Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

11 APRIL 2025

**MEDIA RELEASE**

CHIEF OF DEFENCE FORCE AND OTHERS v FOUR MEMBERS OF THE ARMED FORCES

(SC 20/2024) [2025] NZSC 34

**PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

**Suppression**

Publication of the names or identifying particulars of the respondents is prohibited.

**What this judgment is about**

This appeal concerns the COVID-19 vaccination mandate that the Chief of Defence Force (CDF) first imposed on all members of the Armed Forces of New Zealand on 3 March 2021 as part of their individual readiness requirements for deployment in New Zealand or overseas. A particular focus of this appeal is to what extent the courts should afford a "margin of appreciation" to the CDF's determination of what was needed to meet key objectives of the Armed Forces, including readiness and discipline, when assessing that determination against the New Zealand Bill of Rights Act 1990 (NZBORA).

**Background**

The direction to receive COVID-19 vaccinations was given initially under Defence Force Order (DFO) 3. Under DFO 3 a member of the Armed Forces who is considered inefficient or ineffectual in the performance of their duties is liable to be discharged on performance grounds. DFO 4 then sets out the processes under which a member of the Armed Forces may be discharged or released.

The DFO 3 mandate later overlapped in part with two ministerial orders. The first applied to NZDF members when deployed at Managed Isolation and Quarantine (MIQ) facilities.

The second would have required from 1 March 2022 that all NZDF work be done only by fully vaccinated personnel, but it was set aside by the High Court on 25 February 2022 in *Yardley v Minister for Workplace Relations and Safety*.[1]

In response, the CDF issued a Temporary Defence Force Order (TDFO) on 25 May 2022. It specified that members of the Armed Forces who were not fully vaccinated for COVID-19 were ineffectual and were to have their continued service reviewed. The formal warning process was either dispensed with or heavily truncated, and the relevant Service Chief was to make the final decision, rather than the Service Chief or their delegate. The TDFO also prevented unvaccinated members from certain deployments and generally prevented members who had not received primary COVID-19 vaccinations from accessing NZDF camps, bases and facilities.[2]

**Procedural history**

The four respondents are or were members of the Regular Forces, which comprise full-time personnel. All four are not fully vaccinated against COVID-19. They applied to the High Court for judicial review of the TDFO and an associated Administrative Instruction, and relevant parts of DFO 3 and DFO 4. They claimed, among other causes of action, that the TDFO and its related instruments were unlawful because they imposed an unjustified limit on the right to refuse to undergo any medical treatment and the right to manifest religion and belief. This media release refers to these rights as "the protected rights".

The High Court dismissed the applications for judicial review. The Court of Appeal unanimously allowed the members' appeal. The Supreme Court granted the CDF leave to appeal the decision of the Court of Appeal.[3] The approved question was whether the Court of Appeal was correct to allow the appeal. The Supreme Court also granted Te Kāhui Tika Tangata | the Human Rights Commission permission to provide submissions to the Court.

**Submissions**

Central to this appeal is whether the TDFO and related instruments imposed additional restrictions on the protected rights that were not demonstrably justified in a free and democratic society under section 5 of NZBORA.

The CDF submitted that the Court of Appeal erred by not affording sufficient margin of appreciation to his expert determination of what was needed to meet the objectives of Armed Forces readiness and discipline.[4]

The respondents (as they are now in this appeal) submitted that the CDF lost in the Court of Appeal not because the Court failed to defer but because the CDF fell well short of providing evidence to justify the TDFO's restrictions, which were significant additions to those imposed under DFO 3 and DFO 4.

The Human Rights Commission invited the Court to approach the appeal principally as a search for error on the facts rather than a question of principle about deference. The Court

[1] *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 19 NZELR 125.
[2] For a precise summary of the TDFO's changes to DFO 3 and DFO 4 processes, see at [56] of the judgment.
[3] It is not necessary to distinguish among the three appellants (the CDF, Chief People Officer and Attorney-General) so this media release refers throughout to the CDF.
[4] In the interests of brevity, this media release does not refer to two further errors contended by the CDF.

should inquire whether there is any less rights-intrusive alternative that would be as effective in securing the measure's objective.

**Supreme Court decision**

The Supreme Court has unanimously allowed the appeal. The Court of Appeal's order that the TDFO be reconsidered is set aside, as is the Court of Appeal's interim order that no action may be taken by the CDF pursuant to the TDFO and related instruments pending the reconsideration of the TDFO.

*Proportionality review*

When reviewing a decision made by a public actor against NZBORA, a court may accept that decision so long as the decision-maker has satisfied the court that the decision lies within a range of reasonable alternatives. The court may afford the decision-maker a margin of appreciation where it recognises limits on its own institutional capabilities, relative to those of other institutions (see at [96]–[105]).

In this case, the CDF is the decision-maker appointed by Parliament and the CDF is likely to be in a much better position than the court to evaluate the relevant considerations with respect to operational effectiveness and military discipline. But, because the protected rights are core human rights, the COVID-19 vaccination was associated with a high degree of compulsion and judicial review may be unvaccinated members' only recourse, the court must be prepared to scrutinise carefully the justification offered by the CDF (see at [106]–[109]).

*Did the TDFO and Administrative Instruction further restrict the protected rights?*

The Supreme Court concluded that the TDFO and Administrative Instruction did not materially add to the existing substantive restrictions on the protected rights. DFO 3 already required retention reviews for unvaccinated personnel who were, or were likely to be, not deployable for more than six months. They were generally excluded from deployments in the meantime. The evidence, such as it was, tended to indicate that unvaccinated personnel were also already required to isolate off base. Members also already knew of the mandate, its rationale, and the potential consequences of refusing vaccination (see at [112]–[118]).

While the elevation from commanding officers to Service Chiefs was a material adjustment in process that might result in Service-wide operational effectiveness and discipline assuming greater importance in any given discharge/retention decision, a member's personal circumstances remained relevant to that decision and the commanding officer's close and formal involvement in the process ensured they would not be overlooked. The TDFO and Administrative Instruction also did not signal that discharge was likely; the evidence was that Service Chiefs retained almost half of those whose service was reviewed (see at [115]).

*Did the Court of Appeal allow the CDF a sufficient margin of appreciation?*

The Supreme Court found that the Court of Appeal afforded the CDF an insufficient margin of appreciation. The Court of Appeal's close comparison of TDFO/Administrative Instruction processes against DFO 3/DFO 4 processes risked finding the former unlawful because the latter was a little less restrictive. The Court also appeared to have discounted the significance of vaccine refusal for operational effectiveness and the maintenance of military discipline.

An allowance should have been made for the CDF's status, as the decision-maker designated by Parliament, and his expertise, relative to that of the courts, when deciding whether the TDFO and Administrative Instruction were within the range of reasonable alternatives (see at [129]–[145]).

For instance, the permanent non-deployability of some members might mean it is all the more important that those who can meet individual readiness requirements should do so, so that the NZDF can deploy an appropriate force immediately and rotate members as needed (see at [136]–[139]).

The Supreme Court concluded the Court of Appeal was wrong to find the CDF's justifications for the TDFO and Administrative Instruction inadequate. In reaching this conclusion, the Supreme Court recorded some reservations about the High Court's decision in *Yardley* as it affected the Armed Forces (see at [123]–[128] and [145]).

*Were the TDFO and related instruments demonstrably justified?*

The Court concluded the TDFO and related instruments were demonstrably justified. To the extent the elevation of discharge/retention decisions to Service Chiefs further restricted the protected rights, it was within the range of reasonably available responses to the CDF's concerns about operational effectiveness and discipline. In particular, some members resisted the vaccine because they disagreed it was safe and beneficial to members' health and that it was necessary for operational effectiveness. A Service-wide approach could be justified for reasons of consistency, and hence fairness (see at [121] and [146]).

The decision to bar members from bases and facilities may have been an additional restriction on protected rights, but if so, it was justified. Isolation requirements for infected persons and their household contacts, which included those sharing barracks, meant that a single case could have a significant effect on operational effectiveness. The measure was necessary to maintain forces that were deployable at short notice (see at [119]–[120] and [146]).

**Result**

A The appeal is allowed.

B The Court of Appeal's order that the Temporary Defence Force Order 06/2022 (TDFO) be reconsidered is set aside, as is the Court of Appeal's interim order that no action may be taken by the Chief of Defence Force pursuant to the TDFO and related instruments pending the reconsideration of the TDFO.

C The respondents must pay the appellants one set of costs of $30,000 plus usual disbursements. We allow for second counsel.

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