliance with that command would have prevented him from exercising his right to rest under the Working Time Regulations 1998 (SI 1998 No 1833) (the Working Time Regulations).

4. There is a dispute about whether the appellant was actually entitled to a specified period of rest (11 hours) under the Working Time Regulations at the material time, or whether (as the AJAG apparently believed) the prosecution had conceded the point. On the assumption that the appellant did have that entitlement however, the AJAG dealt with the matter as follows in a short *ex tempore* statement of reasons given at the hearing:

> "The issue that I have been invited to rule upon is as follows, whether the defendant is entitled to rely upon a breach of the Working Time Regulations dated the 1st October 1998 so as to refuse to obey an otherwise lawful order on the basis that such a breach renders the order unlawful.
>
> I rule that the requirements of Section 23 [sic] of the Working Time Regulations, namely that Service personnel are entitled to a daily rest period of 11 consecutive hours between each working day, does not render an order to the defendant to "get his kit and travel on the coach to battle camp", or words to that effect, in breach of that Working Time Regulation unlawful. My detailed ruling is to follow."

5. The sole ground of appeal is that in giving his ruling, the AJAG deprived the appellant of a valid defence to the charge, and that he erred in law in narrowly construing a lawful command as "any order that did not involve the commission of a criminal offence".

The Relevant Legal Framework

(i) Lawful Command

6. Section 12 of the Armed Forces Act 2006 provides:

> "**12 Disobedience to lawful commands**
>
> (1) A person subject to service law commits an offence if —
>
> (a) he disobeys a lawful command; and
>
> (b) he intends to disobey, or is reckless as to whether he disobeys, the command.
>
> (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years."

7. The phrase "lawful command" is not defined, but the Explanatory Notes state: "an order must be lawful; an order to do something which would amount to a crime, for example, would not be lawful". The *mens rea* for the offence is set out in section 12(1)(b). There is no defence of reasonable belief that the command was unlawful: see *R v Lyons* [2012] 1 Cr. App. R. 20 at [36]. As was pointed out in that case, any such defence would seriously undermine the purpose of the section.

8. The current *Manual of Service Law*, Chapter 7, page 1-7-40 (cited in *Lyons*) defines a lawful command as follows (the relevant provision for present purposes being (d)):

> "A command is lawful if:
>
> (a) it is within the authority of the person giving it;
>
> (b) it is for a proper service purpose …;
>
> (c) it is possible for the command to be carried out; and
>
> (d) it is not contrary to UK domestic law, international law or relevant local law."

9. We are grateful to Mr Richard Whittam QC, who did not appear below, and Mr Tom Wilkins for the appellant for providing an historical perspective on "lawful command" in their written submissions, which we can summarise and also expand in certain respects.

10. The first Mutiny Act was passed in 1689 after the "Glorious Revolution" and for nearly 200 years it was renewed annually (although it lapsed between 1698 and 1701).

Parliament was suspicious of any law or practice which would permit a standing army in peacetime without annual review. The Mutiny Act 1689 did not make it an offence to disobey any lawful command, and it is unclear when that specific provision was first introduced. The version enacted in 1875 included, by section 15, a provision which made it an offence punishable by "Death, or such other punishment as by a Court-martial may be awarded" to disobey any "lawful command". The last Mutiny Act was replaced by the Army Discipline and Regulation Act 1879 and that in turn was superseded by the Army Act 1881. All of these statutes made it an offence to disobey a lawful command without providing any further definition or explanation.

11. In *The Constitution and Practice of Courts Martial: With a Summary of the Law of Evidence as Connected Therewith*, published in 1875, Thomas Frederick Simmons said at page 255:

> "…. it is lawful, in the military sense, to disobey an unlawful command of a superior. And the true and practical intent and meaning of this appears to be, that – so long as the orders of a superior are not obviously and decidedly in opposition to the well-known and established customs of the army, or to the laws of the land; or, if in opposition to such laws, do not tend to an irreparable result; - so long must the orders of a superior meet prompt immediate and unhesitating obedience. It surely cannot accord with justice to render a soldier responsible, even in courts of civil judicature for an illegal act resulting from the execution of an order, not in itself so glaringly opposed to all law, as for its illegality to be apparent without reflection or consideration: hesitation in a soldier is, in certain circumstances, a crime; and hesitation is inseparable from reflection and consideration; reflection and consideration, therefore, when tending to question the order of a superior, must, in some sense, be considered as a military offence."

12. The 1907 edition of the *Manual of Military Law* stated that:

> "'Lawful command" means not only a command which is not contrary to ordinary civil law but one which is justified by military law; in other words a lawful military command, whether to do, or not to do, or to desist from doing, a particular act. A superior officer has a right at any time to give a command, for the purpose of maintenance of good order, or the suppression of a disturbance, or the execution of a military duty or regulation, of for any purpose connected with the amusements and welfare of a regiment or other generally accepted details of military life. But a superior officer has no right to take advantage of his rank to give a command which does not relate to military duty or usages, or which has for its sole object the attainment of some private end. Such a command, though it may not be unlawful, is not such a lawful command as will make disobedience of it criminal. In any case of doubt, the military knowledge and

> experience of officers will enable them to decide on the lawfulness or otherwise of the command.
>
> If the command were obviously illegal, the inferior would be justified in questioning, or even in refusing to execute it, as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. But so long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, or to the well-known and established customs of the army, so long must they meet prompt, immediate, and unhesitating obedience."

13. Similar wording appeared in the 24th edition of the Manual, authored by Banning and published in 1946, which addressed the meaning of the section 9 of the Army Act 1881, the predecessor to section 12 of the Armed Forces Act 2006, as follows:

> "It must be proved:
>
> (1) That the command was lawful;
>
> (2) That it was given personally by a superior;
>
> (3) In the execution of his office, and
>
> (4) That it was disobeyed defiantly.
>
> A 'lawful command' means a command which is not only not contrary to the ordinary Civil Law but one which is also justified by Military Law.
>
> … "

14. Although the issue arose in a different context, the duty to obey a command unless it is obviously unlawful was recognised by the House of Lords in *R (Gentle) v Prime Minister and others* [2008] UKHL 20; [2008] 1 A.C. 1356. At para 50 of her opinion, Baroness Hale said this:

> "… Flight Lieutenant Kendall-Smith was court-martialled for disobeying a lawful command when he refused to return to Iraq in June 2005. It was accepted by the Crown that for there to be an offence (then under section 34 of the Air Force Act 1955) the order in question must not have been an order to do something which was unlawful in domestic or international law. The Judge Advocate ruled that this order was not unlawful because it had been given after the United Nations Resolutions authorising the activities of the multi-national force. But he also ruled that it is no defence that the defendant believed that the order was not lawful. The individual's duty is to obey the order, as long as it is not obviously contrary to law …"

(ii) The Working Time Regulations

15. The Working Time Regulations came into force on 1 October 1998 in implementation of the Working Time Directive (Council Directive 93/1004/EC) (the Working Time Directive). Save for regulation 9, which is not relevant for present purposes, it is important to note that the Working Time Regulations apply to the Armed Forces.

16. Article 2 of the Working Time Directive provides, in part that:

> "**Definitions**
>
> For the purpose of this Directive, the following definitions shall apply –
>
> 1. *working time* shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national law and/or practice;
>
> 2. *rest period* shall mean any period that is not working time.
>
> …"

17. Regulation 10 of the Working Time Regulations provides, in part that:

> "**10.— Daily rest**
>
> (1) [A worker] is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer."

18. Regulation 10 reflects article 3 of the Working Time Directive, which provides that:

> "**Daily rest**
>
> Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period."

19. There is a difference in wording, but not in meaning, between regulation 10 of the Working Time Regulations and article 3 of the Working Time Directive. The 24-hour period is one in which the worker carries out any work for this employer. The maximum permitted period of work during any such period is 13 hours.

20. Regulation 10 appears in Part II of the Working Time Regulations which is entitled "Rights and obligations concerning work time". Regulations 11, 12 and 13 give a

"worker" additional "entitlements" to a weekly rest, a daily break and annual leave respectively. These provisions do not impose requirements on employers. By contrast, other provisions in Part II do impose obligations on employers with regard to such matters as maximum weekly working hours, length of night work, health assessments for night workers, and record keeping (regulations 4, 6, 7 and 9).

21. Regulation 18(2)(a) has been the focus of much argument in this appeal. Regulation 18, as substituted by regulation 4 of the Working Time (Amendment) Regulations 2003 [SI 2003 No 1684] provides:

> "**18.**—(1) **These Regulations do not apply—**
>
> (a) to workers to whom the European Agreement on the organisation of working time of seafarers dated 30th September 1998 and put into effect by Council Directive 1999/63/EC of 21st June 1999 applies;
>
> (b) to workers on board a sea-going fishing vessel; or
>
> (c) to workers on board a ship or hovercraft employed by an undertaking which operates services for passengers or goods by inland waterway or lake transport.
>
> (2) Regulations 4(1) and (2), 6(1), (2) and (7), 7(1) and (6), 8, 10(1), 11(1) and (2), 12(1), 13 and 16 do not apply—
>
> (a) where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations;
>
> ..."

22. There is no equivalent provision in the Working Time Directive. However, article 2(2) of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in safety and health of workers at work provides that:

> "This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain activities in the civil protection services inevitably conflict with it."

23. By regulation 29(1) of the Working Time Regulations, an employer who fails to comply with "any of the relevant requirements" commits an offence. By regulation 28(1), these requirements refer to a number of provisions, but not to the *entitlements* conferred on workers by regulation 10 or by regulations 11, 12 or 13. All of the "relevant requirements", with the possible exception of regulation 24A(2), relate to *obligations* imposed on employers.

24. Thus, where an employer refuses to allow his employee to exercise a right conferred by regulation 10(1), the employer does not commit a criminal offence or breach any obligation imposed on him by the legislation. Instead, under the Working Time Regulations, an employee may be able to rely upon a dedicated complaints procedure before an Employment Tribunal.

(iii) Guidance on the implementation of the Working Time Regulations within the Armed Forces

25. By Defence Instruction Notice 2019DIN01-068 (the DIN), entitled "Guidance on the Working Times Regulations - Service Personnel", released in May 2019 and revised in September 2019, the Ministry of Defence (the MoD) gave updated guidance on the implementation of the Working Time Regulations within the Armed Forces.

26. We should refer to the following provisions of the DIN:

> "**Effect of the Working Time Regulations where it applies**
>
> 7. The Working Time Regulations applies to "workers" regardless of whether they work full or part time and, for the purposes of the Working Time Regulations, members of the Armed Forces are treated in the same way as workers. Amongst other things the Working Time Regulations:
>
> …
>
> (c) ensures that a worker is entitled to receive 11 consecutive hours' rest in any 24-hour rest period [sic]
>
> …
>
> **'On-Call' and Being Liable to Attend for Duty if Required**
>
> 17. Time spent 'on-call' is likely to be regarded as working time in the following circumstances:
>
> a. Where the Service person is required to remain at a specific location so that if necessary, they are immediately available to carry out their duties. The specific location may be the Service person's usual place of work, or elsewhere, for example, the Service person's home. Notably, in circumstances where the Service person is required to be in a particular location to carry out duties, all of the time that the person spends on-call will be working time; including any time that the person spends sleeping.
>
> b. Where the Service person is required to remain in a relatively small geographical area so that, if necessary, they can promptly perform their duty if they are called out, and in a state which enables them to properly perform their duties. In these circumstances all of the time that a person spends on-call,

including any time spent sleeping, is also likely to be regarded as working time.

…

The 'Inevitably Conflicts' Exception – Working Time Regulations (Reg 18(2)(a))

35. The exception provided at [Working Time Regulations], reg 18(2)(a) operates where characteristics, or specific activities, peculiar to the Armed Forces 'inevitably conflict' with other provisions. *This exception must not be treated as a blanket exclusion, it applies only when the characteristics or specific activities actually occur; therefore, when applying this exemption, Commanding Officers, and their advisers, should be able to show how the activity in question is both peculiar to the Armed Forces, and inevitably conflicts with the [Working Time Regulations]*.

36. Where this exception applies it is capable of negating all except two of the [Working Time Regulations] requirements. Therefore, Service personnel can be required to work for more than 48 hours per week in a 17-week period and the additional restrictions relating to length of night work do not apply, see paragraphs 45 to 48. Service personnel can also be lawfully denied rest periods, rest breaks and annual leave. However, even where the 'inevitably conflicts' exception applies, Commanding Officers should still strive to reduce the health and safety risks caused by fatigue. If possible, personnel should be given time to rest, even if that rest is not what the person would normally be entitled to pursuant to the Working Time Regulations and where rest cannot be given, other appropriate measures should be taken to alleviate fatigue.

37. Personnel involved in the planning of activities, such as duty rosters, should always consider [Working Time Regulations] implications. However, Commanding Officers are ultimately responsible for ensuring that the Working Time Regulations is complied with and should therefore ensure that personnel who are involved in planning and organising the use of manpower are aware of the restrictions imposed by the [Working Time Regulations].

38. The following activities represent the basic range of Service duties that are likely to fall within the scope of this exception:

a. Operations, including military aid to the civil authorities (where the activities 'inevitably conflict' with other provisions).

b. Support of, and preparation for, specific operations (where the activities 'inevitably conflict' with other provisions).

> c. Exercises and training simulating operational conditions where the purpose of the exercise or training would be frustrated if activities were conducted in a manner that is consistent with the requirements imposed by the [Working Time Regulations].
>
> d. Training, including exercises, aimed at causing fatigue and stress to prepare for or simulate an operational situation.
>
> In cases of doubt Commanding Officers should seek legal/policy advice."

(Emphasis added)

27. Para 7(c) of the DIN appears to contain a drafting error. We consider it should read, "in each 24-hour period" (to reflect the language of the Working Time Directive) or "in each 24-hour period during which he or she is required to work" (to reflect the language of the Working Time Regulations).

Some jurisprudence of the CJEU

28. Though we were referred to a number of CJEU cases, for present purposes we need only refer to the decision of the Grand Chamber of the CJEU in *B.K. v Republika Slovenija (Ministrstvo za obrambo)* (C-742/19) which was handed down on 15 July 2021, and on which the appellant heavily relies. The effect of section 6 of the European Union Withdrawal Act 2018 is that we are not bound by that decision, but we may have regard to it.

29. B.K. was a non-commissioned officer in the Slovenian Army. He was required to perform uninterrupted guard duty for seven days per month over an 18-month period. For this service, he received only a stand-by duty allowance amounting to 20 per cent of his basic salary. Although the focus of the case was not the Working Time Directive but Directive 2003/88, the latter enactment had materially identical provisions.

30. After the lower courts in Slovenia had dismissed the claim for overtime payments during the period of B.K.'s guard duty, the Supreme Court of Slovenia referred two questions to the CJEU. The first question asked was whether article 2 of Directive 2003/88 (in identical terms to article 2 of the Working Time Directive) applied to military personnel performing guard duty in peacetime. The second question asked was whether article 2 precluded national legislation that provided that persons on stand-by performing guard duty and physically present in barracks but not actually working should not count as "working time".

31. In addressing the first question, the Grand Chamber of the CJEU observed that there was a logically prior question that fell to be addressed, namely whether the activities of the armed forces in general, or at least some of them, must be excluded from the scope of article 2 of Directive 2003/88 on the footing that they fell within the exemption specified in article 2(2) of Directive 2003/88 (see para 22 above). The Grand Chamber concluded that not all activities of the armed forces were excluded from the scope of article 2, "but only certain categories of activity, by reason of their specific nature" (see para 65). At paras 73 to 83 the Court identified types of activity

which would be so excluded. Ultimately, it said this had to be a fact-specific question entailing the consideration of a number of factors.

32. At para 88 of its judgment, the Grand Chamber summarised the principles in the following terms:

> "It follows from all the considerations above that Article 1(3) of Directive 2003/88, read in the light of Article 4(2) TEU, must be interpreted as meaning that a security activity performed by a member of military personnel is excluded from the scope of that directive:
>
> – where that activity takes place in the course of initial or operational training or an actual military operation; or
>
> – where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or
>
> – where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or
>
> – where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations."

33. In addressing the second question, the Grand Chamber concluded that on the assumption that Directive 2003/88 was applicable, it did not preclude the enactment of national legislation that provided for different renumeration for stand-by periods. However, if the constraints imposed on the soldier affected "objectively and very significantly" the possibility of freely managing his time during the periods in question, then national legislation that provided for lesser renumeration would be in violation of article 2 (see para 93). On the facts of the case before it, the Grand Chamber concluded, at para 95:

> "It follows from the foregoing that, assuming that Directive 2003/88 applies in the present case, a stand-by period imposed on a member of military personnel which involves him or her being continually present at his or her place of work must be regarded as being working time, within the meaning of Article 2(1) of that directive, where that place of work is separate from his or her residence."

The Facts

34. The appellant was on guard duty at St Omer barracks in Aldershot from 08:00 hrs on 22 November 2019 to 09:00 hrs the following day. He worked three two-hour shifts within this period: between 17:00 to 19:00 hrs, 20:00 to 22:00 hrs and 07:00 to 09:00 hrs (on 23 November). He was "on call" for the rest of the time.

35. Though the appellant was not physically present in the Guard Room for the whole of this period of Guard duty, he could not leave camp and had to be contactable on his radio at all times, ready to return immediately to the Guard Room if required. He would not have been in breach of his duty had he slept.

36. The appellant was due to deploy with his Regiment on Exercise BRUNO WARRIOR on 23 November 2019, with the coach leaving Aldershot at 08:00 hrs that morning. The journey (to Barry Budden, Carnoustie) would take approximately 11 hours. The appellant was not the driver.

37. Exercise BRUNO WARRIOR formed an annual training package and took place over the course of a week. In his witness statement, Staff Sergeant Goring said it was regarded by the appellant's chain of command as "an essential deliverable … to restore battle craft skills", and was intended to "remind, revise and assess individuals on skills and drills". This training would ensure that the Regimental Unit was ready for deployment at a moment's notice, and the appellant's attendance was regarded as "essential to ensure adequate training was delivered to him".

38. At the Court Martial, the prosecution accepted that there was an obvious conflict between the appellant's two duties (that is, his guard duty and his duty to deploy with his Regiment on Exercise BRUNO WARRIOR). It was said that the conflict had arisen because there was some friction between the Guardroom and the personnel who worked there and the Regimental Unit that had not been resolved prior to the morning. We interpolate here that Mr Glasgow QC, who did not appear below, accepted before us that it would have been possible to organise the guard duty roster so as to afford the appellant a period of rest.

39. Lieutenant Mallinder, the appellant's Troop Commander, said in his witness statement that he had been made aware of the conflict between the two duties on 18 November. He consulted with his superiors who said that the appellant should be told to ask the Guard Commander for an early shift, enabling him to finish early and to deploy on "battle camp". The appellant's case however was that ordinarily, a soldier would at the discretion of his Troop Commander, be rested for 24 hours after coming off guard duty; and he had been assured that communication would be made by the chain of command with the Guardroom to have him put on an earlier shift and be signed off duty at an early time.

40. There is a difference in recollection between Lieutenant Mallinder and the appellant to this extent. According to his witness statement, the appellant's understanding was that he was assured that communication would be made by the chain of command with the Guardroom to have him put on an earlier shift and be signed off duty at an early time. It is unnecessary for us to resolve this issue because it was not to form part of the

AJAG's legal ruling, which was given before any evidence was heard and tested at the Court Martial. The AJAG did, however, observe during legal argument that it would not be up to the soldier to have to sort this out: "the two chains of command should have got themselves together and thought of it".

41. In the event, when the appellant reported for his guard duty at 08:00 hrs on 22November, and informed the Guard Commander of the time arranged for the transport to Scotland, he was told that his duty timing would not change.

42. On 23 November (when the appellant was still standing on guard duty) Sergeant Connelly from the appellant's unit told him that he was to get on the coach as soon as he was released. The appellant refused. He said that he was not going on the Exercise, and invoked his entitlement (as he saw it) to 24 hours' rest. At the conclusion of his guard duty, he then went to his room.

43. At 10:14 hrs the coach to Scotland was waiting for the appellant and Sergeant Connelly went to fetch him. The appellant was still in his room, now wearing his pyjamas. The witness statements of the two men are not in full agreement as to what happened next. On the appellant's account, he had not completed the packing of his belongings for the Exercise, and told Sergeant Connelly for a second time that he was entitled to 24 hours rest following a guard shift because "this was in the standing orders he had signed for". The appellant did not invoke his rights under regulation 10(1) of the Working Time Regulation (which was limited to 11 hours rest); nor in the event, was his case at his Court Martial rooted in standing orders or the custom and practice of his unit. Sergeant Connelly's witness statement contains no mention of the appellant asserting his rights on this second occasion. However, Sergeant Connelly certainly understood that it was not the appellant's intention to mount the transport. Sergeant Connelly warned the appellant of the consequences of refusal and ordered him three times to get on the coach. The appellant refused. It is this refusal that formed the basis of the charge for which the appellant was court martialled, of disobedience to a lawful command.

44. Before us each party sought to highlight certain features of the evidence. Mr Whittam submitted that the witness statement of Lance Corporal Crow demonstrated that this Exercise was not an "essential deliverable". He was called off it at the last moment in order to organise a Christmas party. Mr Glasgow drew our attention to other evidence which indicated that on arrival at Carnoustie, the unit would have been given a one-hour safety briefing and then would have been free to rest until the Exercise started at 07:00 hrs the following morning.

The Court Martial Proceedings

45. In his Defence Statement, the appellant said that it was unclear whether his command was compliant with regulation 10(1) of the Working Time Regulations, and put the prosecution to strict proof as to whether it was exempt. On 15 May 2021, two days before the Court Martial, Mr Wilkins filed a revised skeleton argument submitting that his client had no case to answer. His essential point was that Sergeant Connelly's order was unlawful because it violated regulation 10(1). He also said it was his understanding that the prosecution was relying on the exemption under regulation 18(2)(a), and made a brief submission to the effect that the burden was on the prosecution to show that there was an "inevitable conflict".

46. On 17 May 2021, at the outset of the Court Martial proceedings, the AJAG invited the parties to develop their submissions on the issue raised in Mr Wilkins' skeleton argument. A submission that ought to have been considered at the conclusion of the prosecution case then became, in effect, a preliminary issue on what the AJAG believed to be a pure point of law.

47. The essential submission made by Mr Wilkins was that an order contrary to United Kingdom domestic law, is not a lawful order, whether or not it entails the commission of a criminal offence. He added this:

> "There is no dispute that certain exercises would be exempt because of their purposes from the Working Times Regulations. It may be a matter of argument whether this particular exercise was, but our submission is that he was entitled under the Working Time Regulations to an immediate period of 11 hours rest and that there was no military reason for him to deploy on that bus with everybody else."

48. Commander Hartley who appeared for the prosecution, accepted that the Working Time Regulations were applicable to military service, but submitted that "the law is very wide-ranging, and the law effectively affords the Armed Forces a wide discretion". He drew attention to the DIN (see paras 25 and 26 above), and submitted:

> "And I would simply say in relation to that that if there is a breach of guidance then the redress for Service persons is a Service Complaint. *The law affords the Armed Forces a wide discretion by saying that anything peculiar to the Armed Forces which inevitably conflicts can be or is permissible and the regulations are, therefore, exempt.* That is perhaps narrowed slightly by the guidance in an attempt to ensure that personnel are treated fairly but the wide discretion afforded by the law is significant and I would suggest this order plainly is not in breach of the law if we are dealing with that issue and simply that -- the reality of the situation is simply Service personnel work alongside civilian personnel, say, for example, on board a ship according to my own experience. But in those circumstances, whilst the same guidelines may apply, the Services rely on the exemption frequently to ensure that Service personnel do what is needed of them and civilians, while they may on the face of it be afforded the same protection of the Working Time Regulations, the realities are that the exemption is wide ranging and a frequently employed." (emphasis added)

He had earlier said this:

> "CDR HARTLEY: Your Honour, I would suggest this, that despite the fact he was not on the exercise at the time, the order was about deploying on the exercise and so at the point that he

> was given the order it was necessary in order for the exercise to occur the exercise could not occur if it was not followed.
>
> AJAG: If nobody is there.
>
> CDR HARTLEY: Exactly, your Honour, yes. And so the order and at that time was clearly exempt from the regulations on the basis of it being in relation to an exercise if not on the exercise."

49. The prosecution also submitted that section 12 of the 2006 Act was designed "to prevent soldiers from doing things which would render themselves liable for prosecution or otherwise under criminal and UK domestic law".

50. Having given brief reasons for his decision on the day, the AJAG delivered his detailed ruling on 19 May 2021.

51. It is material to note three matters.

52. First, he did so on the basis that the prosecution accepted that the exceptions provided for in the Working Time Regulations were not applicable. Thus, the AJAG said that the Working Time Regulations applied to all Service personnel and that: "There are exceptions for the exigencies of the Service in certain circumstances but for the purpose of this ruling it is accepted that such exigencies are not applicable." This was not however an accurate reflection of the prosecution's position. Albeit regulation 18(2)(a) of the Working Time Regulations was not referred to in terms, it is from this regulation that the language of "inevitably conflicts" is drawn. There can be no doubt therefore that the prosecution's submission was that present case fell within the exception.

53. Secondly, and in consequence, evidence which may have been germane to the "exception" issue was not called, or tested in cross-examination. We note for example that para 5 of the Respondent's Notice says that efforts had been made by the appellant's chain of command to relieve him of his duty given his imminent deployment, "but there were no other soldiers available". This contention finds some support in the prosecution's evidence, but is nonetheless one that the defence may have wished to test in cross-examination.

54. Thirdly, the prosecution accepted before the AJAG that the appellant had technically been on duty for 25 hours, and therefore working continuously for the purposes of the Working Time Regulations, by the time his guard duty ended at 09:00 on 23 November. Further, though as Commander Hartley pointed out, the appellant might have slept throughout the coach journey, the CJEU has held that travel time in this context falls to be treated as "work" rather than "rest" (see *Federacion de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*, 266/14, Judgment of the Third Chamber of 10 September 2015).

55. In the event, the AJAG's ruled that the appellant had no defence in law to the charge he faced, on what were assumed to be agreed facts.

56. His core conclusions were as follows:

> "On behalf of the defendant, it is conceded that by 1014 hours the defendant had been given an order by Sergeant Connelly who was a person with the authority to give it. The order had a military nexus and it was possible to carry the order out. However, the defendant contends that the Working Time Regulations are part of domestic law, that they are on at least an equal footing with Section 12 of the Armed Forces Act 2006 so that if there is a conflict between them it indeed overrides or trumps the otherwise lawful order and did so on this occasion. Therefore, the defendant was entitled to disobey such direct order without sanction.
>
> It is accepted by both the defence and prosecution that the Working Time Regulations are civil law whereas Section 12 of the Armed Forces Act 2006, namely disobedience to a lawful command, is part of the disciplinary sanctions and an offence with a punishment not exceeding 10 years.
>
> Neither the defence nor prosecution could assist with any authorities on the point of conflict between them apart, perhaps, on those relating to conscientious objectors who disobey orders but the defence do not rely upon these authorities.
>
> It would appear and for the purposes of this ruling I accept that the Working Time Regulations had been breached by the defendant's command chain in the circumstances he found himself in. The authorities in relation to disobedience to a lawful command require Service personnel to refuse to obey an unlawful command but this is specifically in the context of Service personnel potentially committing a crime against UK domestic law, international law or relevant local law. Thus the corollary of that authority is that the absence of an unlawful command all lawful commands must be obeyed.
>
> To read into lawful command the requirement that it must take into account the Working Time Regulations and its interpretation which, if breached would override a lawful command, would run against the clear Service necessity for subordinates to obey and respect those in authority above them. It hardly needs stating that the refusal of a lawful order would undermine the chain of command and has the potential to undermine operational effectiveness. For Service personnel to be able to debate whether civil law can override an otherwise lawful command would, as I have said, undermine the Service relationship between those in command and their subordinates that goes to the very core of Service discipline.

> To take the matter to its ultimate conclusion I am of the view that an order to perform a military duty, no matter how dangerous, is lawful so long as it does not involve the commission of a crime.
>
> The proper and proportionate procedure is for the aggrieved soldier to obey the command and then lodge a Service Complaint through the appropriate channel of command to obtain redress.
>
> I, therefore, find no merit in the defence's argument that as a matter of law the breach of the [Working Time Regulations] renders the subsequent lawful command as complained of by the defendant unlawful.
>
> The defence's application of no case to answer is, therefore dismissed."

The appellant's submissions

57. Mr Whittam's submissions can be summarised as follows.

58. The AJAG adopted a flawed construction of the phrase "lawful command" At least since 1907, a "lawful command" has been understood to require conformity with the "civil law" which is not limited to the criminal law of the United Kingdom. "UK domestic law" (the phrase used in the current Military Manual: see para 8 above) therefore covers more than the criminal law. The statutory offence under section 12 of the 2006 Act focuses on whether the command is lawful, not on whether the command is to commit a criminal offence. In oral argument Mr Whittam was pressed on the extent of this principle, and whether it applied to all civil wrongs, including torts against third parties. Whilst he accepted that the line must be drawn somewhere and that it might be difficult to draw in hard cases, he submitted that no such difficulty arose in this case, because regulation 18(2)(a), which forms part of United Kingdom domestic law, draws an appropriate boundary for this type of situation.

59. Even if the importance of military discipline has been characterised in accurate terms by the AJAG, Mr Whittam submitted there is no blanket exemption for military service from the Working Time Regulations, which only provide for specific exemptions. In any event, is clear that the exemption under regulation 18(2)(a) had no application on the facts. Mr Whittam did not rely in this context on the (mistaken) view taken by the AJAG, but on what he submitted was a clear inference from the evidence, namely that it had been possible for the appellant's guard duty to be reorganised prior to the events of the 23 November 2019, so that no conflict between the appellant's guard duty and "battle camp" duty, arose.

The respondent's Submissions

60. Mr Oliver Glasgow QC for the respondent, advanced two submissions.

61. First, that regulation 18(2)(a) plainly applied to the command that was disobeyed. Sergeant Connelly's order for the appellant to get on the coach for the purposes of travel to Exercise BRUNO WARRIOR required him to participate in an activity that

was peculiar to the Armed Forces, namely essential personal training. Further, the breakdown in communication between the two chains of command was neither here nor there, because the issue of inevitable conflict had to be viewed and analysed prospectively.

62. Secondly, and in any event, the legality of the command was not dictated by the application of the Working Time Regulations. The order did not require the appellant to do anything unlawful; and the protection afforded to service personnel permitting a refusal to carry out an unlawful order is intended to ensure that the soldier in receipt of such an order does not carry out an unlawful act. The soldier is not permitted to assess whether or not the person giving the order might be acting in any way unlawfully.

63. In oral argument Mr Glasgow emphasised that chaos would result if service personnel were somehow able to question the lawfulness of military commands (and disobey them) in the sort of situation that had arisen in this case. He said the system of military discipline depends fundamentally on a framework which is easily and readily understood by the soldiers who operate within it. In the real world, there can be no opportunity for debate between service personnel operating within a hierarchical structure as to whether a particular order may or may not infringe a particular regulatory provision. Further, as the military manuals have pointed out, it is only commands that are obviously and decidedly unlawful, viewed from the perspective of what the soldier is being asked to do, which do not require immediate and unhesitating obedience.

Discussion

64. We start with the issue of lawful command.

65. There can be no doubt that the command given to the appellant by Sergeant Connelly was for a lawful military purpose. The appellant was not being ordered to perform a task which was in itself unlawful. If there was an incompatibility between the appellant exercising a right to rest under the Working Time Regulations and complying with that command, we are firmly of the view that this did not render the command unlawful. In other words, what the appellant was ordered to do, namely, to travel to and take part in the Exercise in Scotland was lawful, notwithstanding any right under regulation 10(1) of the Working Time Regulations to which the appellant might have been entitled at the time.

66. The Armed Forces operate on the basis of a hierarchical system where orders must be given and obeyed. A particular order may be, and often will be, the product of a sequence of orders, some of a strategic nature, passing through a chain of command. Those who give and receive the order at the end of a chain will normally have no reason to be aware of its military purpose or justification or of matters that are material to the applicability or not as the case may be, of regulations such as section 18(2)(a) of the Working Time Regulations. These orders however are given and followed within a chain of command in which all service personnel, including Sergeant Connelly and the appellant, are firmly embedded. In the real world in which the Armed Forces operate, there can be no room for debate, differences of opinion, equivocation or hesitation when such orders are given and received. The contrary position would in our opinion, self-evidently undermine operational effectiveness, as

well as respect for superiors and morale. It is necessary therefore that save in the most exceptional and clearly defined circumstances, subordinates should obey orders they are given, without challenge or dispute or equivocation.

67. Mr Glasgow is right therefore to submit that it cannot be for service personnel to question whether the chain of command has ordered something which entails or might entail a breach of any legal provision or an interference with a private legal right. They only need to know that in carrying out what they are ordered to do they will not face liability in the civilian courts or before an international tribunal for doing something that is contrary to law.

68. We accept that the concept of the "lawfulness" of a command is not limited to the authority to give it, but includes what the recipient is directed to do. The Military Manual and the textbook writers, whose opinions are not of course binding on us, have rightly made that point. Regardless of whether these texts require updating to reflect modern conditions, they consistently state that it is only when it is entirely plain and obvious that the act ordered would be "opposed to all law" or even "illegal" that a soldier would be entitled to refuse to obey. The manuals and textbooks deploy different language – "glaringly", "obviously", "decidedly" – but the principle is the same. To take a stark example, all soldiers know that a command to shoot an unarmed prisoner would be patently unlawful.

69. In our view, the reference in the Manual to "the Ordinary civil law" is to the whole body of law that is not military law. Plainly, the authors did not intend that any breach or non-compliance or interference with any aspect of domestic civil law would render an otherwise lawful command unlawful. That would be absurd. Having said that, it is unnecessary for us to say in this case where the boundary of lawfulness should be drawn for the purposes of section 12 of the 2006 Act. The argument we have heard has focused very much on the circumstances of this case and would not enable us to do so. This issue, if it should arise, must await other cases.

70. Returning to the facts of this case, Sergeant Connelly's order did not require the appellant to commit a criminal act, and it did not entail the commission of an offence either by him or the Army. Furthermore, there could be no question of the appellant being required to commit a civil wrong or, indeed, of his superior breaching an obligation owed to him. Even assuming that regulation 10(1) was applicable and that regulation 18(2)(a) was not, the only legal effect of the appellant's obligation to obey Sergeant Connelly's command was that he was unable to exercise his personal entitlement to a period of rest before travelling to Scotland. Regulation 10(1), in contrast with certain other provisions of the Working Time Regulations, does not impose a correlative obligation on the employer. Parliament has decided to provide for a complaints procedure as an appropriate remedy, rather than treating the employer's behaviour as illegal or unlawful in any broader sense. We do not consider that the denial of a right under regulation 10(1) in these circumstances is capable of rendering a command unlawful for the purposes of section 12 of the 2006 Act.

71. There is, we think, a further ground for rejecting Mr Whittam's submissions. Once the possibility is predicated of a breach of regulation 10(1) entitling a soldier to disobey a command in circumstances such as those that arose in this case, it is difficult to discern where any boundary might lie. Put another way, the proposition that all civil wrongs must be within the scope of permitted disobedience would be difficult to resist.

Mr Glasgow proffered examples of an order to build a fence (in breach of planning permission) or an order to destroy a building (in breach of health and safety and/or environmental legislation), and it is not difficult to think of others. Other examples might include an order to march over a field (committing a civil trespass) or cases involving a private nuisance (e.g. the MoD is inured to facing claims by owners of livestock disturbed by low-flying aircraft). In all these cases, obedience to the command would not expose the service personnel to civil liability - they would be entitled to a full indemnity from the MoD; but the command, on the logic of Mr Whittam's argument, would be an unlawful one which those in receipt of it, would be entitled to disobey. In our judgment there would need to be a clear and principled basis for the necessary line of demarcation, and it is not to be found in the fortuitous availability of regulation 18(2)(a) upon which Mr Whittam sought to rest. The logic of his approach is that regulation 10(1) is just one example of a breach of "ordinary Civil law".

72. In any event, and however the issue is analysed, this command was far from being obviously unlawful. We have already stated that there are evidential matters which were left unresolved at the Court Martial. These matters are now hotly disputed on an *ex post facto* basis, but that dispute, by its very nature, creates a fundamental difficulty for the appellant. We are miles away from the glaring and obvious cases contemplated by the Manual and the commentaries. The discussion outside the appellant's room between the appellant and Sergeant Connelly, where even on the appellant's account, he took a different point altogether from the one advanced on his behalf at the Court Martial and in this appeal, was an entirely inappropriate arena for the resolution of this dispute. There is no evidence at all that Sergeant Connelly knew the terms of regulation 10(1); and even if he did, he could not possibly be expected to know whether regulation 18(2)(a) was applicable. Such matters were beyond his rank, and would have required knowledge (of rosters, manpower and other practicalities) which was not at his disposal that morning. The position of the appellant was *a fortiori*. These questions therefore were simply incapable of resolution at the time; but for the command to be unlawful they had to be. It follows that the appellant cannot take refuge in the possibility that a Court Martial might have agreed with him after hearing all the evidence that the exemption was not applicable.

73. The AJAG also concluded that an order to perform a military duty, however dangerous, would not be unlawful unless it involved the commission of a crime. In our view, it was unnecessary for him to take the matter, as he put it, to its ultimate conclusion. Sergeant Connelly's command was not remotely dangerous. An order to jump out of a plane without a parachute would in most circumstances be unlikely, we think, to be for a proper service purpose.

74. It is unnecessary for us to decide whether the appellant's subsequent service complaint was fairly handled (it was rejected on the basis that he disobeyed a lawful command) or how a timely claim to the Employment Tribunal might have fared. These are irrelevant to the point at issue.

75. Finally, we can turn briefly to whether the subject matter of the command given to the appellant fell within the ambit of the exemption provided for by regulation 18(2)(a).

76. The meaning and reach of that regulation is an issue of importance, and there is a disagreement between the parties as to its applicability. As we have explained, the

AJAG proceeded on the erroneous basis that it was conceded by the prosecution that the exemption was not engaged on the facts. Accordingly, he heard no evidence about whether it was or not, nor did he rule on the matter. Both parties to this appeal were confident that there was only one possible answer on the merits, and we were provided with extensive submissions on the law. The difficulty is however that there are material issues of fact that were neither explored nor properly established in evidence; and they remain in dispute. Our conclusion that Sergeant Connelly gave a lawful command, whether or not it might have had the effect of preventing the appellant from exercising a right under regulation 10(1) of the Working Times Regulations, disposes of the appeal. In all the circumstances, interesting and important as the question generally may be, we do not consider it would be right, nor is it necessary to express any view about the applicability of the exemption in this particular case.

Conclusion

77. For the reasons given, this appeal must be dismissed.