[2010] UKPC 9
Privy Council Appeal No 0074 of 2009

JUDGMENT

Larry Winslow Marshall and Others *v* The Deputy Governor of Bermuda and Others

From the Court of Appeal of Bermuda

before

Lord Phillips
Lord Saville
Lady Hale
Lord Brown
Lord Mance

JUDGMENT DELIVERED BY
Lord Phillips
ON

24 May 2010

Heard on 22 and 23 February 2010

Appellant	*Respondent*
Jonathan Crow QC Delroy Duncan	Rabinder Singh QC Howard Stevens Huw Shepheard
(Instructed by Dorsey & Whitney (Europe) LLP)	(Instructed by Charles Russell LLP)

LORD PHILLIPS:

Introduction

1. The Bermuda Regiment ("the Regiment") was raised pursuant to the Defence Act 1965. It is Bermuda's sole military force. Any Commonwealth citizen, man or woman, may join the Regiment as a volunteer. Few choose to do so. Most of the Regiment consists of conscripts, who serve on the same terms as the volunteers. Only men are liable to be conscripted. Service is part time and extends over an initial term of three years and two months.

2. The appellants belong to an organisation known as "Bermudians Against the Draft". Some or possibly all of them have been called up to join the Regiment as conscripts. They do not wish to do so and contend that they cannot lawfully be required to do so for the following different reasons.

i) Conscription of men but not women constitutes unlawful discrimination contrary to article 6(1) of the Human Rights Act 1981 (the discrimination argument).

ii) Conscription is only lawful if the number of volunteers is inadequate to make up the strength of the Regiment. This means that conscription is only lawful if:

a) The Governor has kept the size of the Regiment under periodic review.

b) The Governor has taken all reasonable steps to recruit volunteers.

The burden lies on the Governor of proving that he has satisfied these preconditions. He has failed to discharge this burden ("the precondition argument").

iii) The Governor has proceeded under an error of law in that he believed that he had no duty to attempt to recruit volunteers before resorting to conscription ("the error of law argument").

iv) The Governor has resorted to conscription without giving consideration to a material matter, namely the possibility of establishing a quota of women in the Regiment ("the quota argument").

v) The call-up notices issued under section 17(1) of the Defence Act were invalid ("the invalidity argument").

3. Of these consolidated proceedings one, in which Mr Eve was the applicant, was commenced by an application for judicial review, and the remainder by originating summons. The appellants' challenges to the legality of their conscription were dismissed by Chief Justice Ground on 7 March 2008. Their appeal against his decision was dismissed by the Court of Appeal consisting of Zacca P, Nazareth and Ward JJA, on 28 November 2008. In granting permission to appeal to the Privy Council the Court of Appeal certified a single issue for determination: "can the Government of Bermuda lawfully enforce compulsory military service against the appellants?" The importance of this issue speaks for itself.

The Defence Act 1965

4. Much of the appellants' case focuses on the following provisions of the Defence Act:

"**Raising of Regiment**

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

Voluntary enlistment supplemented by compulsory military service

4. The regiment shall be raised and maintained by means of voluntary enlistment, and also, in case voluntary enlistment proves inadequate for the raising or maintenance of the regiment, by means of compulsory military service, in the manner hereinafter in this Act provided."

5. Section 5 of the Defence Act provides that in exercising his powers and duties under the Act the Governor shall act in his discretion. Provision is made by sections 6 and 7 for the appointment of a Defence Board, to which the Governor is permitted to look for advice. Section 11 provides for the Governor to make Orders in relation to all matters relating to the Regiment, including pay and allowances. Sections 13, 13A, 15 and 16 deal with the liability to compulsory military service of "specified persons". These are defined by section 12(2) as male Commonwealth citizens with Bermudian status. Specified citizens, unless exempted, become liable once they reach the age of 18 to be selected by ballot to fill vacancies in the Regiment. Section 14 provides for the enlistment of volunteers. Conscripts and volunteers serve under precisely the same conditions, including the term of service, which is three years and two months. At the end of that term they are entitled to volunteer for a further term of service. Section 17 is only of relevance to the invalidity argument and we shall refer to its provisions when we deal with that argument.

Facts in the public domain

6. In January 2005 the Governor, after discussions with Ministers, invited the Defence Board to provide him with advice on the Regiment in relation to:

i) The demands likely to be placed on the Bermuda Regiment over the period 2006 to 2011;

ii) The Regiment's desirable future mission, structure and training;

iii) Based on present manning, structure and training, whether or not the Regiment could meet these demands or desires.

7. The Defence Board commissioned a Fitness For Role ("FFR") inspection from British Defence Staff, Washington. This was conducted by the British Army with assistance from officers from the Regiment and the Bermuda police. The FFR Report dated 29 November 2005 recorded a nominal strength of the Regiment of 633, "overborne by 24 against an establishment of 609". Of this number 483 were declared available for service. The Report concluded that in its current state the Regiment was able to fulfil its existing roles adequately but not as well as it could.

8. Those roles were more fully described in the Defence Board's Review dated February 2006. They are:

i) Providing unarmed assistance to the Civil Authority by, inter alia, providing support in responding to crises and by providing Ceremonial Guards and a Regimental Band;

ii) Providing armed assistance to the Civil Power in the case of a breakdown of normal civil order;

iii) Providing assistance to Bermudian society;

iv) Providing assistance to the international community.

9. The Defence Board gave detailed consideration to the strength of the Regiment, in the light of the FFR Report. It concluded that under current conditions the best deliverable strength of the Regiment was unlikely to exceed 500 persons and that at a deliverable strength of approximately 450 persons it should be capable of carrying out its current roles. The Defence Board considered:

> "that the existing Regimental policy of accepting and encouraging all suitable male and females as volunteers should continue; and that there should be an increased emphasis on attracting volunteers."

The Defence Board found that remedial action was required in relation to pay, plant, infrastructure and military equipment in order to ensure that service in the Regiment was recognised as being valuable and meaningful. It identified a need to improve retention of soldiers who had completed the initial three years of service.

10. In relation to the size of the Regiment the Board recorded that this had been reduced from 703 to 630 after a Review by the Governor in 1992 and recommended that the established strength of the Regiment should "remain at 609". There is no evidence as to when this figure had been reduced from 630 to 609.

11. There is a paucity of evidence as to the proportion of the Regimental strength that was made up of volunteers. The Chief Justice was informed by counsel for the respondents that 13 women were currently serving and that 137 women had done so in the past. All of these will have been volunteers. Mr Burchall, who at the material time was the Administrator of the Defence Department, stated in an affidavit that only two volunteers enlisted in the year that Eve was conscripted. It can be inferred from this, and from data in the FFR Report and the Defence Board's Review, that the Regiment is largely made up of conscripts.

The discrimination argument

12. The appellants submit that because conscription is restricted to men the Human Rights Act 1981 ("the HRA") is infringed. As section 30B of the HRA confers primacy on that Act it will follow, if this submission is correct, that the power of conscription that the Defence Act purports to confer is invalid.

13. Section 2 of the HRA includes the following definition of discrimination:

> "(2) For the purposes of this Act a person shall be deemed to discriminate against another person—
>
> (a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—
>
> . . .
>
> (ii) of his sex;"

It is common ground that conscription constitutes discrimination against men within this definition. The issue is whether other provisions of the HRA renders this discrimination unlawful.

14. The provisions of the HRA upon which the appellants rely as rendering conscription unlawful are the following:

> "**Employers not to discriminate**
> 6 (1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by—
> (a) refusing to refer or to recruit any person or class of persons (as defined in section 2) for employment;
>
> . . .
>
> (e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;

. . .

(g) providing in respect of any employee any special term or condition of employment …"

15. Mr Crow QC for the appellants submits that these provisions must be given an interpretation that is generous and purposive, drawing an analogy with cases that concern constitutional rights – see *Minister of Home Affairs v Fisher* [1980] AC 319; *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235 at para 26. This submission is supported by the approach recently taken to the HRA by Lord Neuberger of Abbotsbury, when giving the judgment of the Board in *Thompson v Bermuda Dental Board* [2008] UKPC 33 at para 29. The Board accepts this submission as, indeed, did Mr Rabinder Singh QC for the respondents. The Board considers, however, that Mr Singh was correct to submit that this approach to interpretation cannot go so far as to distort the meaning of the words of the legislation. This is what Mr Crow has sought to do.

16. In dealing with section 6(1)(a) Mr Crow submits that "any person" when used the first time bears a different meaning from "any person" when used the second time. On the first occasion "any person" is the person discriminated against. On the second occasion it does not bear that restricted meaning. Thus, he submits that section 6(1)(a) will be infringed if person A is treated unfairly by reason of a refusal to recruit person B for employment.

17. If the Regiment was comprised exclusively of male conscripts it might have been arguable that there was discrimination against them because of a refusal to conscript women, within the ambit of section 6(1)(a). Mr Crow's problem is that there is no refusal to recruit women for employment in the Regiment. They are invited to join the Regiment on precisely the same terms as the male conscripts, as are any men who are not conscripted. Mr Crow seeks to meet this difficulty by submitting that one must imply the addition of two words into (a) so that it reads "refusing to refer or to recruit *by conscription* any person or class of persons (as defined in section 2) for employment."

18. This is, in the opinion of the Board, a step too far. The meaning of section 6(1)(a) is crystal clear. It treats employment as something that is desirable and renders unlawful treating a person less favourably by denying him or her employment, or the chance of obtaining employment. The relevant wording echoes that of the similar provision in section 2(2)(a), where the ambiguity of the phrase "any person" is not present. By advancing a construction that treats employment as a detriment Mr Crow seeks to turn the meaning of section 6(1)(a) on its head. However generous and purposive one's approach to the subsection it cannot achieve this result.

19. Mr Crow is confronted with a similar problem in relation to section 6(1)(e). It is arguable that conscripts constitute an "employment classification or category". The maintenance of that classification or category does not, however, "exclude any person or class of persons from employment". Those who are not conscripted, be they women or men, are free to obtain employment that is identical to that of those who are conscripted. Mr Crow argues that one must add, by implication, an additional phrase, so that the relevant provision reads "exclude any person or class of persons from employment *as a conscript"*. Once again this turns the natural meaning of section 6(1)(e) on its head, and is not a viable interpretation.

20. Mr Crow has a different argument in relation to section 6(1)(g). He submits that the obligations that relate to conscription constitute a "special term or condition of employment" that treats men who are liable to conscription less fairly than women who are not. The problem with this argument is that conscription is not a "term or condition of employment", it is a manner of procuring employment. The terms and conditions of employment of those who are conscripted and those who volunteer are, in accordance with the provisions of section 19 of the Defence Act, identical.

21. These conclusions are entirely in accord with those of the Chief Justice and of the Court of Appeal.

22. For these reasons the Board rejects the submission that conscription constitutes unlawful discrimination in breach of the HRA. This is not a conclusion that all will regard as satisfactory. It is plain that some, if not all, of the roles performed by the Regiment could just as well be performed by women. There seems no obvious reason why protection from discrimination should not extend to cover conscription.

The precondition argument

23. It has always been the appellants' case that, on the true construction of section 4 of the Defence Act, the respondents could not lawfully resort to conscription unless all reasonable steps had first been taken to raise the Regiment to the appropriate strength by voluntary recruitment. The respondents did not initially accept this. They contended that section 4 permitted recruitment of volunteers and compulsory conscription to proceed in tandem. The Chief Justice rejected this contention. He held that under section 4 of the Act conscription was only permitted if voluntary recruitment had failed and that the respondents bore the burden of proving that this precondition was satisfied. To discharge that burden they had to prove first that the Governor had addressed the size of the Regiment in a reasonable manner. Secondly they had to prove that all reasonable steps had been taken to fill the ranks to the necessary size with volunteers. The Chief Justice held that the respondents had discharged the burden of proving these matters.

24. Neither before the Court of Appeal nor before the Board have the respondents challenged these findings of the Chief Justice as to the construction of section 4. They have been content to rely on the Chief Justice's findings that they had satisfied the burden of proof that they were under. While this has restricted the field of battle, it is right that the Board should express some reservations about the conclusions drawn by the Chief Justice as to the effect of section 4 of the Defence Act. What if the strength of the Regiment had been permitted to exceed to some extent the size needed to perform its roles? Or what if there had been a failure to take some measure that it would have been reasonable to take to improve voluntary recruitment, but this could not have been expected to produce more than a modest increase in the number of volunteers? It is a startling proposition that in either case all conscription would have been rendered unlawful, but it is even more difficult to conceive of a way in which it would have been possible to differentiate between conscripts who were lawfully recruited and conscripts who were not.

25. There is no need to pursue these questions further. The Board has found it possible to resolve this part of the appeal without looking beyond the issues of fact that it raises. These are as follows:

i) Did the Governor address the size of the Regiment in a reasonable manner?

ii) Were all reasonable steps taken to recruit volunteers?

26. In relation to these issues the appellants face a difficulty. They are issues of fact. The Chief Justice found against them on those issues. The Court of Appeal upheld the findings of the Chief Justice. It is the practice of this Board not to review for a third time issues of fact in relation to which there are concurrent findings below. The Board recently drew attention to this practice in *Director of Public Prosecutions of Mauritius v Hurnam* [2007] UKPC 24; [2007] 1 WLR 1582 at paragraph 23. The Board confirmed that the practice had not altered since it was stated by the Judicial Committee in *Devi v Roy* [1946] AC 508 at 521-522. In that case, however, the Board stated that the practice was not a "cast-iron" one and that there could be reasons justifying a departure from it. A miscarriage of justice or the violation of some principle of law or procedure was advanced by way of example.

27. Mr Crow has attacked the findings of fact of the lower courts by contending that they had failed to apply an important principle, which he describes as "the duty of candour". He submits that where a person brings public law proceedings challenging the conduct of a public authority, the defendant is under a duty of candour to explain to the court exactly what has happened and why. He has referred the Board to this

passage in the judgment of Sir John Donaldson MR in *R v Lancashire CC, Ex P Huddleston* [1986] 2 All ER 941 at p 945.

> "This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

28. Lord Donaldson reverted to this theme in *R v Civil Service Appeal Board, Ex P Cunningham* [1992] ICR 816, 822-824. He stated that the fact that leave to apply for judicial review has been granted called for some reply from the respondent. Once a public law court had concluded that there was an arguable case that a decision was unlawful, the court was entitled to be given the reasons for the decision. Lord Donaldson drew a distinction between the legal duty on a public authority to provide an individual with reasons for a decision and the duty to provide a court with reasons for the authority's conduct. Breach of the former duty can lead to the quashing of the decision without more. Failure to observe the latter can lead to the court drawing inferences adverse to the public authority, but it will not necessarily do so.

29. Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. Care must be taken when applying Lord Donaldson's statements to judicial review proceedings in relation to acts of public authorities that do not involve any exercise of discretion. Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove.

30. The originating summons by which the appellants other than Mr Eve commenced their proceedings was issued on 5 December 2006. That summons sought a number of declarations that have not been pursued. The only issue that it sought to

raise that is still alive was the discrimination argument. On 22 February 2007 the lawyers acting for the plaintiffs who had issued the originating summons wrote a letter to the respondents stating that they also acted for Mr Eve, who was contemplating judicial review proceedings. The letter posed a lengthy series of questions, prompted in part by the Defence Board Review. It began by referring to the Government's "obligations" to provide information, as stated by Lord Donaldson in *Huddleston.* Mr Crow accepts that this reference was premature as no judicial proceedings had been commenced, but submits that the duty to respond to the questions raised in the letter arose when Mr Eve obtained permission to apply for judicial review.

31. Leave to apply for judicial review was granted, on the papers, on 20 March 2007. The relief sought to which this leave related included:

> "A declaration that any calling up notice purportedly issued in relation to the applicant is unlawful on the grounds that:
>
> > (a) the Governor has failed to keep under review at reasonably regular intervals the exercise of his discretion under s.3 of the Defence Act 1965 with regard to determining the number of officers and men required for the proper discharge of the Regiment's function; and/or
> >
> > (b) the Governor has not made any reasonable efforts to recruit sufficient volunteers before resorting to conscription"

32. Counsel for the appellants submitted to the courts below and to the Board that the respondents were in breach of the duty of candour in failing to provide the information requested in the letter of 22 February 2007, insofar as this related to these issues. The Chief Justice did not accept that the respondents had been under any duty to give reasons to justify their conduct on the facts of this case (para 15). The Court of Appeal observed that the reason for the duty of candour was to provide the court, where necessary, with the material needed to make an informed decision. The Chief Justice had been able to make reasonable findings on the facts before him and the Court had no reason to disagree with those findings (paras 42 to 44).

33. The Board has concluded that the invocation of the duty of candour in this case is misconceived. It is founded on the premise that the duties to which the Governor was subjected on the true interpretation of sections 3 and 4 of the Defence Act required him to give consideration to implementing recommendations made in the Defence Board Review. It was submitted that by failing to provide any information as

to the consideration given to the Review, or as to any response to it, the duty of candour was breached and the court should infer that no consideration was given to it.

34. It appears from the judgments below that the appellants argued that the Review had recommended that the strength of the Regiment could be reduced to 450 to 500 men. Had this been the case the Board would understand the argument that the Governor ought to explain whether he considered making an appropriate reduction in conscription. But as both the Chief Justice (para 23) and the Court of Appeal (para 34) pointed out, the appellants' argument was based on a confusion between the *established* strength of the Regiment and its *operational* strength. Conscription had to be adequate to maintain the established strength, and the Review recommended that there should be no change to this.

35. Thus the Review did not call for any action from the Governor so far as the strength of the Regiment was concerned. In these circumstances, no adverse inference could be drawn from the fact that he gave no evidence of his reaction to the recommendations in the Review in relation to numbers. Mr Crow suggested that, in the absence of evidence, the court should have inferred that the Governor gave no consideration to the Review. The Board does not accept that submission. The Governor commissioned the Review and there was no need to adduce evidence to support the obvious inference that he read it. The Chief Justice accepted Mr Duncan's submission that the onus was on the Governor to demonstrate that the size of the Regiment had been fixed at an appropriate level, but held that he had done this. The Court of Appeal agreed. So does the Board. The evidence established that the Governor addressed the size of the Regiment in a reasonable manner.

36. The appellants' second submission in respect of which the duty of candour is raised is that the Governor did not take all reasonable steps to recruit volunteers. As to this the appellants' case can be summarised colloquially in the manner suggested by Lady Hale to Mr Crow in argument. The Defence Board Review and the FFR Report had disclosed that the Regiment was a bit of a shambles. This would discourage the recruitment of volunteers. The Governor was under a duty to address the various shortcomings identified. He had adduced no evidence of any steps taken to do so. In the absence of such evidence the court should infer that he had done nothing by way of response to the Review and thus that he had failed to take all reasonable steps to recruit volunteers.

37. It is apparent from his judgment that the Chief Justice took a very different view of the nature of the duty on the Governor to take all reasonable steps to recruit volunteers. He did not consider that this duty encompassed taking steps to make service in the Regiment more attractive. His approach was to consider what had been done to attract recruits to volunteer to the Regiment as it was. He commented that he did not think it appropriate for the Court to review in detail the Regiment's

recruitment programme. He only had to be satisfied that they had addressed the issue in a reasonable, not an optimal manner.

38. The Board has expressed reservations as to the acceptance by the Chief Justice that the respondents had the burden of proving that they had taken all reasonable steps to attract recruits. The Board would certainly not accept that the nature of this duty was any more onerous than that found by the Chief Justice. If the Defence Act had imposed on the Governor a duty to take all reasonable steps to make up the strength of the Regiment by volunteers alone, this would have required making the conditions of service sufficiently attractive to achieve this end. Perhaps this could have been done had money been no object. But the Act makes detailed provision for conscription and thus accepts that this is likely to be necessary to make up the strength of the Regiment. The Board considers that, insofar as the Act imposed a duty on the Governor to take reasonable steps to recruit volunteers, the Chief Justice was correct to consider this as extending no further than requiring the Governor to see that reasonable steps were taken to persuade recruits to join the Regiment as it was.

39. The Chief Justice dealt with this issue in paragraphs 25 to 33 of his judgment. He referred first of all to evidence showing how difficult it was to attract volunteer recruits for reasons beyond the control of the Regiment. He went on to refer to evidence on which he based a finding that there had been a recruitment drive in 2004 that extended to women. He drew attention to evidence that suggested that this had had scant success and observed that there was no need to carry out an extensive recruiting drive each year unless it could be shown that this would have a material impact.

40. On this somewhat scanty evidence the Chief Justice concluded that the Governor had discharged the burden of showing that reasonable steps had been taken to recruit volunteers. The Court of Appeal endorsed this finding. Neither mentioned the fact, which must be well known in Bermuda, that all men who qualify for conscription are asked whether they would like to volunteer. The evidence suggests that few accept the invitation.

41. A clear picture comes across from the evidence, sparse though it is, that the possibility of volunteering to join the Regiment is known in Bermuda, but that this is not found attractive and proactive recruitment has only a marginal effect on the proportion of the Regiment made up of volunteers. For reasons that the Board has already explained, it would not be appropriate to depart from the findings of the Chief Justice and the Court of Appeal on this issue of fact unless there were reason to believe that a miscarriage of justice had occurred or that some other special reason existed for doing so. Neither is shown on the facts of this case and, accordingly, the Board rejects the precondition argument.

The error of law argument

42. Mr Crow argued that the stance taken by the respondents to the precondition argument at first instance demonstrated that the Governor was acting under an error of law. The respondents had denied that there was any duty to attempt to make up the strength of the Regiment from volunteers before resorting to conscription. Mr Crow argued that this showed that the Governor was labouring under an error of law as to his legal obligations.

43. There are two answers to this point. First, as the Court of Appeal observed, it does not follow from the fact that an argument of law is advanced in litigation that the party advancing it has governed his conduct according to it. Secondly, as Mr Singh submitted, the courts below have found as a fact that the respondents complied with their obligations as they actually existed, not as they asserted them to be. Thus the question of whether or not the respondents were, in fact, labouring under an error of law is immaterial. For this reason the Board rejects the error of law argument.

The quota argument

44. Mr Crow argued that the Governor's operation of conscription was unlawful because he had failed to have regard to a material consideration, namely the possibility of making an express requirement that the strength of the Regiment should include a fixed quota of women. The Board has grappled unsuccessfully with this argument. The Governor could not fill a proportion of the Regiment with a fixed quota of women volunteers any more than King Canute could halt the incoming tide. The Board is unable to see how fixing such a quota would have been of any assistance to the task of recruitment nor why the Governor should have given consideration to such a requirement. The Board does not share the conclusion of the Chief Justice that the Governor and those advising him must have considered the possibility of fixing a quota of women volunteers, but endorses his comment that "more importantly, there is nothing to suggest that sufficient women volunteers could be found to fill any such quota: indeed, the figures are to the contrary". For this reason the Board rejects the quota argument.

The invalidity argument

45. Section 17 of the Defence Act provides:

> "Reporting for medical examination; calling up

> 17(1) The Deputy Governor shall prior to the issue of any notices under subsection (2) publish notices in the Gazette and in a newspaper containing lists of persons selected for military service under section 16 requiring such persons to present themselves at such time and place as shall be specified in the notices for medical examination by the medical board and for enlistment.
>
> (2) The Governor shall cause to be served on each person selected for military service under section 16 a notice requiring him to present himself at the time and place specified in the notices published under subsection (1) for medical examination by the medical board and for enlistment."

The only notice published under section 17(1) that has been put in evidence was exhibited to an affidavit sworn by Mr Eve. It was a notice published in the *Bermuda Sun*. The notice set out a list of men selected for military service. The list included the name of Mr Eve and of at least two other appellants, Mr James Famous and Mr Seth Ming. That notice purported to have been published by Mr Burchall, the Administrator of the Defence Department. Mr Crow submits that it should be assumed that the same was true of the notices that related to the other appellants. He further submits either that the Deputy Governor had no power to delegate the publication of these notices to Mr Burchall or, alternatively, that there is no evidence that he did delegate that function.

46. In rejecting this argument both the Chief Justice (paragraphs 47 to 50) and the Court of Appeal (paragraphs 45 to 54) purported to apply the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. Mr Crow submitted that they were wrong to do so for two reasons. In the first place there was no legitimate justification for inferring that a power to delegate applied in this case. In the second place there was no evidence that the Deputy Governor had delegated the duty of publishing the list in this case.

47. These submissions are not wholly apposite, having regard to the nature of the *Carltona* principle. That principle enables officials in a government department to act in their minister's name without any express delegation of authority to perform any particular action. It is enough that the action in question falls within the general authority that the officials of a department enjoy to carry on the business of the department on behalf of the minister. Whether a power or duty is one that a minister must exercise personally or whether it is one that he can leave to his department to exercise on his behalf depends upon the facts of the particular case. There is no difficulty in applying the *Carltona* principle in circumstances where the nature of the power or duty conferred on the minister is such that it is obvious that it will not be exercised by him in person.

48. This case is concerned not with a duty conferred on a minister but with a duty conferred on the Deputy Governor. In *Evans v Minister for Education* [2006] Bda LR 52 Kawaley J stated:

> "I accept the submission on behalf of the Respondent that the '*Carltona* principle' is potentially applicable beyond the narrow confines of statutory powers conferred on Government ministers. It follows that an implied power to sub-delegate based on administrative necessity may potentially be found in respect of purely administrative aspects of the powers delegated by the Governor to the Permanent Secretary, depending on the applicable facts."

The Court of Appeal in the present case endorsed this statement of principle. So does the Board.

49. Mr Burchall in his first affidavit dated 26 April 2007 stated that he held the Civil Service post of Administrator of the Defence Department and was responsible for the maintenance of the military training register and for administering the annual computer ballot by which men are called up for military service in the Regiment. The evidence does not disclose the sequence of events that led to his assuming these duties. Those duties clearly include, however, the publication of the notice whose validity is in issue. The publication of that notice is a purely mechanical administrative act.

50. In his original grounds for seeking judicial review Mr Eve simply averred that the Deputy Governor had wrongly delegated to the Defence Board his authority to publish the notice under section 17(1). Mr Crow argued that, because conscription was at stake, and conscription involved interference with liberty, the service of the notice was an act that the Deputy Governor could not delegate to anyone, whether expressly or under the *Carltona* principle. The Board does not agree. The publication of the notice was the kind of administrative act that one would expect to be performed by someone other than the Deputy Governor himself, under authority either expressly delegated or implicitly delegated under the *Carltona* principle. That act was one that could properly be delegated.

51. The Chief Justice held that the *Carltona* principle applied because:

> "In the ordinary run of the mill it is sufficient if the official exercising the power or fulfilling the duty holds an appropriate office to which the general responsibility for such matters has been entrusted."

He added that he read Mr Burchall's affidavit as saying that the administrative tasks relating to the Regiment and recruitment had been conferred on him and that it was "not necessary to go behind that". The Board agrees. Precisely how Mr Burchall's duties were conferred on him was never in issue and there is no basis for alleging that he was not properly authorised to undertake them. Accordingly the Board dismisses the invalidity argument.

52. For these reasons the Board will humbly advise Her Majesty that this appeal should be dismissed. Submissions in relation to costs should be submitted in writing within 28 days.

LADY HALE

53. It is hard to think of a more obvious case of sex discrimination than to oblige the members of one sex to join the armed forces of their country while allowing members of the other to choose whether or not to do so. If Bermuda were the United States of America, this would be covered by the 14th amendment: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws". Unlike race, sex is not a completely prohibited classification. Nevertheless, "Parties who seek to defend gender based government action must demonstrate an 'exceedingly persuasive justification' for that action". This means that the State must show "At least that the [challenged] classification serves 'important governmental objectives, and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'": see *United States v Virginia* 518 US 515 (1996), quoting *Mississippi University for Women v Hogan* 458 US 718 at 724 (1982).

54. The advantage of the United States' approach is that it acknowledges that there has been less favourable treatment and then concentrates on whether the reasons given for it can withstand rational scrutiny. We cannot know what reasons the Government of Bermuda might have put forward to justify the discrimination because in the present state of the law they are not required to justify it. It is plain, as Lord Phillips has pointed out, that some of the roles performed by the Regiment could just as well be performed by women. It is also plain that an individual woman may be just as capable of carrying out all of the roles performed by the Regiment as an individual man. To assume that she cannot, as Lord Hoffmann put it in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, at para 16, "offends the notion that everyone is entitled to be treated as an individual and not a statistical unit".

55. It may seem paradoxical that a man could complain about a difference in treatment which is grounded in outdated assumptions about the proper roles and predicted abilities of women. But a paradox is merely a "seemingly absurd" statement which may actually be well-founded. Outdated assumptions about women's roles and abilities usually result in less favourable treatment of women. But they can also result in less favourable treatment of men. The assumption that a wife takes her husband's status and can never confer her own status upon her husband, for example, means that the husbands of titled women are denied the titles to which the wives of titled men are automatically entitled. The assumption that a woman's place is in the home has been used to excuse women from jury service which is compulsory for men: see *Rojas v Berllaque* [2003] UKPC 76, [2004] 1 WLR 201. The assumption that women cannot and should not be made to serve in the armed forces of their country means in this case that many more men have to be conscripted than would otherwise be needed.

56. Nor should it be assumed that women welcome their exclusion from what might at first sight seem unattractive activities. Many might find it incomprehensible that women would want to join the Virginia Military Institute, with its Spartan conditions, "adversative" training methods and "rat line" rituals (see *United States v Virginia*, above). But they wanted to do so because such training was and is highly regarded for the leadership qualities and other advantages it confers upon the students. Women are not excluded from the Bermuda Regiment, but it would surely be a more attractive place for them if women were recruited on an equal basis with men.

57. An approach similar to that in the United States would apply if the Bermudan Human Rights Act followed the pattern of many other human rights instruments, both national and international. The Canadian Charter of Rights and Freedoms, for example, provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . ." (section 15(1)). But this is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1). The International Covenant on Civil and Political Rights insists that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" (article 26) but the concepts of equal protection and discrimination carry with them the possibility that some differences in treatment may have an objective justification.

58. The Bermuda Act, however, takes a similar but not identical form to the United Kingdom's anti-discrimination legislation. It contains a definition of discrimination which focuses on less favourable treatment and then makes such discrimination unlawful in relation to various defined activities. The ways in which an employer is forbidden to discriminate by section 6 of the Bermuda Act (see para 14, above) are very tightly drawn. The equivalent prohibitions in the United Kingdom Sex Discrimination Act 1975 render it unlawful for an employer to discriminate against a woman (or a man) "in the arrangements he makes for the purpose of determining who

should be offered that employment" (section 6(1)(a)). The equivalent provision in the Equality Act 2010 makes it unlawful for an employer (A) to discriminate against a person (B) "in the arrangements A makes for deciding to whom to offer employment" (clause 39(1)(a)). It is arguable (I put it no higher) that conscription by lot would fall within such "arrangements".

59. That language is certainly more apt to cover compulsory recruitment than anything in the language of section 6 of the Bermuda Act. Despite the customary bravura of his argument, Mr Crow was faced with two insuperable hurdles. The Bermuda Regiment does not refuse to recruit women (section 6(1)(a)) or exclude them from employment (section 6(1)(e)); and it treats conscripts and volunteers in exactly the same way, so it does not provide any special term or condition of employment for either (section 6(1)(g)).

60. However, the Bermuda Act is again similar to the United Kingdom legislation in providing only very limited grounds upon which direct discrimination such as this can be justified. It was not suggested that any of them would have applied to discriminatory conscription had it been covered by the Act. Yet this is where the real argument should lie: is there, in today's world, any good reason for conscripting men and not women? If service in the Bermuda Regiment is so unattractive that conscription is necessary, should all young Bermudans be obliged to devote part of their time to the service of their country in this (comparatively undemanding) way?

61. I pose these questions, not to propose an answer, but to point out that the appellants have a grievance. They have been treated less favourably than their fellow-countrywomen. The Bermudan legislators may wish to consider reform. If so, they may wish to consider whether there is a more general problem with the design of their Human Rights Act; and if so, whether to adopt the US or Canadian rather than the UK model; or whether the question of conscription should be dealt with specifically; or whether the present situation is indeed justifiable and should be left as it is.

62. These observations are merely a postscript to the reasoning of the Board on the first issue. For the reasons given by the Board on that and the other issues, I too would humbly but regretfully advise Her Majesty that this appeal should be dismissed.