



24 May 2010

PRESS SUMMARY

Larry Winslow Marshall & Ors v The Deputy Governor of Bermuda & Ors [2010] UKPC 9
On appeal from the Court of Appeal of Bermuda

BOARD OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: Lord Phillips (President), Lord Saville, Lady Hale, Lord Brown, Lord Mance

BACKGROUND TO THE APPEAL

The Bermuda regiment was raised pursuant to the Defence Act 1965. Any Commonwealth citizen may join the regiment as a volunteer. Insofar as the required strength of the regiment cannot be maintained with volunteers, male Commonwealth citizens with Bermudian status are liable to compulsory military service once they reach the age of 18. Conscripts and volunteers serve in the regiment under the same conditions of service. In practice few choose to volunteer and the regiment largely consists of conscripts.

The appellants, members of an organisation known as ‘Bermudians Against the Draft’, contended that they could not lawfully be called up to join the regiment as conscripts on the grounds that (i) conscription of men but not women constituted unlawful discrimination contrary to section 6(1) Human Rights Act 1981; (ii) conscription was only lawful if volunteers could not be found, which required the Governor to keep the size of the regiment under review and to take reasonable steps to recruit volunteers; (iii) the Governor had proceeded under an error of law in believing that he had no such duty; (iv) the Governor had failed to give consideration to establishing a quota of women in the regiment and (v) the call up notices were invalid.

The appellants’ challenges to the legality of their conscription were dismissed by Chief Justice Ground on 7 March 2008, and their appeal against his decision was dismissed by the Court of Appeal on 28 November 2008.

JUDGMENT

The Board of the Judicial Committee of the Privy Council unanimously advised Her Majesty that the appeal should be dismissed.

REASONS FOR THE JUDGMENT

The judgement of the Board was delivered by Lord Phillips.

- Although conscription of men and not women discriminated against men it was not unlawful under the provisions relating to employers in the Human Rights Act 1981. The meaning of s 6 (1) was clear. It treated employment as something that was desirable and rendered unlawful treating a person less favourably by denying him or her employment or the chance of obtaining employment. Women were invited to join the regiment on precisely the same terms as the male conscripts. Conscription was not a 'term or condition of employment' but a manner of procuring employment. These provisions might be regarded as unsatisfactory as it was plain that some, if not all, of the roles performed by the regiment could just as well be performed by women and there seemed no obvious reason why protection from discrimination should not extend to cover conscription [paragraphs 12-22].
- The second issue gave rise to two questions of fact – whether the Governor had addressed the size of the regiment in a reasonable manner and whether all reasonable steps were taken to recruit volunteers – which had been determined against the appellants by the Chief Justice and upheld by the Court of Appeal. The practice of the Board was not to review issues of fact for a third time unless there were reasons to believe that a miscarriage of justice had occurred or some other special reason existed for doing so. Neither could be shown in this case. The Governor could be assumed to have read the Defence Board's Review in 2006 which did not call for any action so far as the established strength of the regiment was concerned. Moreover the Board considered that his duty to take reasonable steps to recruit volunteers extended no further than requiring him to take reasonable steps to persuade recruits to join the regiment as it was [paragraphs 23-41]
- It did not follow from the fact that the Governor had argued against the existence of such duties before the Chief Justice that he had not in fact complied with them and the courts had found that he had. Thus the question of whether he was labouring under an error of law was immaterial [paragraphs 42-43]
- The Board was unable to see how fixing a quota of women in the regiment would have been of any assistance to the task of recruitment to the regiment [paragraph 44]
- The publication of notices under section 17 of the Defence Act 1965 was an administrative act which the Deputy Governor could properly delegate. It was not necessary to disclose evidence of the sequence of events leading to the assumption of that duty by the official who published the notices, in the absence of any basis for alleging he was not properly authorised to undertake it. Therefore the call-up notices were valid [paragraphs 45-51].
- Lady Hale added a postscript to the reasoning of the Board on the discrimination issue, pointing out that the appellants had indeed been treated less favourably than their fellow countrywomen but left without relief as a result of the design of the Human Rights Act 1981. Had this followed the approach of the United States or of many other national and international human rights instruments the focus would have been whether the less favourable treatment for men was for reasons which could withstand rational scrutiny. The Bermudan legislators might wish to consider reform [paragraphs 53-62].

NOTE

This summary is provided to assist in understanding the Board's decision. It does not form part of the reasons for that decision. The full opinion of the Board is the only authoritative document. Judgments are public documents and are available at: www.jcpc.gov.uk/decided-cases/index.html.