The Court of Appeal for Bermuda

113 Front Street
Hamilton HM 12
Bermuda

CIVIL APPEAL No. 3 0f 2008

Between:

1. LARRY WINSLOW MARSHALL
2. LAMONT WINSTON MARSHALL
3. SHAKI DETROY EASTON
4. KORI EUGENE SCOTT
5. SHANE DESMOND ONEIL MORRISEY
6. AUDLEY HERBERT CAMPBELL, JR.
7. TEKLE ZION MING
8. RYAN FREDERICK SWAN
9. SETH MING
10. JAMAL HARTDMAN
11. JAMES FAMOUS
12. RUSS FORD
13. SHANNON THOMAS ADDERLEY
14. HAROON WENDELL CHARON EVE

Appellants

and

THE DEPUTY GOVERNOR OF BERMUDA
THE GOVERNOR OF BERMUDA
THE ATTORNEY GENERAL
LT. COL. WILLIAM WHITE

Respondents

Before: Zacca, E., President
Nazareth, J.A.
Ward, J. A.

Appearances: Mr. Crow, QC, Mr. Duncan and Mr. Johnston for the Appellant
Mr. Singh, QC and Mr. Huw O. Shepheard

Date of Hearing: **17th November 2008**
Date of Judgment: **28th November 2008**

Judgment

Ward J.A.

1. The Appellants are members of an organization "Bermudians Against the Draft." They object to performing military service. They have received Call-up Notices pursuant to Section 17 Defence Act 1965. They have not served as required by the Act.

2. They were served with Call-up Notices because the number of persons who enlisted voluntarily was insufficient to enable the Bermuda Regiment to perform its role in Bermuda as envisioned by the Defence Act. In the year 2006 there were two

volunteers. The role of the regiment is largely ceremonial but also, as a military unit, it is to support the Civil Power. It must have the structure and attributes necessary for emergency relief work in a national disaster and is to support the Civil Authority with the security of Bermuda, its peoples, property, livelihood and interests in order to maintain normality.

1. **Ground 1** of the Grounds of Appeal in essence is that conscription for compulsory military service in the Bermuda Regiment is contrary to section 4(2) of the Constitution and is unlawful.

Section 4 of the Bermuda Constitution Order 1968 provides as follows:

"(2) No person shall be required to perform forced labour.

(3) For the purposes of this section "forced labour" does not include

(b) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service in a naval, military or air force, any labour that a person is required by law to perform in place of such service;

(d) any labour required during a period of public emergency (that is to say, a period to which section 14 of this Constitution applies) or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable……."

Section 14 (1) of the Constitution provides as follows:

"This section applies to any period when

(a) Her Majesty is at war; or

(b) there is in force a proclamation (in this section referred to as proclamation of emergency made under subsection (3) of this section."

4. The Appellants draw a distinction between a person who is already a member of the Regiment and who can lawfully be ordered or required to perform labour and a person who is only in the process of becoming a member and who is not yet a member and who may not be ordered or required to perform any duties.

5. In support of that interpretation Counsel for the Appellants argued that legislation protecting human rights should be interpreted broadly so as to give effect to its true purpose namely to ensure contemporary protection of the relevant rights in light of contemporary standards. The argument continued that requiring a person to join the regiment against his will involves imposing on him an obligation to perform forced labour which is contrary to section 4 (2).

6. We cannot help but observe that that interpretation ignores the definition of what is not 'forced labour' in section 4 (3). We are reminded of the caveat of Peter Gibson L.J. in Chief Constable of Bedfordshire Police –v- Liversidge [2003] 1CR 88 that in adopting a purposive approach to construction it is impermissible to rely on the general purpose of the Act to construe the Act in a way that eliminates the limitations and qualifications.

7. Persons are required to serve after they are conscripted and not before. After conscription they are men of the regiment and subject to the rules, regulations, and discipline thereof and must obey lawful commands. Pursuant to section 4 (3) (b) the labour or service required of them after conscription is not 'forced labour".

8. Counsel for the Respondents argued that Section 4 of the Constitution contemplates compulsory military service for the concept of conscientious objector is meaningful only where compulsory military service operates. We find that reasoning convincing.

9. Pursuant to Article 4 of the European Convention "forced labour" does not include any service of a military character. Moreover, compulsory conscription is compatible with the Convention unless it breaches another free-standing right such as religious freedom or freedom from inhuman or degrading treatment or torture.

10. In Peters –v- The Netherlands, Appeal No. 22793/93 it was held that under the European Convention, compulsory military service is not unlawful and may be demanded of a conscript and the mere belief of a conscientious objector to military service is insufficient to gain exemption from the performance of substitute civilian service. Service of one type or the other must be performed once conscripted. We are clearly of the opinion that compulsory service in the Regiment is not forced labor and is not unlawful.

2. **Ground 2** of the Grounds of Appeal is that the learned Trial Judge adopted an inappropriately narrow view of the Human Rights Act 1981 in holding that conscription of men only did not involve unlawful discrimination contrary to section 6 (1) (a) and /or (e) and / or (g) of the said Act.

Under Section 2 (2) of the Act a person is deemed to discriminate against another person if he –

> "Treats him less favourably then he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because –
>
> (ii) Of his sex

Section 6 (1) of the Act deals with discrimination in employment and reads:

> "Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2 (2) by
>
> (a) Refusing to refer or to recruit any person or class of person (defined in section 2) for employment;
>
> (e) Establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;
>
> (g) Providing in respect of any employee any special term or condition of employment.

11. Counsel for the Appellants argued that by conscripting men and not women, men are treated less favourably than women because of their sex and that the Respondents must recruit women on the same basis as men in order to comply with the terms of the Human Rights Act. Thus if men are conscripted, so must women. At present females are not included in the ballot by which persons are selected for conscription.

12. In paragraphs 39, 42 and 43, of his Judgment the Chief Justice held that although conscription of males only was plainly discriminatory on the grounds of sex, the Human Rights Act 1981 was not breached because it was not contrary to the employment provisions contained in section 6. There were no special terms or conditions of employment which affected men only and not women. Male and female volunteers and male conscripts all worked under the same terms or conditions of employment. The basis of recruitment was different but not the terms and conditions of employment.

13. Section 6 is directed to the refusal to employ a person on grounds of sex. It is not directed to the question of less favourable treatment arising from conscription or to arrangements for involuntary recruitment and is therefore inapplicable.

14. Discrimination under Section 2 of the Human Rights Act is not unlawful unless it falls within one of the sections by which discrimination in a particular context is prohibited. Not all discrimination is made unlawful by the Human Rights Act but only discrimination which falls within certain categories.

15. We conclude therefore, that to recruit females by a method, namely voluntary enlistment, which differs from the method of recruitment for males, namely voluntary enlistment and / or conscription, does not breach the Human Rights Act.

3. **Ground 3** is that the decision to implement conscription is unlawful because it has been reached without taking into account a relevant consideration, namely the possibility of establishing a quota for women in the Regiment.

16. Women in the Regiment serve as volunteers. Between 1965 and the present time 137 women have served. That figure does not suggest that there is large body of women anxiously waiting to serve in the Regiment.

17. The Appellants argued that the Governor has failed to take into account a relevant consideration namely whether express provision should be made for the Regiment to be filled in part by a fixed quota of women, and, as a result any attempt by him to operate the compulsory regime for conscription is unlawful.

18. The proviso to section 6 of the Human Rights Act 1981 with reference to non-discrimination by employers reads:

> "Provided that nothing in this subsection shall render unlawful the maintenance of fixed quotas by reference to sex in regard to the employment of persons in the Bermuda Regiment……."

19. The Governor may consider the fixing of a quota of women in the Bermuda Regiment. It is not a mandatory relevant consideration. It is something that he may do. Without the compulsory enlistment of women, the fixing of a quota of women would be meaningless based on the voluntary recruitment of women. For the past 42 years an average of less than four women per year have volunteered.

20. Whether women should be conscripted into the regiment falls within the category of high Government policy and the Governor was under no legal duty to respond to what was essentially a fishing expedition when he received the letter of 22 February 2007 seeking answers to queries on government policy in regard to the establishment of a quota of females in the Regiment and other matters. We understand the law to be that unless the statute sets out the matters which the Governor must take into account, he in the exercise of his discretion must decide the relevant matters which he will take into account. It is not for conscripts to determine the size or composition of the regiment or a suitable programme of training. Creednz Inc. Governor General [1981] 1 NZLR 172.

4. **Ground 4** of the Grounds of Appeal is that the precondition for conscription under section 4 of the Defence Act 1965 has not been satisfied.

Recruitment for the Regiment is governed by Section 4 of the Defence Act 1965 which reads:

> "Voluntary enlistment supplemented by compulsory military service.
>
> 4. The regiment shall be raised and maintained by means of voluntary enlistment, and also in case voluntary enlistment proves inadequate for the raising or maintenance of the regiment, by means of compulsory military service, in the manner hereinafter in this Act provided."

21. In his Judgment of 7 March 2008 the Chief Justice held that the preferred means of raising and maintaining the regiment was by voluntary enlistment, but should that method fail, then resort may be had to conscription of Bermudian males between the ages of 18 and 23 years.

22. Based on the 1st affidavit of the Appellant, Eve, Exhibit HWCE2, the submission of the Appellants is that the policy of conscription is immoral and unlawful. They also believe that if the regiment was properly administered its numbers would be filled by voluntary enlistment from men and women alike and that it would enjoy an upswing in morale and usefulness. There was no evidence in these proceedings which gave support to that belief.

23. In November 2005 a Fitness for Role (FFR) inspection of the regiment was conducted by representatives of the British Army. Its Report was very critical of the functioning of the regiment, which is not entirely surprising, conducted, as it was, by professional soldiers of a part-time regiment.

24. The FFR Inspection Report was critical of the regiment in many areas such as weapon handling and shooting, quality of equipment – communications, vehicles and weapons being very old and in need of replacement. But it also reflected strengths such as an excellent esprit de corps from the top to the most junior soldiers.

25. The Report does not address the question of the lawfulness of conscription nor does it suggest that the regiment would be more effective if enlistment should be restricted to volunteers only.

26. In February 2006, the Defence Board established pursuant to section 6 of the Defence Act reviewed the operation of the regiment and among its recommendations it stated that there should be an increased emphasis on attracting volunteers. It should be noted that paragraph 10 of the Defence Review Report expresses the opinion that the "current strength can only be maintained by the continuance of the policy of conscription."

27. It was also argued by Counsel for the Appellants that conscription was imposed on the basis of a misunderstanding of the law and without regard to a relevant consideration. We doubt very much that one can reasonably conclude, on the basis of an argument by Counsel for the Respondents in the Court below, that the Governor was advised that there was no need to encourage voluntary enlistment as the Respondents could always rely on conscription to fill the ranks. In any event the Chief Justice held that conscription was only permitted if voluntary enlistment had failed and his ultimate decision was based on that finding.

28. It has been suggested that if pay were to be increased, the regiment would be better able to retain personnel past the three years and two months that they are required to serve and more volunteers would enlist.

29. No doubt every Government department would like an increase in pay – teachers, nurses, transport workers, policemen, and the list goes on. But pay has to be viewed against the resources of Government from which the increase of pay must come and it is not for us to prioritize the allocation of resources. This is a matter for the Government whose mandate it is to make decisions of that nature. Indeed Section 3 of the Defence Act pointedly refers to the Governor consulting with the Minister of Finance without whose blessing nothing that requires expenditure of public funds can be achieved. One cannot conclude that because the deficiencies listed in the FFR Report and Defence Review were not immediately addressed that such failure points to the conclusion that the Respondents have ruled out voluntary enlistment as the preferred method of filling the ranks of the Bermuda Regiment.

30. In paragraph 18 of the Judgment the Chief Justice rightly held "that on the natural and ordinary meaning of the words resort to the means of recruitment is sequential – the preferred and primary method is voluntary enlistment, and if that fails (proves inadequate) then and only then may recourse be had to conscription."

31. Whether there are enough volunteers to fill the ranks of the regiment is a question of fact. There was no evidence that persons were rushing to join the regiment. The question is not why they do not rush, but if they do. To argue that if conditions were better, the ranks could be filled with volunteers is to beg the question. The focus should not be on the attractiveness of the regiment but on the numbers that actually come forward of their own accord. In 2006, two volunteers joined the regiment.

32. The Act is silent on measures to be adopted to ensure that voluntary enlistment is adequate. Counsel for the Appellants has argued that the Respondents did not demonstrate that they did enough to ensure that voluntary enlistment was effective and therefore it cannot be said to have proven inadequate. The Appellants argue further that no positive steps have been taken by the Respondents to encourage either men or women to enlist voluntarily. Audley Herbert Campell in his affidavit of 3rd October 2007 expressed the view that the regiment has never truly sought to fill its ranks with volunteer soldiers and he was unaware of any reported recruitment campaigns except one in or about October 2004.

33. The Chief Justice held that conscription was only permitted if voluntary enlistment had failed. To determine whether voluntary enlistment had failed involved a two –step process whereby firstly the Respondents had to establish that the size of the regiment had been fixed at an appropriate level and secondly, that they had taken all reasonable steps to fill its ranks to the necessary size with volunteers.

34. In 1992, the established strength of the regiment was set at 630. Prior to 2006 the established strength was 609, but the operational strength was 483. The Appellants seem to suggest that enlisting 630 men of the regiment is manifestly excessive and 450 or 411 should suffice. Between 1967 and 1977 there were 450 soldiers. From 1978 following the Gilbert Review to 1987 there were 703 soldiers. The FFR Report did not recommend a reduction in the established strength below 609. The Defence Board Review a year later endorsed the existing establishment.

35. On the basis of the evidence before us we were unable to find that the size of the regiment is excessively large for the work it is required to perform. And there is no evidence which could lead to the conclusion that the functions of the regiment could be carried out by volunteers primarily.

36. The Appellants have complained of the Respondents lack of candour. On 22nd February 2007, Counsel for the Appellants sent to the Respondents a list of questions covering subjects such as:

> Whether the Governor had considered fixing a quota of women, whether the Governor had determined that the Regiment could be maintained at a level lower than 630, whether he had consulted the Minister of Finance, and if not, why not, what steps had been taken to increase the number of volunteers and similar questions.

The Respondents did not reply. Their Counsel characterized the questions as "interrogatories without leave"

37. The Appellants contend that the Respondents have not stated what steps have been taken to implement the recommendations for the FFR Report of 2005 or the Defence Board Review of 2006.

38. Based on the lack of information which they received the Appellants have concluded that the Respondents have not taken any positive steps to encourage men and women to enlist voluntarily in the regiment.

39. On the subject of the duty of candour the Chief Justice set out two statements of principle by Lord Donaldson MR. In paragraph 12 he said:

> 12. "The first statement of principle is found in R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941. The case concerned a decision by an education authority to refuse an educational grant. His Lordship said:
>
> > "Counsel for the council also contended that it may be an undesirable practice to give full, or perhaps any, reasons to every applicant who is refused a discretionary grant, if only because this would be likely to lead to endless further arguments without giving the applicant either satisfaction or a grant. So be it. But in my

judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.

Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.

With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognized that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognize that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticized. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.

The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why."

The Chief Justice continued in paragraph 13:

13. The second statement came five years later in R v Civil Service Appeal board, ex parte Cunningham [1991] 4 All ER 410. That case concerned an assessment of compensation for the unfair dismissal of a Prison Officer. His Lordship said:

2. "In R v Lancahsire CC, ex p Huddleston [1986] 2 All ER 941 at 945 I expressed the view that we had now reached the position in the development of judicial review at which public law bodies and the courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration, including, I would add, the administration of justice. It followed from this that, if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to….

Those of us with experience of judicial review are very much aware that the scope of the authority of decision –makers can vary very widely and so long as that authority is not exceeded it is not for the courts to intervene. They and not the courts are the decision-makers in terms of policy. They and not the courts are the judges in the case of judicial or quasi-judicial decisions which are lawful. The public law jurisdiction of the courts is supervisory and not appellate in character. All this is very much present to the minds of judges

> who are asked to give leave to apply for judicial review. Such leave will only be granted if the applicant makes out a prima facie case that something has gone wrong of a nature and extent which might call for the exercise of the judicial review jurisdiction. Whatever the initial position, the fact that leave to apply for judicial review has been granted calls for some reply from the respondent. How detailed that reply should be will depend upon the circumstances of the particular case. He does not have to justify the merits of his decision, but he does have to dispel the prima facie case that it was unlawful, something which would not arise if leave to appeal had been refused.
>
> In fairness to the board it must be emphasized that it is not being uncooperative. It has been advised, mistakenly as I think, that to attempt any justification of a particular award, however surprising that award might by, would be to concede the right of every claimant to reasons. As I have sought to show, this is not so. The principles of public law will require that those affected by decisions are given the reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But, once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is."

40. Counsel for the Appellants has argued that the level of disclosure by the Respondents should have been far greater than it was and as a result the Court should draw adverse inferences against the Respondents. Indeed it was argued that the Court was not only entitled to draw adverse inferences but was required and compelled to do so.

41. Ground CJ, declined to draw such inferences notwithstanding the fact that the evidence adduced on behalf of the Respondents was "somewhat lean."

42. The reason for the duty of candour is to provide the Court where necessary, with the material needed to make an informed decision. Its purpose is not to reverse the burden of proof.

43. In the instant case the Appellants have complained that the Respondents did not come to the table of justice "with all the cards face upwards on the table" However, it must be said that the Appellants could have requested the answers to the questions in their letter of 22nd of February 2007 by a different route.

44. On the evidence before him the Chief Justice was able to make reasonable findings of fact and we have no reason to disagree with those findings.

45. **Ground 5** is that the notices purportedly issued under Section 17 (1) of the Defence Act 1965 are invalid. Pursuant to section 17(1) the Deputy Governor is mandated to publish notices in the Gazette and in a newspaper containing lists of persons selected for military service requiring such persons to present themselves at such time and place as shall be specified in the notices for medical examination and for enlistment.

46. Following the publication of the notice with the names of the selected persons, the Governor pursuant to Section 17(2) shall cause to be served on each person selected for military service a notice requiring him to present himself at the time and place specified in the notice for medical examination and enlistment.

47. The Appellants complain that the notice dated 15 September 2006 and which was published in the Gazette and newspaper as shown in Exhibit HWCE1was not signed by the Deputy Governor. It was signed by D.J. L. Burchall, Administrator of the Defence Department. It was argued that the requirement of publishing the notice by the Deputy Governor is mandatory and that the Deputy Governor cannot delegate that function to anyone else.

48. The intent of Section 17 is to ensure that persons who have been selected for military service learn that they have been so selected so that they can take the appropriate action. The requirement of personal service pursuant to Section 17(2) further ensures that any conscript who misses the Gazette / newspaper notice is nevertheless made aware of what he is required to do for enlistment.

49. The Chief Justice found that there was a proper delegation of authority from the Deputy Governor to the Administrator of the Defence Department for the purpose of publishing the notice. It was a mechanical task which did not require any exercise of discretion or independent judgment and a purely administrative act. In support he cited the Carltona principle expressed in Carltona –v- Commissioner of Works {1943} 2 ALL ER 560 where it was held that:

> "The duties imposed upon ministers and powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is of course the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority."

50. The Chief Justice went on to hold that "in the ordinary run of the mill it is sufficient if the official exercising the power or fulfilling the duty holds an appropriate office to which the general responsibility for such matters has been entrusted."

51. Mr. Burchall, the deponent to the affidavit dated 26th April 2007 was the Administrator of the Defence Department responsible for the maintenance of the military training register and for administering the annual computer ballot by which men are called up for Military Service with the Bermuda Regiment. We accept that the

publication of the names selected under the authority of the Deputy Governor is a purely administrative act.

52. Counsel for the Appellant cited the case of Whitter –v- R Supreme Court of Bermuda, Appellate Jurisdiction 2001 No. 92 to support the argument that the delegation claimed was unproven and did not empower the delegate to act. In Whitter the task to be performed was not merely mechanical as the legal officer, acting as the agent of the Director of Public Prosecutions, had to exercise professional judgment as to whether or not the prosecution should proceed. In this case the publication of a notice in the Gazette and a newspaper was a purely mechanical exercise.

53. In Evans –v- Minister of Education [2006] Bda L.R. 52 at paragraph 67 Kawaley J. stated "the Carltona principle is potentially applicable beyond the narrow confines of statutory powers conferred on Government ministers. The implied power to sub –delegate based on administrative necessity may potentially be found in respect of purely administrative aspects of the powers delegated by the Governor." We agree with this statement of principle.

54. We are satisfied that the Appellants suffered no prejudice because the notice published in the Gazette and a newspaper was signed by the Administrator of the Defence Department in lieu of the Deputy Governor.

55. For the above reasons the appeal is dismissed.

Signed

Ward, JA

Signed

Zacca, P

Signed

Nazareth, JA