IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2011: No. 13

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 GOVERNOR'S ORDERS 1993
AND IN THE MATTER OF APPLICATIONS FOR EXEMPTION FROM MILITARY SERVICE ON THE GROUNDS OF CONSCIENCE

BETWEEN:

(1) JAMES FAMOUS
(2) SHAKI EASTON
(3) SETH MING
(4) TEKLE MING

Applicants

-and-

(1) THE ATTORNEY-GENERAL OF BERMUDA
(2) THE CHAIRMAN OF THE DEFENCE EXEMPTION TRIBUNAL
(3) HIS EXCELLENCY THE GOVERNOR OF BERMUDA

Respondents

JUDGMENT

Date of Hearing: 7th September 2011
Date of Judgment: 15th September 2011

Mr. Eugene L. Johnston for the Applicants
Ms. Shakira Dill, Attorney General's Chambers

INTRODUCTION

1. The Applicants are members of the group Bermudians Against the Draft, also known as BAD. By Originating Summons dated 19 January 2011 they are seeking certain constitutional relief. In particular, they are seeking various declarations and orders relating to their objection to compulsory military service. Such declarations include a finding that they are conscientious objectors, that their compulsory service would be forced labour, that certain provisions of the Defence Act are unconstitutional, that the Defence Exemption Tribunal is unconstitutional for lack of independence and impartiality, an order for the legislature to consider and alter the constitution.

   This action is the latest in a series of actions taken by the members of the group. Such actions have reached as high as the Privy Council without success. At the time of this hearing another, ***Jamal Hardtman et. al. v The Commanding Officer of the Bermuda Regiment and others No. 216, 218 and 213 of 2010*** had been scheduled for trial before another judge.

   The relevant issues and facts to be raised in the present suit appear to be identical to those being raised in the ***Hardtman*** case.

   Pursuant to this suit, the Applicants have by way of summons dated 19 January 2011 made application for an interim injunction against the Respondent in the following terms inter alia;

   (i) Until after the trial of this action or further order of the court, the Respondent must not;
      a. arrest and or detain each or any of the Applicants to this action;
      b. use of any form of compulsion whatsoever for the purpose of disciplining, punishing and or forcing the Applicants collectively or individually to perform mandatory military service to the Regiment.

2. The injunction matter was heard in chambers before me on 27th January 2011 and adjourned to 31 January 2011.

At the conclusion of the hearing on 31st January 2011, the parties agreed that no decision should be handed down until the sister matter, ***Jamal Hardtman et. al. v The Commanding Officer of the Bermuda Regiment and others*** was heard.

As earlier said, that matter was scheduled to be heard before Justice Wade-Miller shortly and consisted of the identical issues and similar facts raised by other members of BAD with both counsel leading in that case.

The Crown undertook not to enforce any orders against the Applicants until that decision or further order of this court.

The matter was consequently adjourned pending the decision in the ***Hardtman*** case.

3. The ***Hardtman*** matter was heard between 7th February 2011 and 9th February 2011 and the decision was handed down by Justice Wade-Miller on 4th May 2011.

The following day, 5th May, 2011, both counsel appeared before me in these chambers. They sought time to study the ***Hardtman*** judgment and expressed the view that thereafter it may not be necessary for this court to render a decision.

Judgment was reserved and the matter was adjourned to a date to be agreed with or set by the Registrar.

4. Subsequently a letter dated 15th June 2011 from Ms. Shakira Dill counsel for the Respondents, was received by the Registrar setting out her difficulty in making contact and positive response with and from counsel for the Applicants, Mr. Johnston.

As a result she requested the injunction matter be set before these chambers for a decision.

5. My understanding however, at the time of the adjournment on the 5th March 2011, so that the parties could study the ***Hardtman*** judgment, was that after study of that judgment, the parties may have wished to make further arguments or may abandon the matter, thus making it necessary or unnecessary for me to render a judgment.

Unfortunately it was a very busy period engaging this judge in important Criminal trials right up to the end of July followed immediately after by preapproved vacation. As a result no appropriate time was scheduled for further submissions or conclusion.

Upon my return to office the parties were immediately summoned to present any further submissions before a decision would be rendered.

6. On 7th September 2011 counsel appeared and made further submissions. Having heard their submissions they were informed of the courts judgment in draft unless any further submissions came forth to vary it.

Having heard the intended decision, Counsel for the Applicants referred to a recent case post the ***Hardtman*** decision which he said may put the ***Hardtman*** decision in doubt and may lead to a variation of the intimated decision. He therefore requested the court to consider before rendering a final decision and undertook to forward it to the court with highlights and additional submissions before the end of the day. Counsel for the Respondents submitted that the new case did not assist the applicants and undertook to forward submissions to the court as well by the end of the day.

The case of ***Bayatyan v Armenia, Application No. 235/03*****,** a European Court of Human Rights case was forwarded with submissions from both counsel by way of email on the same day.

I considered the ***Bayatyan*** decision and the accompanying submissions. I am not persuaded that my intimated decision should be varied.

7. **THE ORIGINAL SUBMISSIONS**

Ms. Shakira Dill for the Respondents applying the ***American Cyanamid*** tests submitted inter alia that; before a court may grant an interim injunction against the Crown in a suit such as this, it must ask itself the following questions:

(a) Is there a serious question to be tried, in the sense that the claim is not frivolous or vexatious.

(b) Only if there is a serious question to be tried, the court should then ask itself whether damages could be an adequate remedy for a party injured by the courts grant or failure to grant an injunction. If not where does the balance of convenience lie? ***American Cyanamid Co .v Ethicon Ltd. [1975] AC 396, 407G-409C.***

An approach she claimed as adopted by Chief Justice Ground in ***Marshall v Deputy Governor [2007] Bda LR 9.***

Mr. Johnston submitted inter alia, referencing the ***American Cyanamid*** tests, that it's not the duty of the court at this stage to decide difficult questions of facts and evidence or complex principles of law, but before a court can refuse the application it must be satisfied that the material available to the court at the hearing of the application for an interlocutory injunction failed to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial and the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. ***American Cyanamid Co. v Ethicon Ltd. [1975] WLR 316 at 323B per Lord Diplock.***

8. I am in agreement with both counsel and consider those principles to be the correct and applicable legal principles upon which I must and shall rely upon in the instant matter.

9. **APPLICATION TO THIS CASE**

As I earlier said, the issues raised in this matter and the material facts are pretty much identical to those in the ***Hardtman*** matter and to some extent those raised in the earlier ***Marshall*** case.

I therefore think it unnecessary to lengthen this judgment by way of a factual regurgitation.

10. **DECISION**

In all the circumstances, after considering the material before me, the authorities cited and the principles earlier cited upon which I have relied, I was unable to find any sufficiency of evidence or principle upon which I could grant the application.

In the circumstances I am compelled to refuse the application for an interim injunction.

11. **FURTHER SUBMISSIONS**

After hearing some submissions from counsel the above decision was indicated to counsel as that which was intended to be handed down unless there were any new submissions capable of causing a variation of it.

Mr. Johnston for the Applicants then further submitted that since the ***Hardtman*** decision, the **Bayatyan** case was brought to the attention of Justice Wade-Miller resulting in the stay of her decision pending appeal. An appeal that shall be shortly heard.

Further, that unlike the ***Hardtman*** case all of these applicants manifested their objection by appearing before the Exemption Tribunal. He submitted that fact distinquishes this case from the ***Hardtmans***. Consequently he submitted that the learning in paragraphs 100 to 110 of the ***Bayatman*** case is relevant.

In paragraph 100 The European Court sought to explain and distinquish the meaning and application of Article 9 and Article 4(3)(b) of the convention. Those articles mirror Sections 8 and 4(3)(b) of the Bermuda Constitution. They deal with the protection of freedom of conscience rights and protection against forced labour and the exception relating to conscientious objectors. In the final sentence of paragraph 100, the court said; "*in itself it neither recognizes nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9"*.

At paragraph 109, the court said;

"*in light of the foregoing and in line with the living instrument approach, the court therefore takes the view that it is not possible to confirm the case law established by the commission and that Article 9 should no longer be read in conjunction with Article 4(3)(b). Consequently the Applicants complaint is to be answered solely under Article 9"*.

At Paragraph 110, the court said;

" in this respect, the court notes that article 9 does not explicitly refer to a right to conscientious objection. However it considers that opposition to military service where it

is motivated by serious and insurmountable conflict between the objection and insurmountable conflict between the obligation to serve in the army and a persons conscience or his deeply and genuinely held religious belief, constitutes a conviction or belief of sufficient cogency , seriousness, cohesion and importance to attract the guarantees of Article 9."……."Whether and to what extent objection to military service falls within the ambit of the provision must be assessed in the light of the particular circumstances of the case."

I understand Mr. Johnston to be submitting that upon those principles if the ***Cyanamid*** principles earlier referred to are applied, the court should find that there is a serious case to be heard and upon the balance of convenience the injunction should be granted.

Without more I might have agreed with Mr. Johnston but I find that there is some material distinction between the instant case and the ***Bayatyan*** case as submitted by Ms. Dill for the Respondents.

Unlike the ***Bayatyan*** case where the state did not recognize the conscientious objector and despite the mirrored sections in the convention and our constitution, the principle of conscientious objection is recognized under Bermuda law. It is provided for by section 27(1) of the Defence Act 1965 which states; *27(1) Notwithstanding anything in the foregoing provisions of this Part, a person may, at any time… 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.

(c) 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.

Thus submits Ms. Dill the ***Bayatyan*** principles are of no assistance to the Applicants.

Futhermore, as referred above the ***Bayatyan*** case explicitly states that whether and to what extent objection to Military service falls within the provisions must be assessed in light of the particular circumstances of the case. Ms. Dill submits that unlike the ***Bayatyan*** case, that was the purpose of the Exemption Tribunal. I am in agreement with that submission.

Applying this principle I have considered the material before me as set out in the affidavits of the Applicant. I have considered the reasons for the decision given by the tribunal and the reasons for the decision given by the Governor. I have applied the principle in ***Cyanamid*** referred by Mr. Johnston, i.e. though it is not the duty of this court to determine the complex issues of evidence and law, I must be satisfied that upon the material available to the court at the application for the interlocutory injunction there is a failure to disclose that the plaintiff has any real prospect of succeeding in his claim for the permanent injunction and if so whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

12. **DECISION**

On the evidence before me, the submissions made and the principles applicable I am not persuaded that in this particular case there is any prospect of success. I am not persuaded that the balance of convenience should lie in the applicants favour and I am not persuaded that the interlocutory injunction should be granted.

The application is refused.

Costs shall be in the cause.

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Carlisle Greaves
Puisne Judge