IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2006 No. 369

IN THE MATTER OF THE INTERPRETATION ACT 1951

AND IN THE MATTER OF THE DEFENCE ACT 1965 AS AMENDED

AND IN THE MATTER OF THE BERMUDA REGIMENT GOVERNOR'S ORDERS 1993

AND IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

AND IN THE MATTER OF MANDATORY MILITARY SERVICE

BETWEEN:

(1) LARRY WINSLOW MARSHALL
(2) LAMONT WINSLOW MARSHALL
(3) SHAKI DEROY EASTON
(4) KORI EUGENE SCOTT
(5) SHANE DESMOND ONEIL MORRISSEY
(6) AUDLEY HERBERT CAMPBELL, JR.
(7) TEKLE ZION MING
(8) RYAN FREDERICK SWAN
(9) SETH MING
(10) JAMAL HARTMAN
(11) JAMES FAMOUS
(12) RUSS FORD
(13) SHANNON THOMAS ADDERLEY

Plaintiffs

- and -

(1) THE DEPUTY GOVERNOR OF THESE ISLANDS
(2) THE GOVERNOR OF THESE ISLANDS
(3) THE ATTORNEY-GENERAL

Defendants

Mr. Duncan and Mr. Doughty for the Plaintiffs; and
Mr. Douglas and Mr. Rochester for the Respondents.

JUDGMENT

INTRODUCTION

1. This matter comes before me on the plaintiffs' application for interlocutory injunctions restraining the defendants[1] and each of them from:

(a) further threatening to arrest and/or detain any of the Plaintiffs;

[1] I have assumed throughout this judgment that I have jurisdiction to grant injunctions in public law cases against public officials, including H.E. the Governor, on the authority of In re M, M v Home Office [1994] 1 AC 377, HL, but I should not be taken as having decided the point after full argument.

(b) arresting and/or detaining any of the Plaintiffs; and/or

(c) calling up any of the Plaintiffs to perform mandatory military service in the Bermuda regiment or to perform any other non-voluntary service in any organization or institution

until after the trial of this action or further order.

2. The proceedings originally sought relief on only two grounds, both arising out of the fact that females are not included in the ballot by which persons are selected for conscription. The first ground ('the Interpretation Act point') is that 'specified person' in section 12(2) of the Defence Act 1965, when read in conjunction with section 9(b) of the Interpretation Act 1951, includes both a male and a female person; that therefore the Register of persons liable to be selected for military service is maintained in an unlawful manner in that it does not include the names of both male and female persons; and that the Regiment's use of a ballot to select men for mandatory military service is unlawful to the extent that it does not include females. The second ground is that, if the first ground is wrong, then the Regiments' policy of only placing the names of male persons in the Register is unlawful in its operation and effect in that it excludes one gender of persons from the ballot contrary to, and in violation of, section 6(1)(a) and/or section 6(1)(g) of the Human Rights Act 1981 ('the HRA') as read with section 2(2) of same. I will refer to this as 'the HRA Act point'.

3. On 19th January 2007 the plaintiffs sought to amend the proceedings to add a further ground that the Regiment's mode of conscription is unlawful as it makes no reasonable attempt to recruit volunteers before resorting to compulsory service ('the voluntary enlistment point').

4. The application is supported by affidavits from ten of the thirteen plaintiffs (being the first, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and thirteenth). Although the history of each is different in detail, the essential picture is that each has been conscripted into the Bermuda Regiment ('the Regiment') and is due to serve. Some failed to report at the outset; some served a short time and then ceased to report; some were granted deferments which have now expired.

5. The proceedings were issued on 5th December 2006, but not served until the 5th of January 2007. The matter first came before me on the plaintiffs' application for an interlocutory injunction *ex parte* (albeit on short notice to the defendants) on Friday 19th January, when, after hearing argument from the plaintiffs' counsel, I adjourned the matter for an *inter partes* hearing on Wednesday 24th January. The defendants very fairly gave

an undertaking through their counsel not to take any action against the plaintiffs until the full hearing.

6. It is trite law that the issue of court proceedings itself does not prohibit anyone from doing anything. This is because anyone can issue proceedings on any grounds, good or bad. There is no vetting process at the time of issue, and no permission is required. There is an important exception to that in public law cases, which this is. They do require permission, but these plaintiffs did not seek or obtain it, and I have dealt with that further below.

7. In order to prohibit someone doing something while the proceedings run their course it is necessary to make an application to the court for an interlocutory injunction. The proper approach of the court on such an application is set out in the well-known case of American Cyanamid Co. v Ethicon Ltd. [1975] AC 396. In very brief summary, the court should not be attempting to try the action or resolve conflicts of evidence at an interlocutory stage. Instead it should apply a two stage approach, in which it asks itself the questions:

> (i) is there a serious question to be tried, in the sense that the claim is not frivolous or vexatious;
>
> (ii) only if there is a serious issue to be tried, then the court asks itself whether damages would be an adequate remedy for a party injured by the Court's grant of, or its failure to grant, an injunction? If not, where does the balance of convenience lie?

However, the application of these principles to the enforcement of a *prima facie* valid statute calls for special consideration, and I have returned to that below.

THE INTERPRETATION ACT POINT

8. The case based on the Interpretation Act 1951 is simply that in section 9(b) of that Act there is a general rule of construction that in every Act and in every statutory instrument "words importing the masculine gender include females;". It is then said that section 12(2) of the Defence Act should be read subject to that. That section defines "specified person", which means those who are liable to be selected for military service, in the following terms:

> "For the purposes of this Part every male commonwealth citizen who possesses Bermudian Status . . . shall, while he is over the age of eighteen years and under the age of twenty three years, be a specified person."

It is argued that "male" there means "male and female", because of the provisions of the Interpretation Act 1951 set out above.

9. In my judgment that is unarguable. Section 9(b) of the Act sets out a general rule of construction, and it has to give way to the clear meaning and intent of the provision, and that is recognized in the Act itself, section 1(2) of which provides:

> "(2) Notwithstanding anything in subsection (1), any provision of this Act—
> . . .
> (b) which applies a particular rule of construction,
> shall not have effect . . . so as to apply that rule of construction, in relation to any other Act . . . —
> (i) where there is in that other Act . . . any express provision to the contrary; or
> (ii) where in that other Act . . . the context otherwise requires."

10. I consider that it is quite clear in the Defence Act 1965 that, when the legislature chose the expression "male commonwealth citizen" they meant just that, and if they had intended it to mean males and females would simply have omitted the word 'male'. By inserting the otherwise redundant word 'male' they plainly meant 'male', and were deliberately seeking to limit the provision to males. This therefore seems to me to be a clear case where the context requires the disapplication of the general rule, and there is no serious question to be tried on this point.

THE HRA POINT

11. The next ground is that, if section 12(2) of the Defence Act 1965 is limited to males, then it falls foul of sections 6(1)(a) and (g) of the HRA, as read with section 2(2) thereof. Section 2(2) defines discrimination, and sections 6(1)(a) and (g) prohibit it in respect of employment. The latter subsections provide:

> **"Employers not to discriminate**
> 6 (1) 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 persons (as defined in section 2) for employment;
>
> (g) providing in respect of any employee any special term or condition of employment:"

12. In respect of this argument, the Originating Summons refers to "the Regiment's policy of only placing the names of male persons in the Register" but that is a mischaracterization. The contents of the Register are stipulated by section 13 of the Defence Act 1965, which provides:

> "There shall be maintained in such manner and in such form as the Deputy Governor may determine a register of specified persons (hereinafter referred to as the military training register) showing which of those persons are liable to be selected for military service."

As discussed above, "specified person" is defined, for these purposes, as "every male commonwealth citizen". The attack is, therefore, really upon the statutory requirement itself, and not on any "policy". That has important consequences for the approach of the Court on an application for an interlocutory injunction, to which I return below.

13. As to first step in the American Cyanamid process, namely whether there is a serious question to be tried, it is quite clear that service in the regiment is to be regarded as employment for these purposes.[2] Mr. Douglas, for the defendants, argues that excluding females from the ballot is not discrimination against those males included in the ballot. He says that it may be discrimination against the excluded females, but they do not complain in this action, and only a person discriminated against can bring a claim under the Act. The argument against that is that the Act defines discrimination as including deliberately treating a person differently to another person on the grounds of sex: see section 2(2)(a). Section 6(1)(a) prohibits discrimination by "refusing . . . to recruit any person or class of persons . . . for employment". It is not, in other words, limited to refusing to recruit the person discriminated against. It can be argued that, if that was what the Act meant, section 6(1)(a) would have referred to "refusing to recruit *that* person . . . ". I think, therefore, that the plaintiffs have a sufficient argument to get them across the first hurdle.

14. The next question is whether damages are an adequate remedy. The application of this to cases in which a public authority is seeking to enforce the law against some person was considered by the House of Lords in R v Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] 1 AC 603 HL. To take it shortly, the plaintiffs may not have a remedy in damages in any event, but even if they do it may be hard to compensate them adequately if they are imprisoned for failing to report. On the other hand the defendants could not be protected by a remedy in damages if an injunction were wrongly granted, because they would have suffered none. As Lord Goff noted at p. 672:

> "It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience."

15. Lord Goff then turned to consider the proper approach of the Court to the balance of convenience where an interlocutory injunction is sought to restrain the application of a *prima facie* valid statutory provision. He said at p. 673:

> "Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" . . . In this context, particular stress should be placed upon the importance of upholding the law of the land, in

[2] See HRA s. 31(2)(b)

> the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so . . . to render it just or convenient to restrain the authority for the time being from enforcing the law."

He continued at p. 674:

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based *as to justify so exceptional a course being taken*." [my emphasis]

16. That requires me to consider the strength of the plaintiffs' case, not just at the first, threshold level, where the question is "is there a serious question to be tried", but again on the balance of convenience. The question then becomes, is the challenge to the validity of the law so firmly based as to justify so exceptional a course as to restrain its enforcement. On the HRA point, I do not think that it is.

17. First, I do not think that the argument on the meaning of discrimination itself is sufficiently strong and clear. Second, there is a further difficulty, which the defendants did not advance but which I canvassed with the plaintiffs' counsel in argument, and that concerns the application of the proviso to section 6(1) of the HRA. Section 6(1) contains, and is subject to, an important proviso in respect of the Regiment, which says:

> "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, the Bermuda Police, the Prisons service or in regard to the employment of persons in a hospital to care for persons suffering from mental disorder."

18. I think it plain that that proviso is intended to permit the Regiment to discriminate on the grounds of sex, and the only question is whether limiting conscription entirely to males can be said to be a "fixed quota". In this regard "quota" should be given its natural and ordinary meaning, which is given in the New Shorter OED, 1993 ed., as –

> "The share of a total or the maximum number or quantity belonging, due, given or permitted to an individual or group."

The definition of "quota system" is also illuminating:

> "a law, rule or custom prescribing the maximum or minimum number or proportion of persons or goods to be admitted to a country, institution etc."

19. Counsel for the plaintiffs argues that the proviso should be interpreted so as to limit "quota" to affirmative action programmes, but that is to restrict unduly the ordinary meaning of the word. I think it is arguable that you can have a quota set at zero or at 100%, and that the plaintiffs' argument based on the HRA risks foundering on an exception applying to the Regiment contained in the Act itself. Again, therefore, I do not think that the plaintiffs' case on the HRA point meets Lord Goff's test.

20. I have also taken into account that the liberty of the subject is in issue, because the defendants, having failed to attend for military service, are now liable to criminal penalties. In that respect I have firmly born in mind the injunction of Hoffman J (as he then was) in Films Rover International Ltd. v Cannon Film Sales Ltd. [1987] 1 WLR 670 at 681, to "take whichever course appears to carry the lower risk of injustice if [the court] should turn out to have been "wrong"[3]. However, I think that the short answer to that is that all citizens are obliged to obey the law unless and until it is set aside or declared invalid, and there is a strong public policy in enforcing that which outweighs individual concerns. See for instance the following from Lord Jauncey in Factortame at p. 679:

> "If an applicant seeking an injunction against primary or secondary legislation cannot show a strong prima facie ground of challenge it will in the absence of quite exceptional circumstances avail him nought that a refusal of an injunction would result in greater injustice to him should he succeed at trial than would result to the other party if the injunction was granted and he failed at trial."

That principle is also embodied in section 28(b) of the HRA itself which provides:

> "28 For the avoidance of doubt it is hereby declared that—
> (a) . . .
> (b) nothing in this Act shall be deemed to authorize or permit any person to commit an offence against the Criminal Code [*title 8 item 31*] or any other provision of law in force in Bermuda;"

21. Mr. Duncan argues that the plaintiffs have not in fact committed the offence of failing to report for a variety of reasons, and that in any event the six month time limit for summary prosecutions has expired. To the extent that commission of the offence turns upon the points in the Originating Summons, or the plaintiffs' belief in their validity, I have already dealt with them, although it should be noted that most of the plaintiffs had no inkling of the legal points now raised at the time they failed to report. To the extent that some of them might have other defences, for example that they were not served with

[3] This passage was cited with approval in Factortame (supra) by Lord Jauncey at p. 683.

the necessary notice to report, or the matter is now outside the six months time limit for summary prosecutions, those are matters with which the Magistrates Court is well used to dealing. They are not matters for this court, and in any event do not arise out of the grounds in the Originating Summons.

22. In any event, it is by reason of their own actions that the plaintiffs, or some of them, may face criminal sanctions. It was always open to them to respond, like most people, to their call up, and that would not have precluded them challenging military service through the courts. Indeed, the first plaintiff was given a year's deferment to make such a challenge, but failed to do so in that time. I return to that in more detail below, when I consider the question of delay. The reality is that many of the others who have filed evidence either failed to respond to their call up, or having done so subsequently dropped out, without any conception at that time of some principled justification for doing so.

THE VOLUNTARY ENLISTMENT POINT

23. The plaintiffs also seek to assert that the Regiment fails in its duty to recruit volunteers before resorting to conscription, and they apply to amend the Originating Summons accordingly. The argument is based on section 4 of the Defence Act, which provides:

> "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."

24. In support of the factual allegation that the defendants have failed in their statutory duty the only evidence put forward by the plaintiffs is the Military Registration Form in the schedule to Order 10(1) of the Bermuda Regiment Governor's Orders 1993. It is hard to follow that argument, because on the face of it the form allows for voluntary enlistment[4], and is to that extent against the plaintiffs. It is up to the plaintiffs to supplement that argument with hard evidence – the burden lies upon them to do so, and it not on the defendants to disprove this assertion until the plaintiffs adduce evidence in support of it. Until the plaintiffs do so, this ground, in my judgment, discloses no arguable case.

CONSCIENTIOUS OBJECTION

25. I should note that, although the Originating Summons recited at paragraph 14 that the plaintiffs "declared their opposition to being mandatorily conscripted into the Regiment" on the basis of their conscience, no relief was sought in respect of that.

[4] The Form prominently displays the question "Do you wish to volunteer for service to begin next year?" It also advises, in Note 3, that "You may volunteer to complete your service early rather than await selection." As the ballot is based upon the registration forms, those conducting the ballot can tell in advance from the form who, if anyone, wishes to volunteer.

THE NATURE OF THE PROCEEDINGS AND DELAY

26. The defendants have advanced an argument that the plaintiffs' complaints should have been brought by way of an application for Judicial Review under Ord. 53 of the Rules of the Supreme Court 1985 (as amended). The general principle is stated in the following note at 53/14/33 of the Supreme Court Practice, 1999 ed.:

> **"Distinction between public and private law** – Where a person seeks to establish that a decision of a person or body infringes rights where are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (*O'Reilly v. Mackman* [1983] 2 A.C. 237 [1982] 3 All E.R. 1124, HL). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process (*ibid.*). "… it would …. as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringes rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O.53 for the protection of such authorities" (*ibid., per* Lord Diplock at 285/1134)."

27. The real point is that applications for Judicial Review have to be brought promptly and in any event within six months from the date when the grounds for the application first arose, although that can be extended by the court for good reason: see Ord. 53, r. 4(1). All these applicants are well outside that time limit, the decision being challenged essentially being that to conscript them. If, therefore, they were required to go by way of Judicial Review they would face time problems. The question is whether they can side-step that by bringing an ordinary action.

28. This is a complex area of the law, which has been modified by recent decisions, although in my view the principle remains sound. The situation is further complicated in respect of the HRA point by the provisions of section 20A of the Act[5], which may permit complaints of discrimination under that Act to be brought by way of ordinary action rather than by an application for Judicial Review, although it is not entirely clear whether this should apply to claims against public authorities where damages are not claimed. It is further complicated by section 27, which provides that no proceeding under the Act shall be deemed invalid by reason of any defect in form or any technical irregularity.

29. Given these complexities I do not think that, in respect of the HRA, this is a point which I should attempt to decide on this interlocutory application. It may be a difficulty that the plaintiffs will face down the road. For present purposes, however, it does retain some significance, namely that it illustrates that in public law matters, which this plainly is, time is important, and the courts will not assist those who sit on their rights. There is

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[5] "20A (1) A claim by any person ("the claimant") that another person ("the respondent") has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort."

also a wider, but similar principle, that the courts will not lightly use the jurisdiction to award injunctions to assist those who have delayed.

30. Each of the plaintiffs has delayed in different ways. Some were called up long ago, the earliest in 2000. In particular, I consider it significant the first plaintiff was deferred for one year by the Exemptions Tribunal on 22nd November 2005, specifically to enable him seek a declaration from the Supreme Court concerning the lawfulness of conscripting only males. They were at pains to explain that if he did not do that he would have to report for duty at the end of the year. In those circumstances it might be thought that the Exemptions Tribunal acted very fairly. That deferment expired on December 1st 2006. These proceedings were commenced on 5th December 2006, outside the one year period. Moreover, they were not in fact served until Friday 5th January 2007. The affidavits in support were not filed until Thursday 18th January at 4.24 p.m. The first plaintiff says, on oath, that he did not understand that he had actually to get his application decided within the year, but as he waited until the year had expired before even beginning it, it is hard to say what he was thinking. He does not advance any other reason for not issuing his proceedings promptly. In those circumstances I am afraid that he has thrown away the opportunity given to him.

31. Against that background, given the individual history of each of the defendants who has filed affidavits in this matter, I would have declined the injunctions they seek on the grounds of delay in any event.

THE APPLICATIONS TO AMEND

32. Although I entertained argument on the pleadings as if amended to include the 'voluntary enlistment point' (see above) I did not formally allow the amendment. Having now considered the matter, I refuse leave to amend as the proposed case is unsustainable as presently framed. In any event, if the plaintiffs wish to challenge an administrative decision on the grounds of non-compliance with a statute they must do so by judicial review, and under this head there is no statutory provision (as there may be in the HRA) which saves them. They therefore require leave, which they have neither sought nor obtained. Had they applied on the grounds presently relied upon I would have refused leave, both because they are out of time, and because the facts on which they rely do not support the allegation. On that basis also I refuse the amendment.

33. The plaintiffs also seek to amend the Originating Summons to include the relief they seek on this interlocutory application. That is a technicality, which has now been overtaken by events, as I have refused interlocutory relief. However, if they still wish to make those amendments as a matter of form, I see no reason to refuse, and so grant leave to that limited extent.

PARTIES

34. The plaintiffs also seek leave to add Col. White, the present commander of the regiment, on the sensible basis that it is his actions that they seek to restrain. I see no reason to refuse that as between the existing parties, and on the face of it he looks like a proper party to these proceedings. I therefore give leave. That leave is, necessarily, given *ex parte* the Colonel himself. He should be served with the amended proceedings in the normal way, and if he then objects to being added he is at liberty to apply to strike out the proceedings against him or to set aside the leave to join him.

35. Mr. Douglas sought to strike out the Attorney General as a party, as he has no responsibility for the regiment or its actions or administration. The plaintiffs counter that he was only joined because the court cannot declare any law to be inoperative without first hearing from the Attorney General: see HRA section 29(2). On that basis I think that he is a proper party, but he should not have been made subject to the injunction application, and I understand Mr. Duncan to concede that.

36. Mr. Douglas also sought to disclaim the responsibility of the first and second defendants for the actions sought to be enjoined. That may or may not be right. It may also be that the pleaded case discloses no cause of action against them, because it fails to identify their responsibility for the things complained of. However, having refused the injunction applications on its merits, I do not need to get into any of that at this stage. I leave all those arguments to an appropriate application at a later date if the defendants are so minded.

CONCLUSIONS

37. On the Interpretation Act and the voluntary enlistment points I do not consider that there is a serious question to be tried. On the discrimination point, although I would not dismiss out of hand the plaintiffs' case, I am in effect being asked to strike down section 12(2) of the Defence Act 1965, and the test for doing that at an interlocutory stage is a high one. I am not persuaded that the plaintiffs have a strong enough case for me to take such an exceptional course. I also consider that their delay in bringing these proceedings has debarred them from interlocutory relief. I therefore refuse the relief sought and dismiss the plaintiffs' application for interlocutory injunctions. I also refuse leave to amend to add the voluntary enlistment point, but I give leave to amend the relief sought and to add the commander of the regiment, as indicated above.

Dated this 26th day of January 2007

Richard Ground
Chief Justice