



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

26 SEPTEMBER 2024

## **MEDIA RELEASE**

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

(SC 20/2024)

**Hearing in the Supreme Court Tuesday 8 October – Wednesday 9 October 2024**

## **CASE HISTORY SYNOPSIS**

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. The synopsis does not comprise part of the reasons for the judgments of the High Court or Court of Appeal, which are linked at the end of this synopsis.

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

## **Background**

Members of the New Zealand Armed Forces are required to meet “individual readiness requirements” to ensure that they are fit and healthy to enter and remain in service, and to carry out the full range of functions that the Armed Forces perform in New Zealand and overseas. Those individual readiness requirements include maintaining certain vaccinations that are specified in the New Zealand Defence Force Vaccination Schedule, which was amended in March 2021 to include vaccination against COVID-19.

In May 2022, the Chief of Defence Force issued a Temporary Defence Force Order (TDFO) under s 27(1) of the Defence Act 1990. The TDFO changed two aspects of the process for deciding whether to retain or discharge members of the Armed Forces who refused to get vaccinated against COVID-19:

- (a) The TDFO truncated the formal warning period for unvaccinated members. This was said to be because retention reviews should already have been raised as COVID-19 vaccination had been part of the readiness requirements for a year.
- (b) Service Chiefs were unable to delegate the review decision to junior personnel. This was said to ensure consistency of decision-making by Service Chiefs, who could best consider the effect of a member’s inability to be deployed on the service as a whole.

The TDFO also prevented certain deployments of unvaccinated members and initially prevented members who had not received the primary COVID-19 vaccinations from going onto any Defence Force camp, base or facility, except in limited circumstances.

## **Procedural history**

Four members of the Armed Forces (the Members), all of whom are not fully vaccinated against COVID-19, applied to the High Court for judicial review of the TDFO and related instruments. The Members claimed, among other causes of action, that the TDFO was unlawful because it was an unjustified limit of the rights affirmed in sections 11 and 15 of the New Zealand Bill of Rights Act 1990. Section 11 provides that everyone has the right to refuse to undergo any medical treatment, while section 15 provides that every person has the right to manifest their religion or beliefs. Before the High Court hearing, the Members also filed written submissions that included alternative ways to achieve the purposes of the TDFO, including the approach taken in the United Kingdom. The Members said these alternatives would have been less rights-infringing for those affected.

On 29 September 2022, the High Court dismissed the Members' applications for judicial review. It determined that while the TDFO limited both rights, the Defence Force had provided sufficient evidence to prove those limits were demonstrably justified in a free and democratic society (according to section 5 of the Bill of Rights Act). In doing so, the High Court allowed the Defence Force some latitude to determine what was required for a member of the Armed Forces to be ready for service.

On 16 February 2024, the Court of Appeal unanimously allowed the Members' appeal. It considered that the limits on the Members' rights were not demonstrably justified because the Defence Force had not established that the TDFO limited the Members' rights in the minimum way possible. The Defence Force failed to meet its burden under section 5 of the Bill of Rights Act by not providing data-based analysis or comparative analysis with measures taken by other military forces to show why COVID-19 vaccination needed to be treated differently to other vaccinations required by the Vaccination Schedule.

## **This appeal**

On 8 July 2024, the Supreme Court granted the Chief of Defence Force, Chief People Officer and Attorney-General leave to appeal the decision of the Court of Appeal. The approved question is whether the Court of Appeal was correct to allow the appeal.

The Supreme Court has directed counsel to focus on whether, to use the appellants' terminology, the Court of Appeal failed to allow a sufficient margin of appreciation when assessing the individual readiness requirements against s 5 of the Bill of Rights Act. Counsel will also argue the nature and extent of justification evidence required and the specificity required of pleadings against state actors.

Because of the issues raised in this appeal, Te Kāhui Tika Tangata | the Human Rights Commission has been granted the right to provide submissions to the Court. The Court is yet to determine whether it will hear from the Commission orally. The Court has reserved a half day hearing on 9 October 2024 for this purpose.

## **Viewing of hearing**

The courtroom is open to the public.

This hearing of the appeal will be live-streamed. Details about access to the live-stream and the conditions of access will be posted on the [Courts of New Zealand website](#) shortly before the hearing. No recording is permitted.

## The panel

The Hon Justice Kós	The Hon Justice Ellen France	The Hon Justice Glazebrook	The Hon Justice Williams	The Hon Justice Miller
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Judges as seen from the public gallery

## Counsel

- Chief of Defence Force, Chief People Officer and Attorney-General (Appellants): *U R Jagose KC, D P Neild and S R Hiha*
- Four Members of the Armed Forces (Respondents): *M I Hague*
- Te Kāhui Tika Tangata | Human Rights Commission (Intervener): *A S Butler KC, R A Kirkness and W H Ranaweera*

## Sitting hours

Court will begin at 10:00 am and conclude at 4:00 pm with adjournments taken from 11:30 am to 11:45 am and from 1:00 pm to 2:15 pm. There is no afternoon adjournment.

## Enquiries

Any enquiries about the hearing should be directed via email to [supremecourt@justice.govt.nz](mailto:supremecourt@justice.govt.nz). While attending the hearing, enquiries can also be directed to the Court Registry, which is located outside the main courtroom in the Supreme Court foyer.

Contact person:

Sue Leaupepe, Supreme Court Registrar (04) 914 3613

Court of Appeal decision: [\[2024\] NZCA 17](#) (16 February 2024)

Supreme Court leave decision: [\[2024\] NZSC 75](#) (8 July 2024)