Easter Term
[2017] UKPC 13
Privy Council Appeal No 0057 of 2016

JUDGMENT

Commodore Royal Bahamas Defence Force and others (Appellants) *v* Laramore (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

8 May 2017

Heard on 23 February 2017

Appellants	*Respondent*
Peter Knox QC Kayla Green-Smith Thora Gardiner (Instructed by Charles Russell Speechlys LLP)	Wayne R Munroe QC Clinton Clarke Jnr (Instructed by Munroe & Associates)

LORD MANCE:

Introduction

1. Colours parades have been a tradition in the Royal Bahamian Defence Force ("the Force") since its creation in 1980. They occur regularly on 14 occasions a week, on four of which occasions (spread over three days) Christian prayers are also said at one point in the parade. There are also ceremonial parades involving the Force during which "ceremonial prayers" are said. The present case concerns the regular weekly colours parades. During these parades, immediately prior to prayers, instructions are given "Parade Off Caps" and "Stand at ease" or "Stand easy", followed immediately after prayers by "Parade Ho!", at which the parade comes to attention and "Parade on Caps".

2. From 1993 to 2006, pursuant to Coral Harbour Temporary Memorandum No 20/93 ("the 1993 Memorandum"), members of religious beliefs other than Christianity were given the opportunity to excuse themselves by falling out during the prayers, falling back in immediately thereafter. This was achieved by an announcement "Stand by for [Morning] [Evening] Prayers, those who wish to fall out". On 9 November 2006, this arrangement was revoked by a further Temporary Memorandum No 67/06 ("the 2006 Memorandum"), stating that "Effective immediately, all personnel are to remain present for the conduct of prayers during ceremonial parades and morning/evening colours", that parade commanders and duty officers were to follow the standard "Off caps" routine and that the "fall out" announcement would no longer occur.

3. The present case challenges the constitutionality of the 2006 Memorandum. It is brought by former Petty Officer Gregory Laramore. He enlisted in the Force on 16 August 1982, and he re-engaged formally in it on 28 December 1984, giving a solemn declaration at the latter date that he was "willing to fulfil the engagement made". At those times, Mr Laramore was a Christian. He converted to the Islamic faith in 1993, and, on behalf of others as well as himself, made known at that time that they did not wish to be a part of a religious assembly other than that of their own belief. As a result of this, the 1993 Memorandum was issued and the new procedure introduced, which lasted until the 2006 Memorandum.

4. Some months after the 2006 Memorandum, on 24 April 2007, Mr Laramore requested "to be exempted from all Christian activity in the [Force] and other religion other than Islam as it is known that I am a believer in Islam". On 25 and again 27 April 2007 he left parade during colours ceremonies when prayers were about to take place. He was charged with disobedience, but before the resulting disciplinary proceedings

were concluded, he issued the present claim challenging the constitutionality of the 2006 Memorandum and claiming damages. The defendants (appellants on this appeal) are the Commodore of the Force, the Attorney General and three individuals involved in charging or seeking to discipline Mr Laramore. Their defence is in outline that the 2006 Memorandum did not infringe Mr Laramore's rights and/or was justified to ensure the efficient administration of the Force. On 9th April 2013 Sir Michael Barnett CJ rejected this defence and awarded Mr Laramore $10,000 damages in circumstances where he had been "required to suffer the indignity and costs of disciplinary proceedings for standing up for his constitutional rights". An appeal was on 24 July 2014 dismissed by a majority of the Court of Appeal consisting of Conteh JA with whom John JA agreed, with Allen P dissenting. A further appeal comes as of right before the Board under section 104(1) of the Constitution.

The Constitution

5. The Constitution enacted in 1973 commences with these recitals:

> "WHEREAS Four hundred and 81 years ago the rediscovery of this Family of Islands, Rocks and Cays heralded the rebirth of the New World;
>
> AND WHEREAS the People of this Family of Islands recognise that the preservation of their Freedom will be guaranteed by a national commitment to Self-discipline, Industry, Loyalty, Unity and an abiding respect for Christian values and the Rule of Law;
>
> NOW KNOW YE THEREFORE:
>
> We the Inheritors of and Successors to this Family of Islands, recognising the Supremacy of God and believing in the Fundamental Rights and Freedoms of the Individual, DO HEREBY PROCLAIM IN SOLEMN PRAISE the Establishment of a Free and Democratic Sovereign Nation founded on Spiritual Values and in which no Man, Woman or Child shall ever be Slave or Bondsman to anyone or their Labour exploited or their Lives frustrated by deprivation, AND DO HEREBY PROVIDE by these Articles for the indivisible Unity and Creation under God of the Commonwealth of The Bahamas."

6. The text goes on to provide as follows:

> "CHAPTER III
>
> PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
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> 15. Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.
>
> …..
>
> 22. (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article 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 and

in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Except with his consent (or, if he is a person who has not attained the age of eighteen years, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

(3) No religious body or denomination shall be prevented from or hindered in providing religious instruction for persons of that body or denomination in the course of any education provided by that body or denomination whether or not that body or denomination is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(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 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 Article 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 without the unsolicited interference of members of any other religion,

and 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."

7. While the recitals to the Constitution express a commitment to the supremacy of God and to an abiding respect for Christian values, it is not suggested that this qualifies or limits the freedoms guaranteed by the substantive text of Chapter III of the Constitution, though it could, arguably, have some relevance to an issue of justification (particularly in the context of ceremonial parades, not directly before the Board on this appeal). In Chapter III, it is also common ground that article 15 is, in the present context, introductory. So the constitutional issue before the Board turns on article 22. Two main points arise, whether Mr Laramore was "hindered in the enjoyment of his freedom of conscience" within article 22(1) and, if he was, whether there was any justification for this under, in particular, article 22(5).

Hindrance

8. The appellants accept, as did Allen P in her judgment (para 25), that the Constitution and in particular Chapter III "which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled" is "to be given a generous and purposive approach": *Attorney General of the Gambia v Momodou Jobe* [1984] AC 689, 700. But they submit that the concept of being "hindered", which is used in article 22(1) is carefully delimited.

9. In this connection, the appellants submit that:

i) Article 22 protects freedom of conscience in a manner which is more limited than the protection that such freedom has under article 9 of the European Convention on Human Rights and the Canadian Charter. They submit that Sir Michael Barnett CJ, who cited and relied on Canadian authority in his judgment, fell here into error.

ii) Article 22(1) is directed in its first part to personal inner freedoms and in its second to outward behaviour. There being nothing in the second part that applies to the present situation, there was also nothing in the arrangements for Christian prayers during colours parades to impinge on or affect Mr Laramore's inner views.

iii) Article 22(2), limited to persons "attending any place of education", is a further indication that article 22(1) should not be read as covering the present military context.

iv) Whether Mr Laramore was "hindered in the enjoyment of his freedom of conscience" must in any event be judged objectively.

v) There could only be such hindrance if (a) Mr Laramore's religion forbad him to stay on parade in the manner prescribed by the 2006 Memorandum or, at the least, if the interference with his freedom of conscience was (b) substantial and/or (c) more than "merely indirect, incidental or inconsequential".

vi) Even under article 9 of the European Convention:

> "The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without hardship or inconvenience."

This quotation comes from Lord Bingham of Cornhill's speech in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 23. The appellants submit that this quotation is relevant to Mr Laramore since he enlisted or re-enlisted in the Force in the knowledge of its traditions and colours parades, which existed in the 1980s and were merely restored by the 2006 Memorandum, after the intermission from 1993.

10. Article 9 of the European Convention provides that:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The Canadian Charter of Rights and Freedoms provides:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable

limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ..."

11. As to the appellants' point (i) (para 9 above), article 9 of the European Convention and articles 1 and 2 of the Canadian Charter both contain outright conferrals or guarantees of freedom of conscience and religion, subject to necessary or justifiable limitations. Article 22 of the Bahamian Constitution operates, in contrast, by prohibiting any person being "hindered in the enjoyment of his freedom of conscience". The Board doubts whether this is a difference of substance or likely to have real effect in practice. The conferral or guarantee of freedom of conscience or religion constitutes a promise that such freedom will be protected, and not interfered with by, the state. The language of interference is commonly used when assessing whether article 9 of the Convention is engaged: see eg the citation from Lord Bingham's speech in the *Denbigh High School* case (para 9(vi) above). The promise in article 22 that "no person shall be hindered in the enjoyment of his freedom conscience" can readily be equated with the concept of interference. Such positive duties as the state may have to confer or guarantee freedom of conscience are more visible in article 9 of the Convention and articles 1 and 2 of the Charter, but it seems to the Board likely that similar duties would be held to arise implicitly under article 22 of the Constitution.

12. The suggestion that article 22(1) deals in its first part with inner freedoms and in its second part with outward behaviour (appellants' point (ii)) is in the Board's view a misreading. The first part of article 22(1) defines the protection afforded. It covers both of what the European Court of Justice recently called "the *forum internum*, the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public": Case C-188/15 *Bougnaoui v Micropole SA*, para 30. The second part specifies various aspects of the freedom (of conscience), the enjoyment of which is by virtue of the first part not to be "hindered". By use of the word "includes" it specifies them on a non-exclusive, rather than an exclusive, basis.

13. The submission in appellants' point (iii) is that the provisions of article 22(2) regarding education confirm that article 22(1) does not cover the present military context. The Board does not consider that article 22(2) provides any such indication. Pressed to its logical conclusion, the submission would mean that it would not conflict

with the Constitution to require a person to receive religious instruction or to take part in or attend any religious ceremony or observance (relating to a religion other than his or her own), so long as he or she was not attending a place of education. Article 22(2) cannot be read as defining or limiting the scope of article 22(1) in this way. It would, for example, clearly conflict with article 22(1) to require all medical workers to receive religious instruction or attend church. All that article 22(2) shows is that particular thought was given at the time when the Constitution was being framed to the position in educational establishments. That does not mean that the general provision in article 22(1) would not by itself have been relevant, or that it is not relevant in situations outside those covered by article 22(2) on which attention did not specifically focus in 1972. Further, as at the date of the Constitution (1973), the Force did not even exist. So specific reference to its position could not then have been made.

14. The appellants' point (iv), that whether Mr Laramore was hindered in the enjoyment of his freedom of conscience must be judged objectively, requires further consideration of what the enjoyment of freedom of conscience involves. Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment, but it arises only once the nature of the individual's particular beliefs has been identified. This is not the place to address the relationship between faith and works, still less their relationship to salvation, in religious history or thought. In the United States the First Amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, …") has been seen as involving a dichotomy between two concepts - freedom to believe and freedom to act, it being said that "That the first is absolute, but, in the nature of thing, the second cannot be": *Cantwell v Connecticut* (1940) 310 US 296, 303-30. But beliefs feed into action (or inaction) as Chief Justice Berger noted in *Wisconsin v Yoder* (1972) 406 US 203, 220, where Amish parents had been convicted for their "actions" in refusing to send their children to the public high school. In *Freedom of Religion under the European Convention on Human Rights* (OUP, 2001), 75, Carolyn Evans quotes in this connection a statement by HA Freeman, *A Remonstrance for Conscience* (1958) 106 Pa L Rev 806, 826 that "great religion is not merely a matter of belief; it is a way of life; it is action". She adds (pp 75-76) that: "Forcing a person to act in a way which is against the teachings of his or her religion or belief … is not irrelevant to the core of many people's religion or belief". A requirement to take part in a certain activity may be incompatible with a particular person's conscience, however much his or her internal beliefs are otherwise unaffected and unchallenged.

15. Point (v)(a), that there could only have been a hindrance if Mr Laramore's religion forbad his staying on parade during prayers, is answered by the considerations identified in response to point (iv). What matters is not what the Islamic religion says, if that were examined and found to have a clear rule on the matter. What matters is Mr Laramore's religiously based beliefs and conscience. In any event, the word "forbad"

puts the barrier too high. What is required is "hindrance", which is not the same as prevention: see eg *Olivier v Buttigieg* [1967] AC 115, 135E (cited below).

16. The other two aspects of point (v) are that any hindrance must be (b) substantial and/or (c) more than merely indirect, incidental or inconsequential. These two points were both accepted by Allen P as deriving from *Olivier v Buttigieg*, *Banton v Alcoa Minerals of Jamaica Inc* (1971) 17 WIR 275, 282-283 and *Hope v New Guyana Ltd* (1979) 26 WIR 233, esp 265f-h and 306-312 (although in *Hope*, and the passage quoted in her judgment from *Hope*, the word in fact used is "consequential", rather than "inconsequential"). None of these authorities, however, supports proposition (b). Contrary to Allen P's view, the court in *Banton* did not define "hindrance" as "any collateral action calculated to substantially interfere with the enjoyment of the right so as to significantly reduce its value". Rather, this was counsel's submission to the court, relying "quite resolutely" (as the court put it: p 282I)) on *Olivier v Buttigieg*. The court's response in *Banton* was that it would be necessary to examine *Olivier v Buttigieg* (p 283A) - and, when it came to do so, it "was unable to detect the least relevance of the decision in *Olivier's* case to the issues raised before this court" (p 288C).

17. Far from supporting counsel's submission in *Banton*, *Olivier v Buttigieg* in fact points in an opposite direction - one of caution about suggestions that a hindrance is so minimal as to be irrelevant. The Archbishop of Malta had declared it a mortal sin to print, write, sell, buy, distribute or read a left-wing weekly newspaper, the *Voice of Malta*. The Maltese Medical and Health Department had followed this up by prohibiting all its 2,660 employees from taking the *Voice of Malta* into its hospitals and other buildings. The Maltese Constitution provided that:

> "13. (1) All persons in Malta shall have full liberty of conscience and enjoy the free exercise of their respective modes of religious worship. …
>
> 14. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference …"

The issue was whether the editor of the *Voice of Malta* had been hindered in the enjoyment of his freedom of expression. In holding that he had been, the Board said:

> "Though the [editor] was not prevented from imparting ideas and information the inevitable consequence of what was done was that he was 'hindered' and that there was 'interference' with his freedom." (p 135E)

The Board went on to reject a submission that the measure of any resulting hindrance was slight and could be ignored as de minimis, for two reasons: first, "the hindrance cannot, on the facts of the case, be classed as minimal" (p 135G); and:

> "In the second place, their Lordships consider that where 'fundamental rights and freedoms of the individual' are being considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account." (p 136D)

18. For proposition (c), the appellants rely in particular on statements in *Hope's* case, which observe that an effect may be too indirect, incidental and consequential to constitute a relevant impediment. That can no doubt be so, but the context in which those statements were deployed in *Hope's* case was very remote from and offers in the Board's opinion no assistance to the resolution of the present. Article 12(1) of the Constitution of Guyana contained the same provision as that quoted above from article 14(1) of the Constitution of Malta. For reasons of general governmental policy about which (it was conceded) there was "nothing sinister", restrictions were by law placed on the importation of various items without a licence. These items included newsprint and printing equipment. A newspaper and its editor challenged the restrictions as a violation of article 12(1). In practice, there were bureaucratic delays in the licensing system, but licences were granted in all cases where they were sought, and the newspaper received licences for more newsprint that it needed. In a judgment of great learning by Crane JA (later Chief Justice of Guyana), the court used various tools to explain why there had been no violation, among them the "pith and substance" rule, and whether the effect of the law on freedom of expression was direct or merely "remote or indirect" (a distinction which it itself saw as involving "the realm of metaphysics, and more specifically that of aetiology": p 309a). The court identified *Olivier v Buttigieg* as a case of direct hindrance (which it on any view was). The court's conclusion in *Hope's* case that there had been no violation of article 12(1) is unsurprising. However the difference is conceptualised, *Hope's* case belongs to a different sphere from the present. Here, as in *Olivier v Buttigieg*, the Board is concerned with the immediate interface between a measure and a fundamental right (freedom of conscience) the enjoyment of which is said to be "hindered" by the measure.

19. Point (vi) concerns the significance of the fact that Mr Laramore voluntarily joined and remained in the Force, accepting its rules. It is based on Lord Bingham's statement in his speech in the *Denbigh High School* case that the Strasbourg institutions, had "not been at all ready to find an interference with the right to manifest religious belief" in such contexts. This in turn derived from a careful analysis of Strasbourg caselaw prior to 2006. The cases Lord Bingham cited were cases where there was a real choice made to undertake a particular employment or activity with an accepted practice or discipline, in circumstances where an alternative without such practice or discipline

could have been (or in some case could still be) chosen "without hardship or inconvenience".

20. The nearest in context of the cases cited to the present is *Kalac v Turkey* (Application No 20704/92), where a judge advocate complained that his compulsory retirement from the army institutions amounted to an interference with his freedom of religion. On the facts, it was due to his membership and participation in the activities of a particular movement which was "known to have unlawful fundamentalist tendencies" and membership of which "breached military discipline and infringed the principle of secularism" (paras 8, 25 and 30). That is a context very considerably removed from the present. Mr Laramore was not seeking to do anything contrary to fundamental military discipline or principles (see also the evidential position, as elicited at trial, to which the Board refers below). The Board regards it as more than a little unrealistic to think of Mr Laramore as having a real choice. He converted to the Islamic religion, as he was of course entitled to, in 1993, long after first joining the Force; and the Board also regards it as no light thing to expect a person who has committed himself to a military career to move to civilian life, in the circumstances with which Mr Laramore was confronted in 1993 or 2006. Lord Bingham himself qualified his reference to taking up some alternative occupation with the words "without hardship or inconvenience".

21. Still more importantly, Strasbourg thinking has moved on. In *Eweida v United Kingdom* (Application Nos 48420/10, 59842/10, 51671/10 and 36516/10), para 83, the European Court of Human Rights noted Lord Bingham's statement and the case law supporting it, but went on:

> "However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under article 8; the right to freedom of expression under article 10; or the negative right, not to join a trade union, under article 11 (see, for example, *Smith and Grady v the United Kingdom*, nos 33985/96 and 33986/96, para 71, ECHR 1999‑VI; *Vogt v Germany*, 26 September 1995, para 44, Series A no 323; *Young, James and Webster v the United Kingdom*, 13 August 1981, paras 54-55, Series A no 44)."

Having said this, the Court concluded:

> "Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any

> interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."

In the Board's opinion, that is the appropriate approach to follow under article 22(1) of the Constitution of The Bahamas.

22. The Board has no doubt that Mr Laramore was "hindered in the enjoyment of his freedom of conscience" in the present case. His conscience told him that he should not be taking part in the prayers which were part of regular colours parades. He made this point after he had converted to the Muslim religion in 1993, and he pursued it after the 2006 Memorandum reversed the dispensation introduced in 1993. The effect of the 2006 Memorandum was that he was no longer able to enjoy or give effect to his freedom of conscience by falling out during prayers. Sir Michael Barnett CJ aptly quoted in this connection from the judgment of Dickson J in *The Queen v Big M Drug Mart Ltd* [1985] 1 RCS 295, 336:

> "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."

Big M Drug itself concerned a challenge by company charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act. The freedom affected was that of persons prevented by the Act from working on a Sunday. Even that was held to constitute a relevant restriction by the court. It is not necessary to go so far in the present case, but the first two sentences of the quotation from Dickson J's judgment are in the Board's view in point.

23. Before the courts below, the emphasis was on the order "Parade off Caps" issued immediately before prayers during the regular colours parades; and initially that was also how the appeal to the Board was presented. This was also the basis of decision in the second Canadian case which Sir Michael Barnett CJ located and cited: *Scott v R* [2004] 123 CRR (2d) 371. The case concerned religious prayers during routine parades at a Canadian Forces base, which were like the present preceded by an order to remove headdress. The differences are that the soldier concerned had no religious convictions,

had (after having previously raised with his superior his concerns about being made to participate in a prayer service in which he did not believe) refused to remove his headdress (but had evidently continued to stand on parade) and was being charged simply with that refusal. The court, in holding that the order conflicted with paragraph 2(a) of the Charter, said (para 8) that:

> "8. The order that was given … was to show 'respect' for what was being done and not mere passive toleration. That is to say, it was designed to constrain him to make a public gesture of approval for a religious ceremony in which he did not believe. …
>
> 10. The fact that the practice of pronouncing prayers at parades and requiring some form of public assent thereto has been hallowed by a tradition of many years in the military as well as other circles cannot justify a breach of the appellant's Charter rights. We emphasize that what was required of the appellant was active participation in the religious ceremony with which he disagreed. The question of enforced passive participation by mere presence is an entirely different issue and one that we do not reach today."

24. The Board agrees with the court's decision in *Scott*. It does not accept that the "caps off" order can be understood as a mere gesture of respect towards Christians, for whom it would have a deeper significance. Mr Laramore's position was not analogous to that of a Christian voluntarily entering a mosque or Hindu temple. He was being required to be present and, while present, to make a gesture which would naturally be understood, and was evidently understood by Mr Laramore, as one of respect towards Christianity and the Christian prayers being said. To have actively to participate in this way in a Christian ceremony, in a way to which he in conscience objected, was in the Board's view to hinder Mr Laramore's enjoyment of his freedom which he had generally to live, by his words and conduct, in a way which was compatible with his Muslim conscience.

25. As in *Scott*, so in the present case the actual issue is whether Mr Laramore was hindered in the enjoyment of his freedom of conscience by being required to take part in a prayers ceremony which included a "caps off" order. It is sufficient for the purposes of this appeal that the Board considers that this positive requirement constituted such a hindrance. The evidence was also addressed to this, the actual situation, rather than the situation as it might have been or be, if the order had been simply to stand on parade during the prayers with cap on, as those of Jewish or Sikh faith were allowed to do by the Canadian Forces' dress instruction in *Scott*.

26. That said, the Board will say something further about the situation as it might have been or be, if the Force had required or were to require non-Christians to remain on parade, but to permit them to keep their caps on, during the prayers part of the regular colours parades. As the Board understands it, this would also have met with Mr Laramore's conscientious objection. Being made to stand on parade, even at ease, during the saying of Christian prayers would in these circumstances also appear to the Board as on its face a hindrance to Mr Laramore's freedom of enjoyment of his conscience. Reference was made to *Lautsi v Italy* (Application No 30814/06), where one element in the reasoning was that a crucifix on the wall of each classroom of the school attended by the claimant's 12 to 13 year old sons was no more than "an essentially passive symbol", which could not be "deemed to have an influence on pupils comparable to that of didactic speech or participation in religious ceremonies". Being required to attend classes in a room where there is a religious symbol hanging on the wall is not the same as being required to remain on parade while Christian prayers are being said. In the former case the focus of what is happening is on the teaching, in the latter case it is on the prayers. In the Board's view, even if non-Christians were to be excused from taking their caps off, the latter case could well be seen as involving a form of sufficiently active participation to hinder a person such as Mr Laramore in the enjoyment of his conscientious beliefs, assuming that these were as the Board understands.

27. In considering whether there was a relevant hindrance, for the purposes of article 22(1), the Board has focused exclusively on the regular colours parades during which prayers are said. This appeal does not concern, and the Board is not deciding any issue regarding, the public ceremonial occasions on which the Force is expected to attend, where a religious element can also be present. For example, the Board understands that it is the practice for there to be a state funeral for certain ministers or officials, with a religious element. There was some, perhaps not entirely consistent, evidence about the extent to which the Force was expected to be present throughout such ceremonies. But Senior Lieutenant Fergusson in a witness statement dated 7 June 2012 indicated that Force personnel are used for ceremonial duties at the organizational, national and regional level in a large majority of which ceremonial events prayers are a component. The 1993 and 2006 Memoranda were expressed to apply to both ceremonial and colours parades. Assuming that, during some ceremonial parades, attendance during religious prayers is required, the Board considers that presence as part of the nation's Forces during an official funeral and ceremony presents different considerations to any which have to be determined on this appeal. In so far as the decisions of the courts below struck down the 2006 Memorandum as regards both ceremonial and colours parades, the Board considers that they went too far. The position regarding ceremonial parades is a separate issue, which would, if it became necessary, have to be considered on its own and on the basis of its own evidence.

28. For the reasons given, the Board considers that Mr Laramore was hindered by the 2006 Memorandum in the enjoyment of his freedom of conscience during the

regular colours parades during which prayers were said. That leaves for consideration the issue of justification.

Justification

29. The issue of justification can be taken quite shortly. The appellants' case was preceded by strong assertions about the importance of uniformity of behaviour, the resulting importance for good order and discipline of the tradition reinstated by the 2006 Memorandum, and the serious consequences that would ensue if Forces personnel were allowed to be exempted from prayers during colours. This case faced in each respect the real problem that the dispensation introduced by the 1993 Memorandum had operated for some 13 years, without there being any evidence that it had affected the Force's discipline or efficiency. There were also some telling answers about the apparent insignificance from any military viewpoint of the prayers during colours parades. Mr Clifford Scavella, who was responsible for initiating the change brought about by the 2006 Memorandum and was or shortly afterwards became Commodore of the Force, gave evidence. Asked whether the prayers served any particular purpose at all, he answered "I suppose it serves a purpose to some". Asked whether, if the prayers were removed, the force could be just as disciplined as it was with it in, his reply was "I suppose so". Asked why the "caps off" order was given, he accepted that "From a military point of view it has no bearing" and that it was "simply reverence".

30. Not surprisingly in the light of the above, there are concurrent findings in the courts below that there was no justification for the hindrance of Mr Laramore's freedom. Sir Michael Barnett CJ said: "As [Mr Scavella] conceded there was no clear military purpose for the prayer, which was only conducted during the colours ceremony three days a week". Conteh JA pointed to the uncontradicted evidence that prayers were not especially necessary for military discipline or prowess and the absence of any evidence that there had been a decline in discipline on parade in the years 1993-2006. He also noted an oddity about Mr Scavella's evidence: "Mr Scavella in his witness statement … said that he did not favour [the 1993] Memorandum, and would always excuse himself from the parade formation when the order was called out for those who were of religious beliefs other than Christianity, if they wished, to fall out, to do so. There was no evidence of Mr Scavella's own faith, but it is clear that he dismissed himself from the parades for reasons other than religious". Mr Scavella's witness statement in fact said that he dismissed himself "in order to demonstrate the profound effect such a policy could have on a disciplined organisation", but, in the absence of any evidence that discipline or organisation were affected, he appears to have assisted to demonstrate the opposite.

31. The present position has in this respect also some similarities with that in *Scott*. The court there noted that paragraph 1 of the Charter recognises the possibility of

"reasonable limits prescribed by law and demonstrably justified in a free and democratic society". But it went on to say (para 9) that on the facts:

> "such a plea would almost certainly founder on the proportionality test, the military having already demonstrated the ease with which it can accommodate those whose religious scruples forbit them from removing their headdress."

That was said, because the Canadian Forces dress instructions provided "specific exemptions for persons whose religious beliefs require that their heads remain covered, notably adherents of the Jewish and Sikh religions" (para 6).

32. Any suggestion of justification under section 22(5) of the Constitution or on any other basis therefore fails in this case.

Conclusion

33. The result is that the Board will humbly advise Her Majesty that the appeal should be dismissed, with the qualification that the declaration made by Sir Michael Barnett CJ and upheld by the Court of Appeal to the effect that the 2006 Memorandum "is unconstitutional and is therefore null and void and of no effect" should be limited so as to refer only to "the conduct of prayers during morning/evening colours", leaving the position regarding ceremonial prayers open for further determination, should the Force wish to seek to uphold, or reinstate the practice contained in, the 2006 Memorandum to that extent.