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
& 12 OTHERS

Plaintiffs

- and -

(1) THE DEPUTY GOVERNOR OF THESE ISLANDS
(2) THE GOVERNOR OF THESE ISLANDS
(3) THE ATTORNEY-GENERAL
(4) LT. COL. WILLIAM WHITE

Defendants

AND

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2007 No. 58

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF THE APPLICANT'S SELECTION TO PERFORM MANDATORY MILITARY SERVICE IN THE BERMUDA REGIMENT

BETWEEN:

HAROON WENDELL CHARON EVE

Applicant

- and –

(1) THE DEPUTY GOVERNOR OF BERMUDA
(2) THE GOVERNOR OF BERMUDA
(3) THE ATTORNEY GENERAL

Respondents

Date of hearing: 25th and 26th February 2008
Date of judgment: 7th March 2008

Delroy Duncan and Eugene Johnston for the Plaintiffs and the Applicant; and
Huw Shepheard and Leighton Rochester for the Defendant and the Respondents.

JUDGMENT

INTRODUCTION

1. In these consolidated matters[1] the applicants[2] seek to challenge their conscription for compulsory military service in the Bermuda Regiment. They do so on various grounds, some of which I considered at an interlocutory stage in Civ. 2006/369[3]. The issues have, however, been redefined and expanded since then by the pleadings in Civ. 2007/58, to the extent that any reference to the issues as they stood at the time of my judgment on the interlocutory application is unlikely to be very helpful. To the extent that the pleaded issues differed between the two actions, that might have had some bearing on relief[4], but in view of the outcome I do not think it necessary to be delayed by any extensive consideration of that.

2. Although the history of each of the applicants 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. Mr. Eve, the applicant in the second action, who was selected for service on 5th September 2006, wrote in requesting a hearing before the Exemptions Tribunal. He says that he received no response, while the evidence for the respondents is that they made one attempt to contact him which failed because, when a regimental messenger went to the address given in his letter, he was told that Mr. Eve no longer lived there.[5]

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[1] They were consolidated pursuant to RSC Ord. 4, r. 10, by my Orders of 31st May [286] and 8th June 2007 [90]. References in square brackets are to the pages in the Pleadings and Documents bundle.
[2] For brevity I am going to I use the plural, "applicants", to refer to both the plaintiffs in Civ. 2006/369 and the applicant in Civ. 2007/58.
[3] See my Judgment of 26th January 2007 [180] refusing the plaintiffs' application for interlocutory injunctions.
[4] Civ. 2006/369 was brought by an ordinary originating summons. Civ. 2007/58 was brought with leave by way of an application for judicial review. Many of the plaintiffs in the first action may well have been outside the six month time limit for bringing proceedings for judicial review of their call-up, and so unable to avail themselves of the purely public law points raised in the judicial review proceedings (although no point was in fact taken on that).
[5] See paragraphs 7 – 13 of the second affidavit of Dennis Burchall [385 – 386].

THE BERMUDA REGIMENT

3. It will help to make the issues clearer if I give a brief overview of the regiment. It is established and governed by the Defence Act 1965 ('the Act'), section 3 of which provides –

> "Subject to and in accordance with this Act, there shall be raised and maintained in Bermuda one military force to be called the Bermuda Regiment, consisting of such number of officers and men as may from time to time be determined by the Governor after consultation with the Minister of Finance; and such military force is in this Act referred to as the regiment."

I take the requirement of "one military force" to reflect the historical necessity of amalgamating the pre-existing racially segregated forces. I take the requirement to consult the Minister of Finance to embody the need to make sure the country can afford the regiment.

4. As to recruitment for the regiment, that is governed by section 4 of the Act, which provides:

> **"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."

That is a key provision for the argument in this case, and I will have to return to it later. In recent times it seems that the regiment has, in practice, been raised largely by conscription.

5. As to conscription, section 13A of the Act provides that every "specified person" shall, on attaining the age of 18, be liable for military service unless otherwise exempted. A list of such persons, known as the military training register, is maintained and every specified person has to enroll on it on turning 18. The procedure for enrolling is set out in the Bermuda Regiment Governor's Orders 1993, and requires all specified persons to

report to a police station or Warwick Camp and complete a form. The form contains a question asking if they wish to volunteer, and explains that it is possible to volunteer and start forthwith, rather than await selection. It tells the registrant that, for persons who do not volunteer, a ballot is held each August to select those who will actually have to perform military service, and that those selected by the ballot will be told to report for a medical examination in October. The key to all of this is the meaning of "specified person". That is set out in section 12(2) of the Act, and it is limited to Bermudian males between the ages of 18 and 23[6].

6. Females are not specified persons under the Act as currently framed, and so are not liable to compulsory service. They are not, therefore, required to register or complete the form. They may, however, still volunteer: any volunteer who is a commonwealth citizen may be enlisted in the Regiment, and that includes females and non-Bermudians[7]. The possibility of female soldiers is expressly recognised in the definition of "man of the regiment" which includes "a volunteer who is a woman[8]". I am told by counsel for the respondents (although it is not in the evidence) that 13 women are currently serving, and that 137 have done so in the past. To put that in context, the current establishment of the regiment is 609[9].

THE ISSUES

7. As they now stand the issues are essentially those set out in the applicant's Notice of Application [1-2] in the second action (Civ. 2007/58)[, where they are fully pleaded. In the applicants' skeleton argument they are condensed as follows -

> (i) The precondition for conscription under section 4 of the Defence Act 1965 has not been satisfied ('the Precondition Argument').

[6] "(2) For the purposes of this Part every male Commonwealth citizen who possesses Bermudian status for the purposes of the Bermuda Immigration and Protection Act 1956 shall, while he is over the age of eighteen years and under the age of twenty three years, be a specified person."
[7] See Defence Act 1965, section 14.
[8] See Ibid., section 1.
[9] See HWCE2, at paragraph 8 [19].

(ii) The decision to implement conscription is unlawful because it has been reached without taken into account a relevant consideration, namely the possibility of establishing a quota for women in the Regiment ('the Quota Argument').

(iii) The conscription of men only involves unlawful discrimination contrary to section 6(1)(a) and/or (e) and/or (g) of the Human Rights Act 1981 ('the Discrimination Argument').

(iv) The notices purportedly issued under section 17(1) of the Defence Act are invalid ('the section 17 Argument').

8. I should note that, although the Originating Summons in Civ. 2006/369 recites at paragraph 14 that "On the basis of their conscience, each of the Plaintiffs declared their opposition to being mandatorily conscripted into the Regiment", no relief was sought in respect of that and it was abandoned in paragraph 4 of their skeleton argument[10]. Nor was any challenge made to conscription on expressly Constitutional grounds.

THE PARTIES

9. I need to say a brief word about the respondents, although no point is taken on it. The Governor has been joined as having primary responsibility for the regiment under the Act. I should note, however, that by the Governor's (Bermuda Regiment Powers) Delegation Directions 1998, the Governor has delegated to the Minister responsible for the Security Services responsibility for "recruitment; community relations; budget; and answers to questions raised in the House of Assembly and the Senate." In this context it seems to me that recruitment includes conscription, and that also seems to be how it has been interpreted by those administering the regiment. To the extent that it may be suggested that recruitment only includes voluntary enlistment, I reject that. It may, therefore, be that the Minister should also have been joined, but nothing turns on that, particularly given that the Attorney General is a party.

[10] An argument based on the construction of section 12(2) of the Defence Act 1965 was also abandoned.

THE DUTY OF CANDOUR

10. Before turning to the individual points made by the applicants, I need to deal with a general point that they make on the evidence, or rather the lack of it. The applicants contend for a general duty of candour on respondents in public law cases, and they say that the respondents in this case have fallen short of that. They say, therefore, in those cases where the respondents have failed to provide information which must have been available to them, that I should draw adverse inferences.

11. In support of their contention the applicants rely upon two statements by Lord Donaldson MR. These statements of the law are worth setting out in full, as this is by no means the first case to come before the Supreme Court in which the respondents in a public law cases files minimal evidence, leaving the court to grope its way to an assessment of the facts. There also seems to be an assumption on the part of respondents that applications for the judicial review of administrative action can be decided on law alone, in a vacuum and divorced from the facts. That may be so in a limited number of cases, but in most the outcome will turn upon a complex interaction between fact and law. If the court is to do justice on the law, it needs to be put in possession of the facts.

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 the 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 recognised 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 recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. 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."

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:

"In *R v Lancashire 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 emphasised 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."

14. Against that, it is argued by Mr. Shepheard that that statement of general principle should be confined to cases of quasi-judicial decisions, which is not what we are considering here. I do not accept that the principle should be so confined, although I do think that the level of disclosure which is appropriate will vary according to the circumstances and facts of each individual case, and the nature of the administrative action which is in question. It should also be borne in mind that documentary discovery is now available in Judicial Review[11], and that if an applicant wishes to pursue an exploration of factual matters he can apply for discovery pursuant to RSC Ord. 24. In this case no such application was ever made.

15. I also consider that conscription by ballot is one of the classic cases where the individual is not entitled to demand reasons. Thus a conscriptee cannot require a detailed explanation of the reasons causing the recruiting authority to resort to conscription. To the extent, therefore, that the applicants seek to place weight on the respondents' failure

[11] See RSC Ord. 53, r. 8(1) and the Supreme Court Practice, 1999 ed., at note 53/14/47.

to reply to their letter of 22nd January 2007 [36], which was before the grant of leave to apply for judicial review,[12] I do not think that they are entitled to do so. Nor can they shift the burden of proof by correspondence. Moreover, while I think it regrettable that the regiment has not done the court the courtesy of giving it a more detailed exposition of its recruitment practices and needs, the situation is not such that I should necessarily draw inferences adverse to the respondents, or seek to go behind the evidence that is adduced on their behalf, notwithstanding that it is somewhat lean.

16. I turn, then, to consider the four arguments advanced by the applicants.

1. THE PRECONDITION ARGUMENT

17. The argument is that conscription is only permissible if voluntary enlistment proves inadequate for manning the regiment. This is based upon the terms of section 4 of the Act (see paragraph 4 above), which says that the regiment "*shall* be raised and maintained by means of voluntary enlistment, and also, *in case voluntary enlistment proves inadequate* . . . by means of compulsory military service" [My emphasis]. It is said that, because this affects the liberty of the subject, it should be construed in the subject's favour, and that it means that resort can only be had to compulsory conscription if voluntary enlistment has first proved inadequate.

18. Mr. Shepheard's response to this is brief[13]. He says that the section, on its true construction, provides for two parallel routes for raising and maintaining the regiment, which run side by side and not in sequence. He says that "and also, in case" should not be read as if it were "or, if", but rather that "and also" means that both means of recruitment are equally available. That argument, with respect, seems plainly wrong. It simply ignores the words "in case voluntary enlistment proves inadequate". I consider 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

[12] Leave was granted by Bell J on 20th March 2007 [81].
[13] A second argument that, because I refused leave to amend the first action to add this ground, that it was not now before the court, was abandoned, presumably in view of the clear pleading of it in the second action.

('proves inadequate') then and only then may recourse be had to conscription. Nor, in this context, can I detect any shade or distinction between the meanings of "in case", and "if".

I consider, therefore, that conscription is only permitted if voluntary enlistment has failed. That is, of course, a question of fact. I accept Mr. Duncan's submission that the burden of proof on that question lies on the respondents, but, taking a realistic view of the probabilities, it may not take a great deal to satisfy that burden.

19. Mr. Duncan argues that satisfying that burden involves a two step process. First, he argues, the respondents cannot suggest that voluntary enlistment has proved inadequate unless they can demonstrate that the size of the regiment has been fixed at an appropriate level. Secondly, they must demonstrate that they have taken all reasonable steps to fill its ranks to the necessary size with volunteers. I accept that approach in principle, though, as I explain below, I do not think it has all the consequences for which Mr. Duncan contends. I will deal with the evidence on each limb in turn.

(a) The Size of the Regiment

20. It is not the function of the court to carry out an inquiry into what the regiment's necessary or optimum establishment should be. It is enough if the respondents can show that they have addressed the issue in a reasonable manner. It may be that if the applicants could show that no thought was given to this, and that if it were there would be such a significant reduction in the regiment as to mean that it could be filled by volunteers, that their argument would gain some traction, but they cannot do that.

21. Much of the evidence on this can be extracted from two important documents which have been placed before the court by the applicants. They are a 'Fitness for Role Inspection' carried out by the British Defence staff in Washington in November 2005 ('the FFR')[18-21], and a subsequent Review of the Regiment by the Defence Board[14] of February 2006 [24-33].

[14] The Defence Board is a statutory body established by section 6 of the Defence Act and charged with advising the Governor and Minister on their responsibilities under the Act.

22. The Defence Board's Review sets out a brief history of the Regiment, which, in the absence of anything to the contrary, I accept. It shows that the regiment was created in 1965. The first major review took place in 1978, following the disturbances of the previous year, and it recommended an expansion of the regiment's establishment from 450 to 703. This was put into effect and the regiment held its new strength "until at least 1987". In 1992 the then Governor, Major-General Sir Desmond Langley, reviewed the regiment and recommended a reduction of its established strength to 630, which was implemented. There was then a review in 2000 which was not implemented, but there is nothing to show that it said anything concerning the strength of the Regiment. However, at some unspecified point prior to 2006 the establishment had in fact been reduced to 609, and that appears to have been its established strength at all times material to the call-up of the applicants.

23. The Defence Board's Review of February 2006 followed shortly after FFR, and relied heavily upon it. It saw no need to make any change in the established strength of the Regiment. It concluded and unequivocally recommended that:

> "The established strength of the Bermuda Regiment should remain at 609".

To the extent that the applicants rely upon the Review as recommending an operational strength of 450 to 500, they are misreading the report if they think that means a reduction in its established strength. There is a difference between the two. In paragraph 7 of the Review the Defence Board explains –

> "Operational strength is the strength that can be delivered, or what is expected to be delivered, when the Regiment is ordered or required to undertake military operations."

At the time of the FFR the nominal strength was 633, the establishment was 609, but only 483 were declared as available for service. It is that 483 which constituted its then operational strength[15].

24. Against that background, I accept the applicant's argument that the Governor is under a duty to review the regiment from time to time to ensure that no more people than necessary are being conscripted. How often such a review is carried out will depend on a variety of factors, not least whether anything has in fact changed or not[16]. In ordinary circumstances once every five years may suffice. The 14 years between 1992 and 2006 seems too long, but it does not avail the applicants, because in 2006 the Defence Board endorsed the existing establishment, and there had been no significant change in the recommended establishment over those 14 years[17].

(b) The Failure to Attract Volunteers

25. As to whether that establishment could be made up by volunteers, the Defence Board, at paragraph 10 of its Review [29], considered that it could not:

> "The Board feels that the Regiment's current strength can only be maintained by the continuance of the policy of conscription; and further, that under current law, the annual delivery of manpower is unlikely to exceed 180 men on a regular and continuing basis."

26. Mr. Burchall, the defence administrator, who provided two affidavits for the respondents, shared that view[18]:

> "15. Voluntary enlistment is and was, when I was Administrator, inadequate for raising and maintaining the Regiment. In the year that Eve was conscripted, I believe there were only two volunteers who enlisted in the Regiment."

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[15] "On 1st November 2005, the Regiment reported that it had an operational strength of 483 men." Defence Board Review, paragraph 7 [27]. In fact, of that 483 only 411 reported for the duty at the time of the FFR.
[16] I am not here addressing how often the regiment should be reviewed for fitness for role or operational purposes. That is not my job. The Defence Board recommended an annual independent military assessment. That may well be sensible, but it has no direct bearing on this case.
[17] I do not regard the reduction from 630 to 609 as significant for these purposes, for reasons which I explain further below, nor is there anything to show that any of the applicants were conscripted at a nominal strength of 630.
[18] See paragraph 15 of his second affidavit of 17th August 2007 [386].

I have no reason to doubt that. It is a statement on oath. As such, it is evidence not mere assertion (as the applicants repeatedly contended). There was no application to cross-examine him on it, although the trial directions I gave expressly contemplated the possibility of doing so. It is one thing to say that the applicants could have given more detail over a longer period, quite another to disbelieve a man on his oath just because he fails to give such detail.

27. It is true that the Board also considered that "the rate of volunteering should be improved" and that more could be done to retain soldiers beyond their compulsory service, but it also recognised a variety of factors beyond the control of the Regiment, which made retention difficult. These included the pressure of other commitments, such as family, home, career, business and leisure. In the past the retention rate had been in the region of 7% - 10%, but had fallen off from that. The problem was not that an improved retention rate would avoid conscription, but that it was needed to strengthen the nucleus of commanders and managers. There is nothing in all of that to support the applicants' case.

28. Nor do I think it appropriate for the Court to review in detail the Regiment's recruitment programme. It may be that they could and should do more to attract volunteers, but I only have to be satisfied that they have addressed the issue in a reasonable, not an optimal, manner.

29. To counter the Board's view, the applicants rely upon a search of the computerized archive of the daily newspaper, the Royal Gazette. It only produced one reference to a recruitment campaign. Unfortunately the affidavit which exhibits the search[19] does not say how far back the data base goes. However, the complete search was exhibited, and the earliest piece retrieved is dated 8th August 2001. On the assumption that the newspaper was carrying articles about the regiment before that date, the likely inference is that the archive does not extend back much earlier than that. So it only sheds light on the period of about 6 years before the commencement of these proceedings.

[19] See the affidavit of William Zuill of 6th March 2007 [43].

30. There was one recruitment drive referred to during that period in two articles of 29th October 2004. The articles announce the drive and describe the advertisements to be used as part of it. The applicants say in argument that I cannot assume that it actually took place, as the announcement was merely a statement of intent, but I am not applying the criminal standard of proof. It seems highly unlikely that the regiment would announce a drive, describing in detail the advertisements they intended to use, and then inexplicably fail to implement it. On the balance of probabilities, therefore, I find that there was a recruitment drive in or about November 2004. It would, of course, be helpful to know what results it yielded, but I am not going to infer that it yielded a massive influx of new volunteers, given that by 2006 (the year that Eve was recruited) the number of volunteers had dropped to two.

31. I was also shown a further newspaper article for 30th November 2007, announcing a new drive aimed particularly at women. It contains the following statement from the officer in command of the regiment[20]:

> "It has been three years since we have advertised for women volunteers, yet we have continued to welcome a handful every year."

That confirms that there was in fact a campaign in 2004, and that it extended to women. I think that that was adequate for the purposes of the statute. I do not think that the regiment is required to carry out an extensive recruiting drive each year, unless it could be shown in some way that it would have a material impact on the need to conscript and the size of the draft.

32. It also seems to me that it is not enough for the applicants to show that a marginal, or even moderate, improvement in the volunteer rate is possible. The fact that a better retention or volunteer rate might have improved the odds of the individual applicants being conscripted is not sufficient, in my judgment, to entitle them to relief. It is not a zero-sum game in which one more volunteer means one less conscript. The regiment are entitled to adopt a broad approach to establishing the size of the draft. They do not, in my

[20] Col. White, the fourth defendant in Civ. 2006, No. 369.

view, have to wait each year to see how many people volunteer and then tinker with the size of the draft accordingly. There are practical reasons for this, the most obvious being that there is going to be a discrepancy between the number drafted in any one year and those who actually serve. If justification for that was required, the applicants provide it themselves. They were all conscripted, but none has served out their term, and several did not report at all.

33. It would, of course, have been helpful if the Regiment had provided an explanation as to the size of the draft, the number reporting and so on, but I am not prepared to infer from that failure that they are drafting too many. That would fly in the face of the FFR and the Defence Board Review. Indeed, the figures speak for themselves. The number conscripted in Eve's year was 589.[21] I have no reason to think that that is not pretty standard, and was not at least similar in the preceding years. Yet the Defence Board's Review reveals that only 199 new recruits completed Recruit Camp in January 2005[22]. Assuming the original draft had been roughly comparable to the 589 in Eve's year, that is a fairly massive attrition rate. Moreover, that 199 brought the operational strength of the regiment to 539 as at 1st March 2005, but by the FFR on 1st November 2005 that had been reduced by 128 (of whom 56 had been discharged and 38 were AWOL) to the 411 who actually reported for duty. The Defence Board describes this as representing "significant reductions or losses when compared to the manpower originally supplied." It demonstrates (if demonstration were needed) that relating the size of the draft to the size of the actual intake cannot be a precise exercise.

2. THE QUOTA ARGUMENT

34. As I understand it, the argument is that, in fixing the size of the Regiment and exercising the power to conscript, the Governor has failed to take into account whether certain functions of the Regiment could and should be performed by women rather than men. The applicants point out that many of the Regiments modern functions are equally amenable to performance by women as by men, particularly as a combat role is not

[21] See HWCE1 [9-15] which is the call-up notice of 15th September 2006. In fact the real number was 604, as the final page was omitted from the copy exhibited.
[22] See paragraph 8 [28].

foreseen. It is said, therefore, that the Governor should have considered whether express provision should be made for the Regiment to be composed of a fixed proportion of males and females, using the power under section 6(1) of the Human Rights Act 1981 ('the HRA') to fix a quota for each sex. It is said that, if that had happened, and if appropriate steps had been taken to encourage sufficient females to volunteer, the need for conscripting males might not have arisen. As it is, no such quota has been fixed, and the applicants invite the inference from that that the Governor did not apply his mind to the possibility of doing so.

35. In my judgment that inference is unsustainable. I have no reason to think that the Governor and those advising him have not considered the possibility of fixing a quota of women volunteers and rejected it. The applicants seek to surmount the absence of evidence on this by saying that the duty of candour (see above) requires an explanation of what has been decided and why, and that as the respondents have failed to do so the court should drawn an adverse inference, but, in view of the considerations set out in paragraphs 14 and 15 above, I am not prepared to go that far.

36. More importantly, there is nothing to suggest that sufficient women volunteers could be found to fill any such quota: indeed, the figures are to the contrary.

3. THE DISCRIMINATION ARGUMENT

37. The next ground is that, if section 12(2) of the Act is limited to males, then it falls foul of paragraphs (a), (e) and (g) of section 6(1) of the HRA, as read with section 2(2) thereof. Section 2(2) defines discrimination, and paragraphs (a) to (g) of section 6(1) prohibit it in various forms in relation to employment.

38. Section 2(2), insofar as it is relevant, says –

> "(2) For the purposes of this Act a person shall be deemed to discriminate against another person—

(a) if he treats him less favourably than 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—

(i) . . .

(ii) of his sex;"

39. I think it plain that subjecting males but not females to compulsory military service is to treat them differently to females because of their sex, and is therefore discriminatory. But that is not the end of it. Discrimination alone is not prohibited by the HRA[23]. To be unlawful under the HRA discrimination must fall within one of the operative sections of the Act. The relevant provisions are contained in section 6(1), upon paragraphs (a), (e) and (g) of which the applicants rely -

"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;

(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: . . . "

40. To the extent that counsel for the respondents seemed to argue that the HRA was not intended to apply to the Defence Act, and that, if the legislature had meant it to do so, it would have said so in terms, any such argument seems to me to be wholly unsupportable. First of all, it is plain that the HRA does have military service in its contemplation because in various places it makes special reference to, or provision for, it. Thus, section 31[24] specifically applies the HRA to military service, and specifies that employment

[23] Discriminatory legislation is prohibited by section 12 of the Constitution, but this case is not brought under that section, which is, in any event, subject to exceptions.

[24] **"Application to Crown etc**

31 (1) This Act applies—

includes military service. Moreover, the HRA plainly has the regiment in contemplation because the proviso to section 6(1)[25] allows for fixed quotas by reference to sex in regard to employment in, *inter alia*, "the Bermuda Regiment". Even were that not so, the HRA purports to be of general application, and indeed, by section 30B, declares its primacy over all other legislation:

> **"Primacy of this Act**
>
> 30B (1) Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.
>
> (2) Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995."

The fact that that was inserted by an amendment in 1992, which came into effect on 8th April 1993, seems neither here nor there for anything happening after 1st January 1995.

41. I turn, then, to consider whether any of the provisions of the HRA are engaged by male-only conscription. If they are, that is the end of it (subject only to the question of remedy, which I touch on briefly below). There are no exceptions in the public interest,

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(a) to an act done by a person in the course of service of the Crown—
(i) . . .
(ii) in a military capacity in Bermuda; or
. . .
(2) A reference in this Act to employment applies to—
(a) . . .
(b) service of the Crown in a military capacity in Bermuda; or
(c) . . .
as it applies to employment by a private person; and for that purpose a reference express or implied to a contract of employment includes a reference to the terms of service."

[25] "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."

Whether that might be used to legitimise the conscription of males only, if it otherwise contravened the statute (see further my Judgment of 26th January 2007, paragraphs 17-19), was not an argument advanced or relied upon by the respondents, and I am not, therefore, called upon to decide it.

and there is no balancing exercise between the public and the private interest as may arise on a Constitutional application.

42. The applicants limit their argument to sections 6(1)(a), (e) and (g) of the Act (for which see above). I do not think that paragraph (a) is engaged. The evidence is clear that the Regiment does not refuse to recruit women, and indeed welcomes them. Nor do I think that paragraph (e) is engaged. It may well be that the Act establishes an employment classification, namely those liable to conscription, but that does not exclude females from employment. It merely excludes them from compulsory employment. I do not think that adopting a purposive construction changes any of that.

43. The applicants rely most heavily on paragraph (g). They argue that the compulsory nature of male military service is a special term or condition of that service. On this I accept the respondents' argument that conscription is not properly a term or condition of service, but rather a means of supplying recruits, and that the terms and conditions of service are the same for men and women, conscript and volunteer. In particular the period of service is the same for conscripts as for volunteers, and the way that the Defence Act expresses that is very telling:

> "**Period of compulsory service**
> 19 (1) Every person upon whom a calling up notice is duly served shall, on the day on which he is required by the notice to present himself, be deemed to have been duly enlisted in the regiment for a period of three years and two months *as if he had been enlisted as a volunteer under section 14*." [my emphasis]

44. I should add that, were I wrong on the non-application of section 6 of the HRA, I would have required further submissions as to the consequences of that. In particular I would have wanted to hear argument on whether a declaration of inoperability under section 29[26] was retroactive or prospective only. I would also have wanted argument on

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[26] **"Power of Supreme Court**
29 (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act."

the relationship between section 29, which was in the original act, and section 30B (see above), which was apparently added by amendment in 1992.

4. THE SECTION 17 ARGUMENT

45. This is a short point. Conscriptees are called up by the service upon them of individual notices under subsection 17(2) of the Defence Act. A pre-condition of this is the publication of a notice complying with subsection 17(1) of the Act:

> "17(1) The Deputy Governor shall prior to the issue of any notices under subsection (2) publish notices in the Gazette and in a newspaper containing lists of persons selected for military service under section 16 . . . "

46. The only notice in evidence relates to Mr. Eve, and it signed by Mr. Burchall, the Defence Administrator, and not by the Deputy Governor. The pleaded case upon it is that "the Deputy Governor wrongly delegated to the Defence Board his authority to serve notices under section 17(1) of the Defence Act 1985[27]". The applicants therefore argue that Mr. Eve's call-up notice was issued without jurisdiction to do so. It is accepted that this is a technicality, but the argument is that where the liberty of the subject is concerned, technicalities are important.

47. The respondents argue that "there is no question of the Deputy Governor having wrongly delegated his authority to publish notice under section 17(1)", and they rely upon the principles in Carltona v Commissioner of Works [1943] 2 All ER 560:

> "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 . . . "

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[27] See ground 1 of the "grounds on which relief is sought" [3].

The applicants respond that there is no evidence of such a delegation, and that while the 'Carltona' principles may apply to authorize an actual delegation, they do not operate to supply one.

48. I do not accept the applicants' contention. The practical application of the principle does not require that the responsible person personally and in writing delegate each task. If there had to be a formal delegation for each power or duty, a Minister in a busy department, particularly in a large jurisdiction like the U.K., would spend all his time signing delegations. That is not what is meant. 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. There will, of course, be special cases where, because of the nature of the responsibility or power being exercised, a more formal delegation will be required. The case of Whitter v DPP (App. Jur. 2001/92)(21st June 2002), upon which the applicants rely, was just such a case. This is not.

49. It is again unfortunate that the point was not expressly addressed in the evidence. The closest that the evidence comes is Mr. Burchall's first affidavit, which was sworn before the point was raised. There he says –

> "I currently hold the Civil Service post of Administrator of the Defence Department which I have held since the 1st June 2000. I make this affidavit on behalf of the Defendants in this matter. As Administrator, I am 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."

I read that as saying that the administrative tasks relating to the Regiment and recruitment have been conferred on the Administrator. I do not think it necessary to go behind that. Moreover, the task concerned is purely mechanical. There is no exercise of discretion or independent judgment concerned. The names of those to go in the Notice are selected by ballot: section 16. There is nothing requiring the Deputy Governor to conduct the ballot itself. Section 17 merely requires him to publish notices containing the lists of those

selected. In those circumstances I consider that the establishment of Mr. Burchall's post alone is enough to constitute a sufficient delegation of such a purely administrative act.

50. I also note that the likely reason that such a task was expressly conferred upon the Deputy Governor is that Defence is a reserved power under section 62 of the Constitution[28]. The primary Constitutional function of the Deputy Governor is to assist the Governor in respect of the reserved powers:

> **"Functions of Deputy Governor**
>
> 19A (1) Subject to the provisions of subsection (2) of this section, the Deputy Governor shall—
>
> (a) assist the Governor in the exercise of his functions relating to matters for which he is responsible under section 62 of this Constitution;"

However, pursuant to section 62(2) of the Constitution, the Governor has formally delegated some of his responsibilities under the Defence Act, including those relating to recruitment, to the Minister responsible for Security Services[29]. Once that had been done there remained no reason why the duty of publishing the outcome of the ballot should remain upon the Deputy Governor.

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[28] "**Governor's special responsibilities**
62 (1) The Governor, acting in his discretion, shall be responsible for the conduct (subject to the provisions of this Constitution and of any other law) of any business of the Government, including the administration of any department of government, with respect to the following matters—
(a) external affairs;
(b) defence, including armed forces;
(c) internal security;
(d) the police.
(2) The Governor, acting in his discretion, may by directions in writing delegate, with the prior approval of the Secretary of State, to the Premier or any other Minister designated by him after consultation with the Premier such responsibility for any of the matters specified in sub-section (1) of this section as the Governor may think fit upon such conditions as he may impose."

[29] See the Governor's (Bermuda Regiment Powers) Delegation Directions 1998 (BR 59/1998).

CONCLUSIONS

51. For the reasons set out above, I consider that the preconditions for conscription were met at all material times. In particular I find that the establishment of the regiment was kept under adequate review and was set within a reasonable range; that reasonable efforts had been made to attract volunteers; and that voluntary enlistment is and, at all material times was, inadequate for raising and maintaining the regiment. I do not consider that the position would be materially changed by establishing a quota for female volunteers. On the technical point concerning the call-up notice in the Eve case, I find that that notice was regular, and that the administrative function of publishing it had been sufficiently delegated to the Defence Administrator.

52. While I consider that the conscription of males only is plainly discriminatory on the grounds of sex, that alone is not enough to breach the Human Rights Act 1981. The issue is whether the compulsory conscription of males is contrary to the employment provisions contained in section 6 of that Act, and in particular the prohibition on discrimination by means of special terms or conditions of employment contained in subsection 6(1)(g). That is the heart of this case. For the reasons given above, I do not think that conscription of males only is a term or condition of employment, and so the section is not engaged.

53. I therefore dismiss the consolidated actions. Notwithstanding the outcome, I am grateful to both counsel for the applicants for the clear and helpful way that they addressed the issues and presented the evidence. I will hear the parties on costs.

Dated this 7th day of March 2008

Richard Ground
Chief Justice