



# **The Court of Appeal for Bermuda**

## **CIVIL APPEAL No. 7 of 2011**

Between:

**JAMEL HARDTMAN  
LAMONT MARSHALL  
LARRY MARSHALL**

Appellants

**-v-**

**THE COMMANDING OFFICER OF THE BERMUDA REGIMENT  
THE CHAIRMAN OF THE DEFENCE EXEMPTION TRIBUNAL  
& INTERESTED PARTIES**

Respondents

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**Before: Zacca, President  
Ward, J.A.  
Baker, J.A.**

**Appearances:** Mr Eugene Johnston for the Appellants  
Ms Shakira Dill for the Respondents

## **Judgment**

**Date of Hearing:  
Date of Judgment:**

**7 November 2011  
17 November 2011**

**WARD, JA:**

**Introduction**

On the 7<sup>th</sup> day of November 2011 we dismissed the appeal and said our reasons would follow. We now give the reasons.

1. This is not the first attempt by the appellants to avoid having to serve in the Bermuda Regiment.
2. In Civil Appeal No. 3 of 2008 in which the same parties and others appeared, the Court held that conscription is not forced labour and is not unlawful. The effect of conscription was that conscripts are subject to the rules, regulations and discipline of the Regiment. Once conscripted, service of one type or another must be performed, unless the conscript is exempted. The mere belief of a conscientious objector does not excuse him from performing his duty of service in the Regiment.
3. The appellants and others appealed to the Privy Council in Appeal No. 0074 of 2009 [2010] UKPC9 in which the Board held that conscription does not constitute unlawful discrimination against men in breach of the Human Rights Act 1981 and further that there was nothing to suggest that sufficient women volunteers could be found to fill any quota of women that might be settled upon.
4. The appellants having lost their argument about conscription being in breach of the Human Rights Act 1981 have taken new wind and argue that their constitutional rights have been violated in that pursuant to section 4(3)(b) of the Constitution, their right to be protected from forced labour has been violated. Section 4 of the Bermuda Constitution Order 1968 reads:

*Protection from slavery and forced labour*

*4 (1) No person shall be held in slavery or servitude.*

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

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

*(a) any labour required in consequence of the sentence or order of a court;*

*(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 objection to service in a naval military or air force, any*

*labour that that person is required by law to perform in place of such service.*

5. Slavery was abolished in Bermuda in 1834, more than five generations ago. No person in Bermuda is held by such bonds. The reference to slavery in the argument was most inappropriate.
6. This Court has already held that conscription in Bermuda is not unlawful under the Human Rights Act of 1981. The appellants are members of a disciplined force, to wit, the Bermuda Regiment, whether or not they want to be, and as such must carry out the lawful orders of the Commanding Officer of the Bermuda Regiment. It is not a question of personal choice. Such service is not forced labour and is not in breach of the Bermuda Constitution Order 1968.
7. The appellants have also argued that their rights to manifest their beliefs under the Constitution have been violated.
8. Section 8 of the Bermuda Constitution Order 1968 reads:

*8(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section, the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private to manifest and propagate his religion or belief in worship, teaching, practice and observance.*

*(2)....*

*(3)....*

*(4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.*

*(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required...*

*(a) in the interests of defence, public safety, public order, public morality, or public health; or*

*(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion or belief without the unsolicited interference of persons professing any other religion or belief, except so far as that provision or, as the case maybe, thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

9. It is argued that the appellants should have the freedom to manifest their religious belief by not serving in the Regiment. It is said that their religious beliefs are well known because of their public expression over the years. On the other hand it is argued that judicial notice cannot be taken of them for beliefs are changeable, beliefs today may not be beliefs tomorrow and there is a procedure laid down in the Defence Act for establishing such beliefs. The appellants refuse to follow that procedure because they argue that the Tribunal is biased and will decide against them as it has decided against others with similar beliefs.
10. We do not understand how an exemption can be granted by the Tribunal unless an application is made to that Tribunal for an exemption.
11. The learned judge held at paragraph 50 of her judgment of 4<sup>th</sup> May 2011 that the Defence Exemption Tribunal is properly constituted in accordance with the legislative requirements. We are of the view that it has been shown to be independent and impartial whether the test to be applied is that of the fair-minded observer or that of the real danger of bias. We cannot assume that it will be biased.
12. Pursuant to section 27(1) of the Defence Act 1965 a person may at any time after reporting under subsection 13 A(2) of the Defence Act apply to the Exemption Tribunal to be registered as a conscientious objector on the grounds that
  - (a) he conscientiously objects to performing combatant duties; or
  - (b) he conscientiously objects to performing any kind of military service.
13. When the relevant applications were listed for hearing, the applicants did not appear. They were therefore not found to be conscientious objectors.
14. It is not for this Court to usurp the function of the Exemption Tribunal. The appellants' duty is to follow the procedure laid down in section 27 of the Defence Act 1965.

15. Counsel for the appellants placed much reliance on the judgment of the European Court of Human Rights delivered on 1 June 2011 in the case of *Bayatyan vs Armenia* in which Bayatyan, an Armenian national, had been convicted for his refusal to serve in the Turkish Armenian army. His religious belief was that of a Jehovah Witness.
16. He argued that his conviction had violated his right to freedom of thought, conscience and religion.
17. Under the Armenian law, every citizen was obliged to serve in the Armenian army. After a number of appeals it was eventually held that conscientious objector status could be claimed in most of the member States on the basis of religious and a broad range of personal beliefs and that Bayatyan, being a Jehovah Witness, was motivated by his religious belief to object to military service.
18. In the instant case the objections of the appellants were not presented to the Exemption Tribunal before whom they failed to appear.
19. The case of Bayatyan is not an authority in support of the proposition that the Exemption Tribunal and the law as set out in the Defence Act can be ignored altogether.
20. As Ronald Dworkin wrote in *Taking Rights Seriously*:

*“In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed.....*

*.....If he decides that he must break the law however, then he must submit to the judgment and punishment that the state imposes.....”*
21. We agree with the learned judge that if the appellants seek exemptions from military service they must appear before the Exemption Tribunal. *Khan v Royal Air Force Summary Appeal Court* [2004] EW HC 2230 (Admin).
22. A person enlisted in the Bermuda Regiment is required to serve for three (3) years and two (2) months. It is a question of fact whether Lamont Marshall has so served. The learned judge held that he has not. He has spent his time in resisting calls to be on active duty. As the learned judge said at paragraph 71 of her judgment, “serve is a verb which requires

some active fulfilment of the duties of service. It particularly includes an obligation to fulfil the lawful orders of the Commanding Officer and others who have the authority to give such orders to an enlisted person.”

23. Lamont Marshall has not obeyed such orders, has not served and is not entitled to be discharged.
24. We were subjected to wide-ranging discussion about the infelicities of the drafting and the presumed meanings of terms in the Defence Act 1965 and their future impact on imagined scenarios. It is not the function of this Court to engage in sterile academic discussions unrelated to the facts of the litigation currently before us.
25. The appellants by refusing to carry out the lawful orders of the Commanding Officer of the Bermuda Regiment, and not having gained an exemption, were subject to arrest. Their arrests were lawful. The conditions under which they were held were not inhumane or degrading and there was no breach of the constitutional provisions.
26. We concur with the comments of the learned judge adopted from *R (Limbuela) v Home Secretary* (HLLE) [2006] 1A.C. 414 at paragraph 87 of her judgment as to what constitutes inhumane or degrading treatment.
27. The appeal is dismissed. Costs to be paid by the appellants, to be taxed if not agreed.

*Signed*

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Ward, JA

*Signed*

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Zacca, P

I agree

*Signed*

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Baker, JA

I agree