In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 216
2010: No. 218
2010: No. 233

In the Matter of the Bermuda Constitution Order 1968 and
In the Matter of the Defence Act 1965 and
In the Matter of the Bermuda Regiment's Treatment Generally of the Question of Conscientious Objection and the Treatment of Conscientious Objectors

BETWEEN:

(1) JAMEL HARDTMAN
(2) LAMONT MARSHALL
(3) LARRY MARSHALL JR

Applicants

-AND-

(1) THE COMMANDING OFFICER OF THE BERMUDA REGIMENT

(2) THE CHAIRMAN OF THE DEFENCE EXEMPTION TRIBUNAL

Respondents

-AND-

(1) HIS EXCELLENCY THE GOVERNOR OF BERMUDA

(2) THE MINISTER OF NATIONAL SECURITY (formerly THE MINISTER OF LABOUR HOME AFFAIRS AND HOUSING)

Interested Parties

Dates of Hearing: Monday, 7th February 2011 to Wednesday, 9th February 2011
Date Judgement Delivered: Wednesday, 4th May 2011

Mr. Eugene Johnston, J2 Chambers for the Applicants

Ms. Shakira Dill, Attorney-General's Chambers for the Respondents

The Parties

1. The Applicants Messers. Jamel Hardtman, Lamont Marshall and Larry Marshall, Jr are members of the Anti-Conscription Campaign Group, Bermudians against the Draft ("BAD").

2. The Respondents are the Commanding Officer of the Bermuda Regiment ("the COBR"), and the Chairman of the Defence Tribunal.

3. The interested parties are His Excellency the Governor of Bermuda and the Minister of National Security (formerly the Minister of Labour Home Affairs and Housing).

Background

4. On the 27th May 2010 the COBR sent each of the first two named Applicants recommencement of military service orders. Each Applicant's history after he received the order is different but each refused to serve on the basis of his claim to be a conscientious objector and brought separate actions.

5. The third Applicant applied to the Defence Exemption Tribunal ("DET") for total exemption from the performance of any form of military service in the Regiment on the ground that he is a conscientious objector. The DET heard the third Applicant who claims that the DET found that it had no authority to determine if he was a "conscientious objector" and deferred his application for a period of one year so he could challenge the lawfulness of the Regiment's policy of enforcing mandatory military service.

Issue

6. The overall issue in this matter is whether the COBR, in arresting the first two Applicants because they failed to appear for military service having not appeared before the Exemption Tribunal, was acting in breach of their Constitutional rights and in particular their right to manifest their belief as conscientious objectors.

7. The Constitutional relief sought by the Applicants pursuant section 15(2) of the Constitution is set out in paragraph 22.1 to 22.13 of their Originating Summons for a Constitutional relief. The Applicants did not address the court on the different forms of relief as they wanted the initial challenge settled before they did so. By an Order of Court dated 26th August 2010 the actions are being heard together with the Application for relief pursuant to the Constitution being heard first.

The Complaint

8. The Applicants overall issue is reformulated and dealt with under six heads.

The first is that Messers Hardtman and Marshall's right to be protected from forced labour was violated.

Second, the Exemption Tribunal does not comply with section 6(8) of the Constitution.

Third, the right to believe whatever one wish, and to manifest that belief has been violated in respect of Messers Hardtman and Marshall.

Fourth, they were deprived of their liberty.

Fifth, Mr. Lamont Marshall alone, for the purpose of this argument, is entitled to a discharge pursuant to section 28 of the Defence Act 1965.

Sixth, looking at the sum total of the things that took place, what the Regiment has done to Messers Hardtman and Marshall, was to have subjected them to inhumane or degrading treatment, contrary to Section 6 of the Constitution.

9. Mr. Johnston Counsel for the Applicants maintained that notwithstanding the Order of the Court 'that the Constitutional issue be heard first' if the Constitutional questions are resolved first the other public law questions fall away and can be decided in one manner only.

10. Mr. Johnston developed the six arguments and emphasized that Mr. Larry Marshall Jr. is only concerned with the impartiality argument because he has already appeared before the Exemption Tribunal.

11. There is substantial and factual legal similarity in each matter. The Applicants are all members of the campaign group, "Bermudians Against the Draft" ("BAD"). They object to performing military service. Their "collective view is that the Bermuda Regiment ("The Regiment") is administered in an oppressive and unlawful manner." BAD is campaigning to end military conscription in Bermuda. The members of BAD believe, *inter alia,* that to perform mandatory military service in the Regiment is to "impliedly lend support to the improper way the Regiment is administered". Consequently no person should take up employment or be compelled to perform regimental duties.

12. A summary of the facts as they relate to each of the three Applicants follows: –

Mr. Lamont Marshall's case

13. At 11:00 am on 5th July 2010 Regimental Police went to his home to arrest him. He had been previously arrested by the Regimental Police, detained at Warwick Camp for two (2) days and during that incident he resorted to a hunger strike.

Once he learnt Regimental Police were at his home he immediately, on 5th July 2010, applied for and was granted an interim injunction preventing the Regimental Police from arresting or detaining him to allow him to conclude the relevant legal paperwork required to challenge the lawfulness of the COBR's decision to arrest him.

Mr. Marshall first attended Warwick Camp during the latter part of 2002; he said at that time he was unaware of his right to object to mandatory military service on conscientious grounds. He was raised as a devout Christian, with beliefs which are contrary to the operations and workings of the Regiment. His experience in the Regiment was a terrible one. Before being enlisted he had to undergo a physical examination. There was no privacy while the men were awaiting medical examination, all the men were brought together into a room where they were ordered to strip down to their underwear. The examination is carried out in a group, in another room which is slightly smaller.

14. In his evidence he listed a number of other matters:—

(i) to teach regimental discipline the recruits were made to watch pornographic films.

(ii) the standard of treatment included a number of humiliating experiences. For example, his foot split during a parade due to the weight of various items he had to carry around. Expletives are the words most used, conscripts mothers are called derogatory names, alcohol which is used excessively is the choice beverage for Regimental Officers, soldiers are made to urinate into cans, water for showers is cold and uncomfortable. They were made to run long distance against their will, brought to physical exhaustion in the name of military training, forced into a gas chamber – masked are worn but were ordered to be taken off once they were inside the chambers. The days were long and grueling – between 16 and 18 hour days during recruit camp.

Recent Arrest

15. On May 27th 2010 he was one of the subjects of a service order, as well as Jamel Hardtman, which was sent via his father. The order required him to speak to Regimental Sergeant Major Lee on or before 3rd June 2010. He refused. On 16 June 2010, while on his job, he was arrested by Regimental Police. At about 4:30pm they took him to Warwick Camp and kept him in a hot, humid and poorly ventilated cell, with no toilet and very little room, where he stayed until around 11:00 am the following day. He believes he was charged with "insubordination" and not "complying with orders".

16. When the COBR saw him he took up the role of prosecutor and jury. He fined him $500 and he was ordered to return to Warwick Camp on 4th July 2010 to undergo military training with the Cadet Corp. He told the COBR that he would not be paying the fine nor would he be attending Cadet Camp. Among his reasons was his unequivocal stated view that his conscience would not allow it. It was his conscience that compelled him to spend his time in the cell on hunger-strike.

Beliefs

17. Mr. Marshall says that the Regiment's conscription regime violates the right of every man in Bermuda between the ages of 18 and 33. Notwithstanding the exception of the prohibition against forced labour set out in Bermuda's constitution he believes that conscription to the Regiment is forced labour "undeserving" of constitutional protection. There could be no excuse of forcing young men alone to perform military service. He cannot in good conscious conduct any good service in the Regiment, as through this the Regiment will be supported in violating the rights of all those who may be caught in the vice of conscription. His service would lend support to the idea that young men can be mistreated and insulted by the Regiment's superiors.

The Defence Exemption Tribunal (DET)

18. Mr. Marshall complains that he was never given a proper opportunity to make his views clear to the DET. The Regiment informed him of a date and time of the tribunal hearing and informed him if he was not found to be a conscience objector he would be arrested for breach of military offences. He was given two (2) days between notification of the hearing and the date of the DET hearing itself. He was not able to attend. In any event he does not believe his non attendance would have made a difference as the DET is avowedly biased.

Mr. Jamel Hardtman's Case

19. Mr. Hardtman is also a member of BAD. He states that Lamont Marshall's description of the treatment of subordinate soldier's in the Regiment, and the conditions of the prison cells at the Regiment is accurate.

    Like Lamont Marshall he has already served time in the Regiment. In 2000 his name appeared in the newspaper. Although he has always been firmly against service in the Regiment, he was unaware of his rights regarding the matter.

20. In 2001 recruit camp began a very degrading and suppressive system. He has read paragraphs 5 – 12 in the Second Affirmation of Lamont Marshall made on 13th July 2010 and his description of the treatment of subordinate soldiers and of the condition of the prison cells at the Regiment is accurate. The worth of the Regiment is over shadowed by the numerous rights violation and abusive practices.

21. For those reasons he and other member of BAD cannot in good conscience allow themselves to be subjected to mandatory military service in the Regiment as to do so would lend indirect support in the continuation of the Regiment's policy of conscription and rights violation.

    In 2001 he approached the COBR, Brian Gonsalves, who was in charge of the training company at the time and unsuccessfully asked to be released to St. John's Ambulance Service.

    He strongly believes the COBR is being vindictive with him and other members of BAD because they continue publicly to speak the truth about the Regiment.

22. On 27th May 2010 through his former attorney he received a Resume Military Service Order ("the Order") which required him to attend an interview with Regimental Sergeant Major Lee no later than 3rd June 2010. He had his lawyer write to Sergeant Major Lee by letter dated 2nd June 2010. He failed to turn up for the interview but he telephoned on 3rd June 2010. Sergeant Major Lee wrote back to Mr. Hardtman stating that his likely date for training would conclude on 3rd June 2010 when the Regiment's part-time element takes summer vacation.

23. He instructed his attorney to write that he would at some point be seeking a hearing before the DET to determine if he was a conscientious objector. The Regiment took this as a request and convened the sitting of the DET at 9am on the 11th June 2010 which was only two clear days away. His lawyer wrote back requesting that the DET reconvene at a different time. He failed to appear on the 11th June 2010 as his attendance was impossible: this does not detract from the fact that he believes the DET is an inherently biased organization. He believes the use of guns is always an unnecessary action and that any person in the Regiment must by implication support the use of guns, warfare and murder.

24. His lawyer wrote back requesting that the meeting be convened on a date after June 24th as his next exam was on the 10th June followed by another on the 24th June. He felt that preparation for a DET hearing would detract from his preparation of his exam on June 24th. He said that his request fell on "deaf ears". He failed to attend on 11th June 2010.

25. He was informed that while he awaited the DET hearing he was subject to arrest, and if the DET determined that he was not a conscientious objector he would remain subject to arrest. When Lamont Marshall was arrest shortly after 11th June 2010, he turned himself in as a show of solidarity. Before release he met and spoke with the COBR who charged him with failing to appear at the Regiment on 3rd June 2010. He was also charged with speaking to the media. He said that he told the COBR that he was a talk show host and that his job was to discuss whatever the people of Bermuda would like to discuss.

26. On 6th July 2010 Regimental Police arrested him at his place of employment; he believes to further embarrass him. He was placed in the same decrepit cells Lamont spoke about. He was charged with failing to pay the $500 and failing to appear for training at cadet camp.

He is a conscientious objector, he does not believe in using guns and thinks that a non combatant solider, for example a medic, is just as morally objectionable as shooting another man while on call of duty.

Mr. Larry Marshall Jr.

27. Mr. Marshall Jr. says that he is a member of BAD. He believes that no person should take up employment or be compelled to perform regimental duties. Further, his religious beliefs prevent him from performing mandatory military service or any military service for any military organization. Therefore for reasons of his conscience he is not able to perform any form of military service.

He applied to the DET for total exemption from performance of any form of military service. His beliefs form the basis of his Application.

On the 22nd November 2005, Mr. Larry Marshall Jr. appeared before the Tribunal. The transcript of the proceedings shows Mr. Marshall Jr's. Beliefs. In summary he believes the conscription system is unfair and unjust. As a British Overseas Territory citizen he believes that he is under no obligation to join the Bermuda Regiment as to do so is a blatant violation of his rights.

28. Conscription was abolished in "Britain" many years ago as it violated the basic human rights of its citizen.

His conviction is that no institution should have the authority to force anybody into Military Service. He questioned if this is not slavery then it is the closest thing to it in the 21st Century.

He said that the DET found it had no authority to determine whether he was a "conscientious objector" within the meaning of the said terms in section 27 of the Defence Act 1965.

29. The Tribunal took the course of deferring Mr. Marshall Jr. for one year so that he could pursue a case against conscription. Mr. Johnston said that challenge ended on 24th May 2010 when BAD's appeal to her Majesty in Council was unsuccessful.

The Relevant Legislation

30. The interpretation section of Part 1 of the Defence Act 1965 ("the Act") defines "calling up notice", as the notice to be served by the Governor in accordance with section 17 of the Act.

Section 8 defines the establishment of the Exemption Tribunal and it derives its powers by reference to the First Schedule with respect to the Constitution and Procedure of the Tribunal

> "***Exemption Tribunal***
> *8 (1) For the purposes of this Act there shall be established a tribunal to be called the Exemption Tribunal who shall have the powers and discharge the duties conferred or imposed upon the Exemption Tribunal by or under this Act.*
> *(2) The provisions of Part 1 of the First Schedule shall have effect with respect to the constitution and procedure of the Exemption Tribunal, to certain powers, duties and immunities of the Tribunal as therein mentioned, to appeals from decisions of the Tribunal, and to the remuneration of members of the Tribunal*."

Section 9 of the Act sets out that the powers of the Tribunal are akin to a court of summary jurisdiction.

Section 13A contains the liability to military services provisions. This provision as read with Section 27(1) lie at the heart of this matter

31. "***Liability to military service***
13A (1) Every specified person—

(a) on attaining the age of eighteen years; or

(b) if he does not become a specified person until he is over the age of eighteen years, then on becoming a

specified person, shall be liable to be selected for military service unless he is and remains an exempted person.

(2) Every specified person on becoming such a person including persons claiming to be exempted or deferred persons and every exempted or deferred person on ceasing to be such a person shall report to such person at such time and place and in such manner as may be required by Governor's Orders.

(3) Every specified person on reporting in accordance with subsection (2) shall furnish in such form as shall be prescribed by Governor's Orders the particulars required in such form.

(4) Every specified person who claims to be an exempted or deferred person shall make available when reporting under subsection (2), or if a member of the Regiment on becoming an exempted or deferred person, such information relating to his claim for exemption or deferment as may be required.

(5) Any person claiming to be an exempt or deferred person when reporting pursuant to subsection (2) whose claim is not accepted may apply to the Exemption Tribunal for exemption or deferment, as the case may be.

(6)…….

(7)…….

(8) Any person who without reasonable excuse, the proof of which shall be upon him who fails to report under subsection (2) commits an offence against this Act."

32. Section 27(1) allows a person anytime after reporting under Section 13(A)(2) to apply to the Exemption Tribunal to be registered as a conscience objector. The relevant provision of Section 27(1):-

"***Conscientious objectors***
27 (1) Notwithstanding anything in the foregoing provisions of this Part, a person may, at any time after reporting under subsection 13A(2), 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.

(2) The Exemption Tribunal, if satisfied upon an application under subsection (1) that the ground on which the application was made is established, shall inform the Governor

accordingly, and the Governor shall cause the name of the conscientious objector to be entered in a register of conscientious objectors to be kept by the Governor.

(3) If the Exemption Tribunal are not so satisfied they shall inform the Governor accordingly.
(4) The Governor shall make arrangements for securing that a person registered in the register of conscientious objectors shall during the period for which he serves, or would have served, by virtue of being called up for military service,—
(a)…

(b) if an objector referred to in subsection (1)(b), be required to perform alternative community service of such kind as is approved by the Governor and set out in an order made by the Governor and published in the Gazette."

33. The First Schedule Part I 1965 Defence Act contains the Constitution of the Tribunal, how it should function and the rights of a person aggrieved by a decision. Paragraph 7 is in these terms:-

"*7 (1) If any person is aggrieved by the decision of the Exemption Tribunal with respect to any application made by him under this Act, he may appeal to the Governor, whose decision in the matter shall be final.*
(2) No appeal shall lie to the Governor unless —
(a) the aggrieved person gives notice of appeal to the Exemption Tribunal at the sitting of the Tribunal at which the decision of the Tribunal is communicated to him; and
(b) the grounds of appeal are submitted in writing to the Governor before the expiration of five days from the date of the decision of the Tribunal:
Provided that where an application made by any person has not been granted by the Tribunal, the chairman of the Tribunal shall forthwith inform that person of his right of appeal under this paragraph, and, if the chairman fails so to inform that person, that person, if aggrieved by the decision of the Tribunal, may appeal to the Governor on giving notice to the Tribunal and on submitting in writing to the Governor the grounds of appeal, so however, that if he is subsequently informed in writing by the chairman of the Tribunal of his right of appeal, then no appeal shall lie unless, before the expiration of five days from the date on which he has been so informed, he gives notice to the

Tribunal and submits to the Governor in writing the grounds of appeal.

(3) When a notice of appeal is given to the Tribunal in accordance with the foregoing provisions of this paragraph, the Tribunal shall send to the Governor the record of the proceedings relating to the application of the appellant."

34. Paragraph 8 stipulates when the Governor hears an appeal pursuant to Paragraph 7 he does so on the record. Paragraph 8 reads: -

"*8 When an appeal is made to the Governor in accordance with paragraph 7 the Governor after considering the record of the proceedings and the grounds of appeal submitted by the appellant may—*

(a) dismiss the appeal; or

(b) give such other direction as he thinks just."

35. A few sections of the Bermuda Constitution Order 1968 require examination in order to complete the analysis of the legislation relied upon by the Applicants.

"***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 objections 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;"

Section 5 safeguards protection from arbitrary arrest

"***Protection from arbitrary arrest or detention***

5 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:

(a) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge,

(b) ...

(c) ...

(d) .....

(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence,

(2)…….

(3)…….

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person"

36. Section 6 of the Constitution stipulates that a person who is charged must be afforded a fair trial within a reasonable time. Section 6(8) deals specifically with a fair hearing as it relates to civil courts and other adjudicating bodies. Section 6(8) states: —

"*6 (8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time*."

37. Section 8 (1) of the Constitution contains the protection relating to a person's freedom of conscience

"***Protection of freedom of conscience***

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 practise

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 may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The Applicants Submission

38. Counsel for the Applicants, Mr. Johnston's submission is taken from his skeleton argument and submission to the court. He submitted that (i) a conscientious objector has religious and political reasons why he cannot serve in the Regiment; (ii) the Applicants refusal to serve in the Regiment is a manifestation of their belief as conscientious objectors; (iii) that the Exemption Tribunal is biased. It operates in a very negative way. The body always had a membership which includes high ranking Regimental officials who are appointed by the Governor and any appeals from the Exemption Tribunal's decision goes to the Governor who is the head of the Regiment.

The Impartiality Argument

39. Mr. Johnston submitted that the impartiality argument concerns the operation of the DET. The DET is not an independent and impartial tribunal as required by section 6(8) of the Constitution. It was not set up in an institutional way. The Tribunal itself was not sufficiently independent or impartial.

Mr. Johnston stressed that if a Tribunal is determining civil rights or obligations it is either that the Tribunal itself at the first instance has all the necessary requirement of independence and impartiality, or if it doesn't, there is a review court or body that has that measure of control.

Regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and whether the body presents an appearance of independence.

The Tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint. It must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The Applicants say there is an objectively justifiable fear that the Exemption Tribunal is not independent or impartial.

How members are appointed is an important consideration they are appointed by the Governor. The Governor pursuant to section 62 of the Constitution has a constitutional and legislative responsibility for control and operation of the Regiment. He has the responsibilities even though he delegates those responsibilities sometimes to the Commanding Officer and to the Defence Board. The Governor is head of the Regiment, pursuant to section 62 of the Constitution. The Governor's closeness to the Regiment as an organization cannot be

overlooked by a fair minded and informed observer. Tenure is another important area. There needs to be some safeguard to protect the person's position. The fair-minded and informed observer will say: the members are appointed by the Governor, he has the right to remove them at whim. There's nothing built into the Legislative scheme which prevents that from happening.

40. There has been a history of the membership having a Regimental leaning they are appointed by the Governor. They have a number of roles there may be a fear that these people are too close to the Regimental apparatus to give an impartial judgment on matters such as this. It is about the appearance of bias. It's about safe guards and our Exemption Tribunal provides us with none.

41. There has been a general reluctance on the part of the DET to explain to applicants the DET's views on what constitutes a conscientious objector. This necessarily means that the DET is able to move the boundaries of the definition as they see fit.

Though entrusted with the obligation to give reasons, the reasons characteristically given are in summary-form and do not set out the submissions made to them and why they succeed or fail. It is not a discretionary judgment; it is simply an assessment of the quality of the person's belief as it relates to them. That is a fact sensitive matter and it requires a full Tribunal at the Appellate level.

42. When the Applicants, Hardtman and Marshall applied to go before the DET, they hastily convened a meeting of the Tribunal to fit their schedule, and when Hardtman and Marshall said, I can't make that, please schedule it for another time, they refused. But what they did do, they sent the full Regimental apparatus against the Applicants, we say for one purpose only, to make a point. They were arrested, at different times, Marshall held for two days, and then brought up on Regiment charges, all the while telling the Commanding Officer, "I have conscientious beliefs that require protection. I'm a conscientious objector."

Mr. Johnston submits that those overt acts by the State, violated section 4 of the Constitution, and they also violated section 8(1) of the Constitution.

Ms. Dill's Response to the Impartiality argument

43. Ms. Dill said that Mr. Johnston submitted that the Exemption Tribunal is not an independent Tribunal as contemplated by section 6(8) of the Constitution; they are appointed by the Governor and are remunerated in accordance with the Government Authorities (Fees) Act 1971. However, Ms. Dill submitted that the manner of appointment or remuneration does not in and of itself mean that the Tribunal is not impartial or independent.

Ms. Dill for the Regiment submitted that the third Applicant complains that his application was deliberated upon in the presence of the Defence Administrator. However, the Regiment's role at the Exemption Tribunal hearing is purely

administrative and it is not inappropriate for a Regimental Officer to act in this administrative role.

44. Counsel for the Applicants boldly insinuates *inter alia* that the Governor appoints persons to the Tribunal whom he believes will reject a conscientious objector's application. He says that the more persons who are exempted the harder it will be to raise a regiment. There is no evidence to support that. Also, Mr. Johnston speaks to the tenure of the members of the Exemption Tribunal he maintained that the Defence Act fails to provide members with a set period for their appointments.

Ms. Dill said Counsel for the Applicants is speculating about what a member will or will not do to stay on the Board.

45. In *Sepet v Home Secretary* [2003] 1 WLR 856 the court held at paragraph 44 that:-

> "*...practice support Dworkin's view that recognition of the strength of the objector's religious, moral or political feelings is only part of a complex judgment that includes that pragmatic question as to whether compelling conscientious objectors to enlist or suffer punishment will do more harm than good*."

> "*Among the other relevant factors are the following: first, martyrs attract sympathy, particularly if they suffer on religious grounds in a country which takes religion seriously; secondly, [unwilling soldiers may not be very effective;] thirdly, they tend to be articulate people who may spread their views in the ranks; fourthly, modern military technology requires highly trained specialist and not masses of unskilled men.*" *(emphasis added)*

This passage indicates that it makes no sense for the Exemption Tribunal to purposely refuse to "accept someone as a conscientious objector, because it would do more harm than good."

46. Mr. Johnston, argued that the Exemption Tribunal performs administrative roles as well but Ms. Dill argued that the same could be said of the Public Service Commission or the head of the Civil Service.

47. Ms. Dill refers to the case of *Fay v Governor* [2006] BDA L.R. 65 which dealt with the issue of the impartiality or independence of the Dental Board. At paragraph 41 the court said:-

> "*Save for his special reserve powers under section 62 of the Constitution (external affairs defence, internal security and the Police) and statutory powers which are expressly stated by the Constitution or by any law to be exercisable in his discretion, the Governor acts on the advice of the Cabinet or a Minister. The concept of judicial independence typically connotes not just a decision-maker who is independent of any form of control by the Executive arm of Government, but is also a facet of the separation*

of powers. The following passage was cited with approval by Lord Carswell in the recent Privy Council decision in *Kearney v Her Majesty's Advocate*:

> "*Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial', as Howland CJO noted [in the lower court], connotes absence of bias, actual or perceived. The word 'independent' in s 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly in the Executive Branch of government, that rests on objective conditions or guarantees.*"

48. In the *Fay* case the Dental Board instituted disciplinary proceedings as well as adjudicated upon them and Kawaley, J. found that there was a violation of the principles that no man should be judge in his own cause. Further, he noted that this could not be cured by an appeal to the Governor.

49. The Exemption Tribunal is not a judge of its own cause. Its function is to hear and determine applications of persons claiming to be conscientious objectors. It is irrelevant, Ms. Dill maintains, that a former regimental officer sits on the Board. There are many Tribunals that have persons who are sufficiently familiar with the field in which they sit. The Exemption Tribunal is impartial and independent, the court need not address the Governor's role as this is only necessary where there is non-compliance with the statutory regime.

Court

50. Ms. Dill is correct. Individuals who wish to establish that they are conscientious objectors apply to the Exemption Tribunal for it to be considered whether they are conscientious objectors. In my opinion the Tribunal is properly constituted as it was established in accordance with the legislative requirement. In terms of the composition of the Tribunal I have asked myself whether, in all the circumstances of the case, there is a real danger of bias or apparent bias individually on the part of any member of the Tribunal or collectively on the part of the Tribunal in the sense that he or they might unfairly regard or have unfairly regarded with favour or disfavour an application before the Tribunal See Lord Geoff comments in *R v Gough* [1993] AC 646 in this regard at page 647:-

> "*…the test to be applied in all cases of apparent bias was the same, whether concerning Justices, member of inferior tribunals, arbitrators or jurors, and, in cases involving jurors, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely, whether, in all the circumstances of the case, there appeared to be a real danger of*

bias, concerning the members of the tribunal in question so that justice required that the decision should not stand; that, accordingly, the Court of Appeal, in dismissing the appeal, applied the correct test."

In *Fay* the Dental Board had a two-fold role; it instituted disciplinary proceedings as well as adjudicated upon those proceedings. This dual role led to the finding that they were judges of their own cause.

There is nothing offensive to section 8 of the Constitution to have a formal regimental officer sit on the Board as an administrative officer. On the fact before me I can find nothing that gives rise to a real danger of bias (actual bias or apparent bias) by the DET in the rejection of the application of members of the regiment to be excused on ground of conscience. Accordingly, the court dismiss the impartiality argument.

The Forced Labour Argument

51. Mr. Johnston maintained that the core belief of the group is that conscription itself is contrary to the very thing that we define humanity by, which is choice, the ability to choose what you do, how you devote your time.

In a forced labour regime, where any kind of forced labour is exacted, the respect for any member of the labour force is not what it should be and the Regiment is a prime example of that. The government violated Messers. Hardtman's and Marshall's rights to be protected from forced labour.

52. Mr. Johnston submits that section 8(1) applies in its full force to section 4(3)(b) and all the protection that section 8(1) provides must carry over into the forced labour provision. Forced labour is wrong, says Mr. Johnston because it deprives persons subjected to it of an essential element associated with their humanity; choice.

Mr. Johnston continued that conscription is in every respect an exercise in forced labour; and that because the Regiment adopts the policy of conscription, the organisation time and again puts in place the requisite conditions for the mistreatment of persons subjected to compulsory military service; and that persons should not contribute, in any way, (through the performance of compulsory military service, or to call-up notices or other similar demands from the Regiment) so long as that institution employs a policy of conscription.

53. There are people who are intimately connected with the Regiment who support the ideal and objectives of BAD and what they are trying to do. For example, Mrs. Steede a former sergeant major in the Regiment considers herself a closet supporter of BAD and who can no longer remain silent in her stance against military conscription. She said *inter alia* how can anyone endorse slavery in any form which is a shocking parallel with the members of BAD beliefs.

Ms. Dill's Response to the Forced Labour Argument

54. As regards to the forced labour argument Ms. Dill submitted that the court does not have to embark on the process that is outlined by Applicants. The Applicants have not appeared before the Exemption Tribunal and they have not been declared conscientious objectors consequently, the provisions of section 4(3)(b) of the Constitution applies to them in the sense that compulsory military service in the Regiment is not forced labour and is not unlawful – See *Larry Winslow Marshall* [2008] Bermuda Law Reports 72 at paragraph 10.

55. Counsel for the Applicants accepts that section 9 of the Convention is similar to our section 8 of the Bermuda Constitution Order but he does not accept the jurisprudence of the European Court of Human Rights in relation to the application of section 9 since article 9 does not guarantee the right to conscientious objection. The right to appear before the Exemption Tribunal was available by use of the Defence Act before the enactment of the Constitution and for that reason section 8(1) of the Constitution does not automatically transfer into section 4(3)(b) the conscientious objection section. It is clear from the case of *Sepet* that it does not follow that section 8(1) is synonymous with section 4(3)(b).

56. In *Sepet supra,* the court held:-

> "*They are free to hold whatever opinions they please about Turkish policy towards the Kurds as long as they report for duty. Putting the same point in a different way, imposing a punishment for failing to comply with a universal obligation of this kind is not persecution.*"

At paragraph 32,

> "*Mr. Nicol accepts that ordinarily a conscientious religious or political objection is not a reason for being entitled to treat oneself as absolved from the laws of the state. In many Western countries, including the United Kingdom, civil disobedience is an honourable tradition which goes back to Antigone. It may be vindicated by history — think of the suffragettes — but often what makes it honourable and demonstrates the strength of conviction is willingness to accept the punishment. (That is not to agree with Socrates that it would necessarily be dishonourable to try to avoid punishment.) The standard moral position is summarised by Ronald Dworkin 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. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies and a man has duties other than his duties to the state. A man must honour his duties to his God and to his*

conscience, and if these conflict with his duty to the state, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the state imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligations."

"*This suggests that while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.*"

At paragraph 36:-

"*But ordinary army service, though demanding and often inconvenient, sometimes unpleasant and occasionally dangerous, is in many countries (and was in many more, including the United Kingdom) part of the citizen's ordinary duty.*"

Ms. Dill submits these paragraphs support the view that section 4(3)(b) must contemplate that a person makes their beliefs known and those beliefs must be tested so it does not follow that section 8(1) is synonymous with section 4(3)(b).

Court

57. In my judgment I accept Ms Dill's submission that the Applicants must make their beliefs known and the beliefs must be tested. In order to do so they must appear before the DET and they have not appeared before the DET. Therefore, the court rejects the forced labour argument.

The Manifestation of Belief Argument

58. Mr. Johnston submits freedom is not confined to freedom to hold a religious belief. It includes a right to express and practice one's beliefs.

The Government unlawfully interfered with Messers Hardtman and Marshall's right to manifest their belief. If a person seeks to manifest his beliefs through practice, or observance the State cannot interfere with that person's right to do so unless the provision in section 8(5) of the Constitution is made out.

59. Section 8(5) of the Constitution merely tells the court to adopt the standard proportionality test as seen throughout fundamental rights jurisprudence. *Huang v Secretary of State for the Home Department Kashmiri v Same* [2001] UKHL II illustrates that the state must provide sufficient justification for interfering with a person's competence or capability to manifest their belief. The State cannot interfere with this right unless the provision of section 8(5) of the Constitution is made out. In *Huang*, at page 187 the court in dealing with the issue of proportionality said:-

> "*In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing (1998) 4 BHRC 563 at 572, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionatewhether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*
>
> *This formulation has been widely cited and applied.... This feature is (at 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in R (Razgar) v Secretary of State for the Home Dept [2004] ...when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said (at [20]) that the judgment on proportionality: must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the convention. The severity and consequences of the interference will call for careful assessment at this stage."*
>
> "*If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.*"

60. Mr. Johnston further submitted that section 8(5) requires that the balancing exercise must always take place when assessing proportionality, under the Constitution. In this case, the proportionality exercise is adopted in this way. Was it absolutely necessary for the Commanding Officer or anyone in the Regiment to arrest, detain, or force the Applicants to perform mandatory military service before the administrative requirements set out in section 27(1)(b), were satisfied by the Exemption Tribunal. The obvious answer to that question must be no, and to show that the Commanding Officer had this test in mind in paragraph 14 of his Affidavit, the Commanding Officer attempts to provide the justification necessary for his actions. He says:

> "*On several occasions, both [Private Hardtman] and Marshall" – [not titles they accept] -- "have claimed to be Conscientious*

Objectors, and they did so [sic] on 16 June 2010 during the same interview with me in front of Captain Gauntlett and the RSM. The Defence Act lays down a simple process; Conscientious Objectors must establish their claim to exemption on conscientious grounds to the Exemption Tribunal. Until such time when the Exemption Tribunal deems them to be bona fide Conscientious Objectors, they are required to continue to serve. That logic for this is," -- here's the justification "in my respectful submission, unassailable – "if there were a hurricane or other disaster between the making of their application and the determination of it by the Tribunal, the Regiment must be able to call on the services of every member to discharge its duties."

61. The truth of the matter makes a nonsense of what the Commanding Officer provided as justification, because these men, have not been on active duty — Lamont Marshall, and Jamel Hardtman — since 2002 and 2004 respectively and they have never required them to serve up to that point. To arrest them now and pretend that there is a justification because there may be a hurricane is specious. It's definitely not the type of justification that is required by the court to satisfy section 8(5). There could be no justification for making a conscientious objector perform any form of military service.

62. The Applicants have taken their stance in the full glare of the public. They were litigants in BAD's previous set of cases. The COBR was well aware of this when he decided to send out Resume Service Orders to the Applicants. In addition, if he needed clearer evidence of the Applicant's conscientious objections, he received them at the latest by 3 June 2010. The Regiment's response was that Hardtman and Marshall remained soldiers who must continue to serve until the decision of the DET. A DET hearing was hastily convened at a time appropriate for the DET, and the Regiment; but not Hardtman or Marshall. Officer Christopher Gaunlett made it clear in an email to the Applicants attorneys on 8 June 2010 that Hardtman and Marshall remained subject to arrest. He said:

Your clients remain subject to arrest up to the time of that meeting, and may remain subject to arrest after the meeting, depending on the decision reached by the Tribunal.

The prohibition on conscripting conscientious objectors is found in the Constitution, not the DA 1965. That prohibition would exist even if there was no DET to determine whether a person had conscientious objections preventing them from performing military service in the Regiment. Therefore, it cannot be right that a person, who makes his beliefs known to the Regiment, can lawfully remain subject to arrest and detention; or be classified as a soldier in the Regiment until such determination is made.

Ms. Dill's Response to the Manifestation of Belief Argument

63. Section 8(1) of the Constitution provides for the holding of belief; while section 4(3)(b) provides for conscientious objection. If the Constitution wanted them to

be synonymous it would have said so.

As regards, the manifestation test Ms. Dill stressed by reference to the case of R(*Williamson) v Sec of State for Education and Employment* [2003] *QB* 1300 "The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief of a fundamental problem. With religious beliefs this requisite is readily satisfied."

64. Ms. Dill maintained that the beliefs outlined by the Applicants are not a fundamental problem. The Privy Council has already decided upon the lawfulness of conscription. The Court of Appeal has decided that conscription is not forced labour. The Applicants must pass the threshold of beliefs and they have not; therefore, the court does not even have to proceed to the manifestation test.

65. Mr. Johnston suggests that the failure to appear for Regimental duties is a manifestation of a belief but as outlined in the case in *Williamson* it could simply be the motivation.

66. Ms. Dill maintained a conscientious objector cannot manifest his belief until he has expressed it in some way. In this case there is a procedure – we have the Exemption Tribunal.

Court

67. Since any examination of manifestation or interference must start with belief the question here is when did the Applicants — Messer Hardtman and Marshall manifest their beliefs. Mr. Johnston maintained that in the normal case one would have to go before the Exemption Tribunal that is the test in *Khan v Royal Airforce Summary Appeal Court [2004] EWHC 2230 (Admin).* However, in this case because of the Applicants challenges and because of their membership in BAD, to satisfy the Constitution and the manifestation test they would not have to go before the Exemption Tribunal.

68. In my judgment a conscientious objector has not manifested his belief until he has followed the legislative procedure laid down in the Defence Act 1965 section 27(1) whereby conscientious objectors manifest their beliefs. In *Mohisin Khan and Royal Air Force* Summary Appeal Court [2004] EWHC 2230 (ADMIN) at paragraph 64 the court said: -

> "*...whatever the position might be in other circumstances, and we think this is a fact sensitive question, it should not be said that a conscientious objector has manifested his belief until he has expressed it in some way to his service. In some circumstances we can conceive that the mere absence or desertion could be such an expression. For instance, where there is no procedure for conscientious objection at all, or one that is insufficiently knowable. Where, however as here, the basic background is one of*

volunteer service, the call-out is on a basis that there may be exemption on companionate grounds, the record reservist is given repeated opportunities to voice any concerns, as a serviceman he is familiar or at any rate required to be familiar with the Queen's Regulations and as a recalled serviceman he has, as is conceded, access to those Regulation and to the Leaflet, we do not think that it makes sense to say that the appellant has manifested his belief until he has informed his service of it, and has done so in a formal way.

I am of the view that in order to manifest their belief the Applicants must appear before the Exemption Tribunal.

As indicated in *Khan* until an Applicant has "formally applied for discharge" as a conscientious objector he cannot say that his conscience or religion has been interfered with. He must make it clear by applying to the Exemption Tribunal that he is a conscientious objector. Being a member of BAD in my judgment does not fulfil the legislative requirement. Section 21(1) requires the Applicant to appear before the Exemption Tribunal to state his case. Given these factors the COBR's action did not amount to an interference with the Applicants rights guaranteed by the Constitution. Accordingly, the court rejects the manifestation argument.

Liberty & Discharge Argument

69. Mr. Johnston submitted that this argument relates to Mr. Lamont Marshall only who has served his time and is entitled to be discharged pursuant to section 28. The discharge argument does not rely on any provision in the Constitution it is based on the proper interpretation of the relevant provision of the DA 1965. Mr. Lamont Marshall was enlisted in the Regiment on 25th November 2002. He served a total of one year and eleven months before commencing legal proceedings against the Deputy Governor in an effort to outlaw conscription. He was granted a deferment on the 7th September 2004 in order to attend full time education abroad. This deferment would have expired around 7th September 2006 leaving him with approximately one year and three months to complete service. He has been enlisted without deferral since 7th September 2006. Consequently, in accordance with the relevant provision in the 1965 DA he has been entitled to be discharged from the Regiment since 7th September 2007.

In a new action he requested through his Counsel that he be given an opportunity to appear before the DET to make an application under section 27.

There is a question as to when a person is considered enlisted. There are two answers given by the Defence Act which are contradictory of each other. Section 17(1) deals with the Deputy Governor sending out names in the *Gazette*; section 17(2) the Deputy Governor shall serve a notice on each person selected for military service to present himself for medical examination and section 17(3) states:-

"*Where a person selected is fit for military service has been medically examined after presenting himself…be enlisted and served with a written notice, to be called a calling up notice, requiring him to present himself at such place and time, not earlier than the seventh day after the date of the notice…"*

We see from subsection (3) that enlistment occurs at the stage of the calling up notice when you are required to report by virtue of the calling up notice. And then it comes down to 4, the proviso to subsection (4):

"*Provided that any person who without reasonable excuse fails to report under section 13A(2) or fails to notify a change of address as required by Governor's Orders shall be deemed to have been served with a calling up notice on the publication thereof in the Gazette.*"

Section 17A says that a person is to serve for military service after presenting himself for medical examination pursuant to section 2 and shall be required to serve for a period of three years and two months in the Regiment, provided that he shall not serve after he attains the age of thirty-three.

Section 17B is the provisions for calling up in absentia, and it provides for enlistment in subsection (1), where it says if:

"*The Governor is satisfied - that the person has, pursuant to section 17(2), been served with a notice requiring him to present himself at the time and place specified in the notices published under section 17(1) for medical examination by the medical board and for enlistment; and the person has failed so to present himself;*"

Then we have the period of compulsory service in section 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."

What's immediately apparent about the section is that 19 contradicts section 17 and 17A as to when your enlistment occurs and when your service starts.

Section 20 is headed "Computation of period of service" it reads:-.

*"**Where a man of the regiment -***

(b) becomes enrolled as a pupil or student in any school, college or university outside Bermuda or as a full-time student at the Bermuda College;..."and his military training" – [it's not disjunctive] -- is deferred as

> *provided in section 25, then any period for which his military training is so deferred shall not count as a period of service for the purpose of computing the total period for which he is to serve in the regiment: Provided that no person shall be required by reason only of this section, to serve as a man of the regiment after he attains the age of thirty-three years."*

And then there's an obligation to undergo military training in section 21(1), which includes annual drills and such things.

But in 21 (2) it says:

> "*Subject to subsection (1) the commanding officer shall have power by order to direct that the men of the regiment or any particular man of the regiment shall attend a specified number of drills during any period specified in the order."*

And section 22 gives the Commanding Officer power to dispense with military training in whole or in part regarding the service set out in section 21.

And that takes us to the interpretation problem that we have in section 28.

28(1) says:-

> *"A man of the regiment shall, except when the regiment or the sub-unit of the regiment of which he is a member is embodied, or when the Governor otherwise directs, be entitled to be discharged on the expiration of the period for which under this Part he is required to serve."*

70. Two points; the first is, it makes no reference to after he has satisfied the certain number of drills. It does not refer to service in that sense, it refers to the computated period of time, which starts from enlistment.

The second point is that once that period of time has been served a man of the regiment is entitled to be discharged. There's no discretion in it.

Ms. Dill's response to the Liberty / Discharge Argument

71. Ms. Dill said as to the context section 17(A) provides that a person who has been selected for military service in the Regiment shall be required to serve. Pursuant to section 19(1) once a person has been served with a calling-up notice he is deemed to have been duly enlisted and is required to serve for three (3) years and two (2) months.

Serve is a verb which requires some active fulfillment of the duties of service. It particularly includes an obligation to fulfill the lawful orders of the Commanding Officers and others who have authority to give such orders to an enlisted person.

72. The Defence Act requires a man of the Regiment to undergo training and additional duties under section 21(2). On any reasonable view of the legislation a person has not spent a period of time in service if all he has done is actively resisted his call-up by hiding out or by challenging it as a matter of law. The Act would be frustrated if someone could be said to have served for that period, if they did not appear. It cannot be that just because a period of time has expired that service in the Regiment is complete.

In response to the suggestion that certain sections in the Defence Act are contradictory Ms. Dill submits, that section 17A is not contradictory to section 19. It makes sense that a person can be enlisted in absentia. Under section 17B(6) that person must be deemed medically fit to serve. Time starts running only when you serve in the Regiment.

73. Section 16(2) of the Constitution.

Counsel referred to section 5 of the Constitution for the liberty argument.

There can be no contravention of section 5 because the arrests are in pursuit of a disciplinary law, which is a law regulating the discipline of any disciplined forced which includes the military. Section 16(2) exempts the disciplinary law of the Regiment from having to comply with section 5.

Ms. Dill further submitted, that in any event there wasn't a violation of section 5 because their arrests were done in accordance with section 5(1)(e).

Court

74. In my judgment Ms. Dill's submission are correct in principal and in application. Therefore, the court disallows the liberty, discharge argument.

The Degrading/Inhumane Treatment Argument

75. Mr. Johnston argues that to come within section 3 of the Constitution the conduct must attain a certain level of severity that normally include actual bodily injury or intense physical or mental suffering. The level of severity is relative and depends on all the circumstances of the case. Irrespective of the head it's under — torture inhumane or degrading treatment or otherwise —it is still a violation of the Constitution.

For a certain form of treatment to be degrading it has to be one of two things. It must either arouse feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance. This is not relied on by the Applicants. They rely upon the second part of the definition of degrading treatment which is action it such as to drive a person against his will of conscience. The questions that arises for the court is whether what the Government did to the Applicants reaches the minimum level of severity in a military context.

Mr. Johnston maintains that forcing a conscientious objector to do military service may very well be degrading treatment. Military service by its very nature involves humility and debasing elements. In order to decide if the treatment exceeds the permissible limits in military service, the court is asked to decidewhether the treatment goes beyond the elements of suffering or humiliation connected with that legitimate form of service.

76. The Court reiterates that article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v Italy* [2000] ECHR 26772/95, para 119). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v UK* [1978] ECHR 5310/71, para 162).

77. According to the Court's settled approach, treatment is considered "inhuman" if it is premeditated, applied for hours at a stretch and causes either actual bodily injury or intense physical or mental suffering (see, as a classic authority, *Kudla v Poland* [2000] ECHR 30210/96, para 92, and *Yankov v Bulgaria* [2003] ECHR 39084/97, para 104 (extracts)). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v Switzerland*, Commission's report of 8 July 1993, para 67, Series A no. 280), or when it was such as to drive the victim to act against his will or conscience (see, for example, the Greek case, cited above, and *Keenan v UK* [2001] ECHR 27229/95, para 110). The question whether the purpose of the treatment was to make the victim suffer is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of art 3 (see *Peers v Greece* [2001] ECHR 28524/95, para 74).

78. Mr. Johnston stressed that in this case the issue arises in broad circumstances the first point is that the Commanding Officer quite deliberately arrested, detained and forced these gentleman to do military service when he knew he had no reason to disbelieve that they had had conscientious beliefs which required attention and respect. The COBR did it to break their will and force them to act against their conscience. The Regiment does not exact the same type of attention

to everybody. But they redouble their efforts to make sure that members of BAD served. No doubt, maintained Mr. Johnston to send the community a message that conscription is here to stay and the people who oppose it can still be dealt with.

79. Also Mr. Johnston urged that the court should take into account the particular beliefs of the Applicants and how military service relates to those beliefs. One of the beliefs is founded in the historical record, for these particular Applicants, that forced labour is likened to that ordeal, slavery, by the Applicants. Mr. Johnston maintains that our place in society is determined by our historical record. That the COBR knows the beliefs of the Applicants yet moved to conscript them and put them in the very circumstance they take umbrage to. The effect is to say that we don't care about your historical record and by virtue of not caring about your historical record we do not care about your humanity.

These men have had some involvement in what they say happened in 2001, 2002 etcetera and this was largely uncontested they also formed the basis of their objections to military service from the memories.

80. Further Messers Marshall and Hardtman as members of BAD, are aware of a plethora of atrocities that took place in the Regiment and they don't wish to be placed in the circumstances where that is possible. Both Messers Marshall and Hardtman were held in confinement in a cell with less than appreciable conditions. Mr. Hardtman was arrested in the full glare of the public and taken from his job when they knew he was a conscientious objector and they knew he would have a right to be released only a few hours later.

81. In short, it is the Applications' submission that because of the Regiment's systematic abuse of their right to manifest their beliefs, coupled with the deliberately discriminatory way in which their humanity continued to be judged, they have been subjected to degrading treatment contrary to section 3 of the Constitution. The egregiousness of the Regiment's conduct against Hardtman and Marshall is heightened further because the Regiment deprived those men of their liberty in circumstances where there could be no justification for the attack made against them. This was the Regiment telling Hardtman and Marshall that they were lesser than the average citizen in Bermuda. The arrests, the harassment, and the subjection of Hardtman and Marshall to compulsory military service in the circumstances of this case when they hold the particular beliefs that they hold, surely crosses the dividing line between permissible and impermissible conduct with respect to military service.

Ms. Dill's Response to the Degrading/Inhumane Treatment Argument

82. The Applicants complain of their arrest at paragraphs 15 to 20 of the Constitutional Summons. Section 5 of the Constitution protects a person from arbitrary arrest or detention, the exception being where a criminal offence was being committed (section 5(1)(e)).

Pursuant to section 36 of the Defence Act failure to complete military training is a criminal offence.

The offender can be brought before a court of summary jurisdiction or before the Commanding Officer (section 37(1) Defence Act) in furtherance of section 26, 32 or 36. It cannot be a violation of their section 5 rights because pursuant to section 5(1)(e) the exception being that a criminal offence was being committed. The arrests were not done with the purpose of embarrassing or harassing the Applicants. They were done in furtherance of a legitimate purpose. Most likely if the Regiment knows where someone is more than likely it would be able to go and pick that person up.

83. Private Hardtman was arrested at work because it had not proved possible to arrest him at home. During the arrest procedure a request was made that Private Hartman be allowed to finish some "business" at HOT 107.5 premises where he worked which was allowed. His arrest does not amount to inhumane or degrading treatment. The Regiment was fulfilling a lawful purpose. In all circumstances section 3, degrading treatment, of the Constitution is not engaged.

84. The Applicants say the cells form part of the degrading or inhumane treatment. However Mr. Marshall accepted in cross-examination, that Bermuda is hot and humid in the summer months. It follows if the cells are hot and humid that's a characteristic of being in Bermuda. There were beds in the cells; it was a grated door, not a solid door so air could get in freely. There were bathrooms and washing facilities that he could use if requested.

Court - The Inhumane/Degrading Treatment Application

85. The authorities recognize that ill-treatment must reach a minimum level of severity to fall within the scope of the expression "inhumane or degrading treatment or punishment See *R (Limbuela) v Home Secretary* (HLLE) 2006 1 AC p 414.

86. In respect of this argument the question for the court is whether the degree of severity endured by the Applicants reached the degree of severity prohibited by section 3 and 5 of the Constitution. A high threshold is set which is determined by the facts and the circumstances in each case.

87. As regards the type of treatment Lord Bingham of Cornhill in *Limbuela*, *supra* said that:-

> "*Treatment is inhumane or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases the treatment is inhumane or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one.*"

In my assessment the conduct described in the Applicants complaint does not engage section 3 and 5 of the Constitution and does not constitute a breach of the Applicants Constitutional right not to be subjected to inhumane and degrading treatment or arbitrary arrest. The court has looked at all the relevant circumstances of this case and has concluded that there was no breach of the Applicants Constitutional rights. The COBR was fulfilling a lawful purpose in having the Applicants arrested and the conduct in carrying out their arrest did not cause any serious suffering.

Mr. Johnston likened the Applicants treatment to forced labour which is equated to the ordeal slavery. This is to misrepresent things. Slavery is an entire system which degraded the human being and deprived the individual of basic rights, eg freedom of assembly, and association, or the freedom to practice religious beliefs, to vote, or to own property; the Conscription simply requires a citizen to perform their obligation to society and after all not all obligations are voluntary for example, paying taxes is not an obligation that is voluntary. For this reason the court rejects the inhumane, degrading treatment argument.

General Administration of the Regiment

88. Turning to the claims in relation to the general administration of the Regiment Ms. Dill maintained that the Applicants make a number of claims in relation to the administration of the Regiment and many of them date back ten years. Mr. Hardtman refers to the year 2001. These practices are not reflective of the Regiment today. Conscripts are being asked to serve in the Regiment today as it is presently constituted.

The COBR's evidence shows that the Regiment has evolved over the years the soldier's handbook shows that the Regiment has been working to modernize its program – ill treatment is not allowed, respect for others, tolerance, compassion is emphasised because comradeship and leadership depends on it. Education is encouraged and special training opportunities are offered including funding

support.

89. In response to the Applicants claim at paragraph 3.1 of the Constitutional Summons, in evidence, officer Gauntlett said since his first year as a recruit in 2003 the use of profanity across the Regiment has reduced significantly. The COBR said that the Regiment does not teach soldiers foul language. The soldiers bring it to the Regiment as they learn from society. The allegations that the Regiment practices bribery, that soldiers urinate in cans, that unjustifiable force is used are all denied.

90. During cross-examination Ms. Steede admitted that her bold, blanket statement in her affidavit that she has never seen a solider use foul language higher up the Regimental change was incorrect. She had in fact seen a junior officer use foul language to a senior officer who happened to be herself.

Both Messers Hardtman and Marshall accepted that the gas chamber that they both referred to was a tent and the COBR explained that it was inoculation training which is conducted once during a soldier's time in the Regiment. It is provided so that a soldier can identify the smell of CS gas, so that he can trust his respiratory equipment. The British army conduct this form of training with their new recruits.

Court

91. Section 3 of Defence Act 1965 recognizes that a military force shall be raised and maintained. Section 4 recognizes that it shall "be raised and maintained by means of voluntary enlistment"…and if this proves inadequate for raising and maintaining the Regiment, then by compulsory military service [conscription]. Section 8(5) of the Constitution provides that nothing done under the authority of any law shall be held to be inconsistent with or in contravention of the protection of freedom of conscience (section 8(1)) to the extent that the law in question makes provision which is reasonably required in the interest of defence, public safety, order, protecting the rights and freedom of other persons.

92. The Applicants contend that the COBR in carrying out his duties has contravened section 8(1). In my judgment I can find no compelling support in the decided authorities for holding upholding this contention.

There can be no doubt that each Applicant has expressed that he holds belief that are to him a matter of importance. That is not challenged. The right of conscientious objection is recognized by the legislation.

93. However, an Applicant must follow the procedure that has been laid down by the legislation which is that they must appear before the Exemption Tribunal. In

Khan, supra at paragraph 24 the court said:-

> "*The thrust of his argument was that there is a clear procedure for members of the Royal Air Force, whether regular or reserve, to claim conscientious objection. They must make the claim. If they do not do so they cannot simply refuse to obey an order or refuse to report for duty on the grounds of conscience. That could not be acceptable in any disciplined service. To allow them to do so would lead to anarchy. I have sympathy with this argument but for reasons which will become apparent, it is not necessary for me to rule on whether it represents the law."*

94. Ms. Dill argued that at paragraph 4–7 of the Constitutional Summons the Applicants indicate that they have beliefs that are protected by section 8(1) of the Constitution but they have not gone before the Exemption Tribunal to put forth those beliefs and be deemed conscientious objector or not. The legislature has entrusted the Exemption Tribunal with that task and the courts cannot make any determination. This proposition is supported by the case of *Barracalogh Appellant; Brown and others Respondents* [1897] AC 615 in which the court at page 620 said:-

> "*I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover — the very matter relegated to the inferior court — determined. Such a proposition was not supported by authority, and is, I think, unsound in principle."*

95. Ms. Dill maintains that the arrest of the Applicants was justified as they failed to appear on 11th June. They made no further arrangement to attend before the Tribunal. Contrary to the Applicants claim of procedural impropriety there was no procedural impropriety as these cases were not heard and were not determined in their absence.

96. It is not for this court to usurp the function of the Exemption Tribunal and to embark on an enquiry into the asserted beliefs of the Applicants.

97. I disagree with Mr. Johnston that the Applicants do not have to appear before the Exemption Tribunal because for four years the members of BAD have fought "up and down this country" against the Regiment and against the Government on this basis or that at least six of them have been turned down by the Exemption Tribunal, so we know that if these gentlemen where to go before the Exemption Tribunal the result is almost ensured.

98. In my view on the state of the law as it is today as shown by the material before me Messers Hardtman and Marshall must appear before the Exemption Tribunal.

Accordingly, the court rejects the general administration complaint. It is not for this court to determine that issue. The proviso to section 15(1) of the Constitution stipulates that the Supreme Court should not intervene if it is satisfied that adequate means of redress are available. Adequate provision is available under the Defence Act which should be satisfied before the Applicants can apply to the Supreme Court. It is not a function of the Supreme Court to carry out the responsibilities of the Exemption Tribunal.

Larry Marshall Jr.

99. As regards Mr. Larry Marshall Jr. the third Applicant, Ms. Dill argued that Mr. Marshall mistakenly asserted that the DET found that they had no authority to determine whether he was a conscientious objector. That assertion is incorrect; page 60 of the transcript states:-

> "*Mr. Marshall, we have listened to what you said, based on what you said, we're very satisfied that you have not made a case that you are a conscientious objector."*
>
> *"We feel that it is only right that we handle you in the same consistent manner as we handled them, which is, that we're going to give you a one year deferment for military service in order to allow you to make such application as you want to the Supreme Court as to the legality of service in the Regiment.*
>
> *We can't make that decision, we don't have the authority to make that decision,...*"

100. Ms. Dill submitted that the DET said that they did not have the authority to decide whether conscription itself was legal. That point has now been satisfied. The DET clearly stated that they did not feel that Mr. Marshall had made a case that he was a conscientious objector but still gave him that one year deferment that they had afforded other Applicants in relation to BAD.

Court

101. Based on the Privy Council decision conscription is legal. The DET found that Mr. Marshall Jr. is not a conscientious objector. In the result Mr. Marshall Jr, has to complete his military service.

102. Before concluding I would add that all the material before me was given full consideration and the fact that any item may not have been mentioned does not mean it was not given due consideration. For these reasons the Constitutional application fails.

Dated the 4th day of May 2011

WADE-MILLER J