IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 20/2024**

BETWEEN	**CHIEF OF DEFENCE FORCE**
	First Appellant
	CHIEF PEOPLE OFFICER
	Second Appellant
	ATTORNEY-GENERAL
	Third Appellant
AND	**FOUR MEMBERS OF THE ARMED FORCES**
	Respondents

APPELLANTS' SUBMISSIONS ON APPEAL

12 September 2024

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
David Neild
David.Neild@crownlaw.govt.nz

COUNSEL FOR THE APPELLANTS CERTIFIES TO THE BEST OF THEIR KNOWLEDGE THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

CONTENTS

INTRODUCTION

1. It is accepted here that the challenged decision – a Temporary Defence Force Order (**TDFO**) – imposed a limit on protected rights by creating a process to respond to a member of the Defence Force refusing vaccination against COVID-19. At issue is whether that limit is justified. Justification is a legal question, and it is for the Court to determine. But justification will often involve both law and fact and is sensitive to context.[1] The nature of the decision and decision-maker will be relevant— and the "extent of any leeway accorded to their expertise" will vary.[2]

2. The coherence of the developing law of NZBORA justification is enhanced when courts first conduct a transparent analysis in which they expressly address whether the context requires any latitude to be given to the decision-maker and then show how the court calibrates any latitude with its constitutional role of independent determination of lawfulness. Whether the facts call for a structured approach, or something less, it should be evident from the judgment whether, when and how the court has considered or accommodated the context and decision-maker's expertise.

3. Where the Court of Appeal went wrong was in not giving leeway to the Chief of Defence Force's (**CDF**) expert determination of what approach best met the objectives of Armed Forces readiness and service discipline in the early COVID-19 years. While the Court returned the decision to the CDF to make again, its substantive analysis and determination that the CDF did not justify the rights-limiting TDFO was wrong. It was wrong because the Court failed to recognise the distinctive roles and institutional expertise of the courts and the CDF; it failed to show restraint and respect for the latter's responsibility for armed forces readiness. How to thread the needle between maintaining the distinctive role of an accountable decision-maker

---

1 Forsyth and Ghosh *Wade & Forsyth's Administrative Law* (12th ed) at 317.

2 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [85].

and upholding the important role of an independent court is the issue that arises in this proceeding.[3]

4. The challenge brought is not to the addition of a COVID-19 vaccination to the military's schedule of required vaccinations. The respondents accept that decision was lawful.[4] The narrow challenge here is to the TDFO, which directs how retention reviews should proceed for those members who refused to meet the Armed Force's individual readiness requirements and be vaccinated for COVID-19. They were therefore not deployable.

5. In the High Court, Churchman J expressly accorded the CDF's judgement about military necessity a "level of latitude" as part of the proportionality test.[5] In contrast, the Court of Appeal did not demonstrably give any weight to the CDF's judgement in considering whether the measure was justified. That failure is an error of law.

6. The error led to the Court determining a military matter based on its own assessment of whether the review of the members' retention was necessary to meet the CDF's legitimate objective of maintaining disciplined Armed Forces at a state of readiness for deployment.[6] This is quintessentially a matter on which the Court should show some restraint and respect, or leeway.[7] The Defence Force is an organisation of State, with a unique ethic of service and discipline.[8] It is the only agency of State that "maintains disciplined forces available at short notice", ready to conduct military operations as and when directed by the Government.[9] Those

---

3 See Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZLR 377 at 408.

4 See the Court of Appeal decision at [9] [05.0008] and the Four Members memorandum filed after the Court of Appeal hearing at [13] [102.0469].

5 High Court decision at [125]. [125] [102.0324].

6 Affidavit of Air Marshal Short, 29 June 2022, at [5], [10]-[14], [19]-[21], [25], [34] [201.0161]; Second affidavit of Brigadier Weston, 2 September 2022, at [5]-[6] [201.0213].

7 See *R v Jack* [1999] 3 NZLR 331 at 339; *McCartin v R* [2016] NZHC 1807 at [24]; *New Zealand Defence Force v District Court of New Zealand* [2022] NZHC 3559, [2023] 2 NZLR 512 at [20]; *Council of Civil Service Unions v Minister for the Civil Service* [1985]1 AC 374, at 420D.

8 NZ Defence Doctrine Publication DDP1.1 Force Generation at [1.03] [303.0673].

9 Affidavit of Air Marshal Short at [11] [201.0163].

operations may be in civil emergencies or military crises.[10] The Defence Force must be ready for dynamic and evolving situations.[11]

7. The court's constitutional role in determining the lawfulness of Defence Force decisions is enhanced by according appropriate weight to the considered judgement of the CDF. But in finding that the CDF didn't prove to the Court's satisfaction that the TDFO was the least rights-infringing measure possible, the Court erred by effectively stepping into the shoes of the expert CDF, leaving him with no discretion to choose between a range of reasonable measures to achieve what the courts below accepted was an important objective.

8. The error is obvious when one compares the evidence filed for the CDF outlining the reasons for the TDFO with the remarkably scant evidence said to represent the United Kingdom Defence Force approach (filed by the applicants in the High Court very late) on which the Court of Appeal concluded that there might be a less intrusive measure available.

9. The Court of Appeal made two further errors of law.

10. The Court held that the TDFO was a further incremental limit on the right to refuse medical treatment which must itself be justified. But the TDFO amended an existing process by which the consequences on a member of the forces who refuses to meet readiness requirements are worked through by the Heads of Service. Discharge from service might result but was not inevitable, as the Defence Force evidence shows. The right to refuse medical treatment is binary. A person whose right to refuse medical treatment has been limited cannot be rendered more unable to refuse. A new concept of an incremental limit is not required to be added to the existing law of justification of limits on rights.

11. The Court of Appeal erred by placing significant weight on evidence the respondents had filed, very late in the proceeding: a two-page generic

---

10 See DFO 18 Defence Health [301.0149].

11 Affidavit of Air Marshal Short at [14] [201.0165].

letter that purported to show an alternative approach taken by the United Kingdom Armed Forces.[12] The Court found that approach was less intrusive than the TDFO and that the failure to justify why it hadn't been followed was the CDF's error. This alternative approach was not pleaded.

THE FACTUAL BACKGROUND

12. The challenged TDFO sets out how retention reviews of members of the Armed Forces who decline to receive vaccinations against COVID-19 should proceed. Through the TDFO, the CDF varied the normal retention review process (in Defence Force Order 3 (**DFO 3**) and Defence Force Order 4 (**DFO 4**)) for those members who were not deployable because they had not received COVID-19 vaccinations.

13. The challenge is narrow, as the respondents concede that the decision to make COVID-19 vaccines part of the Armed Forces individual readiness requirements was lawful.[13] Nor are the processes in DFO 3 and DFO 4 challenged (except as they are amended by the TDFO).[14] The challenge is therefore narrow as the TDFO makes minor procedural changes to the normal retention review processes.

14. The members were not peremptorily discharged, they were not subjected to disciplinary procedure as they would have been had the CDF taken the approach advanced in the applicants' alternative cause of action (use of s 72 Armed Forces Discipline Act 1971[15]). The Administrative Instruction gave guidance including reasons why the member might be retained despite their refusal to meet readiness requirements. Indeed 17 of 39 who had their service reviewed because of their refusal were retained, including one of the respondents.[16]

---

12 [301.0142].

13 See the Court of Appeal decision at [9].

14 See the memorandum filed by the Four Members after the Court of Appeal hearing, dated 26 April 2023, at [13] [102.0469].

15 See the Amended Statement of Claim at [76]ff [101.0042].

16 See the memorandum dated 13 October 2022 filed by counsel for the Chief of Defence Force [102.0353], confirming that [redacted] was retained and [redacted] was discharged. The other respondents did not have their retention reviewed: see the affidavit of Jacinda Funnell at [10]

15. Against this narrow challenge is the unique military context into which the Court is asked to intervene. The CDF was confronted by a very small number of service personnel who were outright refusing to meet one of the readiness requirements for deployment. In the Armed Forces, this is significant, as the evidence establishes.[17] These are members of the Armed Forces who serve at His Majesty's pleasure, in accordance with Part 4 of the Defence Act 1990. The prerogative to undertake the defence of the realm is vested in the Governor-General as Commander-in-Chief and is given statutory endorsement by s 5 of the Defence Act 1990. As well as the defence of the realm, the purpose of the Armed Forces is extended by ss 5 and 9 of the Defence Act 1990 to diverse purposes including contributing forces for the purposes of the United Nations; contributing forces under security treaties, agreements or arrangements; and, where requested, assisting the civil power in New Zealand. Discipline – morale and the command structure – are uniquely important to the effective functioning of a military force.[18]

The Defence Force Vaccination Schedule

16. On 3 March 2021 the Director Defence Health added the primary course of the COVID-19 vaccinations to the baseline programme of the Defence Force's vaccination schedule.[19] The booster shots were added on 11 February 2022,[20] although they were later removed in March 2023,[21] and those members who had the primary COVID-19 vaccination but not the booster did not have their retention reviewed (including two of the respondents).[22]

17. Compliance with the vaccination schedule is part of the Armed Service's Fitness Standards, one of 19 criteria against which individual readiness is

---

[401.0009].

17 See the affidavit of Air Marshal Short at [5] [201.0161]; the First affidavit of Brigadier Weston, 29 June 2022, at [34] [201.0187]; NZ Defence Doctrine Publication DDP1.1 Force Generation at [1.01] [303.0673].

18 Affidavit of Air Marshall Short at [34] [201.0169]; First affidavit of Brigadier Weston at [88] [201.0204].

19 First affidavit of Brigadier Weston at [40] [201.0192].

20 First affidavit of Colonel Tate, 29 June 2022, at [91] [201.0154].

21 Third affidavit of Colonel Tate, 17 March 2023, at [12]–[13] [401.0006].

22 Affidavit of Jacinda Funnell, 17 March 2023, at [10] [401.0009].

assessed in Chapter 6 of DFO 3.[23] The objective of the individual readiness requirements is set out at the start of Chapter 6 and is expressly linked to the ability to deploy as a fundamental component of military service.[24]

18. The Defence Force requires recruits to comply with the vaccination schedule prior to enlisting or entry.[25]

The consequences of failing to meet individual readiness requirements

19. DFO 3 sets out three readiness levels, plus a fourth – "not deployable". In most cases, if members refuse to meet the vaccination requires, then they are considered not deployable.[26]

20. Where a member has been or is likely to be not deployable in excess of six months, they are assessed as "being unable to maintain individual readiness" and "their continued service is to be reviewed".[27]

21. The review of the member's retention was therefore already a consequence of the existing DFO 3, which dates from 23 November 2009, together with the changes to the vaccination schedule. As noted, there is no challenge to the lawfulness of the addition of the COVID-19 vaccinations to the schedule.

The Temporary Defence Force Order

22. On 25 May 2022, the CDF issued the TDFO. Its purpose was to truncate the retention review process for those members who did not meet the individual readiness requirement because they failed to comply with the vaccination schedule. Although that process is described in the TDFO and DFO 3 as a "performance discharge", that is a reference to the procedure to be followed in DFO 4, and discharge is not inevitable; as noted 17 of the 39 members whose retention was reviewed were retained.

---

23 DFO 3 at [9.6.17] and [9.6.36] [303.0443] and [303.0448]; First affidavit of Brigadier Weston at [15] [201.0183].

24 DFO 3 at [9.6.1] [303.0436].

25 First affidavit of Brigadier Weston at [23] [201.0185].

26 First affidavit of Brigadier Weston at [22] [201.0185].

27 DFO 3 at [9.6.50] [303.0452].

23. The TDFO amended the retention review process as follows:

23.1 The timeframes for the formal warning periods in DFO 4 were amended "as retention reviews should already have been raised".[28]

23.2 The ability of the Service Chiefs to delegate the review decision was removed, which ensured consistency of decision-making by the Service Chiefs, who were best placed to take into account the effect of the member's inability to be deployed on the service as a whole.

23.3 The usual process in DFO 4 is that the member's Commanding Officer is able to direct that no further action is taken if they are satisfied that the member should not be discharged.[29] Because the decision was elevated to the Service Chief, the ability of the Commanding Officer to bring the retention review to an end at an earlier stage was necessarily removed.

24. The TDFO also prevented members who had not received their primary COVID-19 vaccinations from accessing any Defence Force camp, base or facilities.[30] The TDFO was later amended so that members who were retained after a retention review were permitted to re-enter defence areas under local force health protection measures and with an individual risk assessment as needed.[31]

The Administrative Instruction

25. On 31 May 2022 the Chief People Officer Brigadier Weston issued Administrative Instruction 01/2022, which provided guidance to the Service Chiefs "in deciding to retain members who fail to meet the Individual Readiness Requirement (IRR) for the COVID-19 vaccination".[32]

---

28 TDFO 06/2022, annexure A at [7] [303.0415].

29 DFO 4 at [16.119] [303.0520].

30 TDFO at [17]–[19] [303.0411].

31 Second affidavit of Brigadier Weston at [8.1.2] [201.0215]. See TDFO 13/2022 [304.0741].

32 CPO Administrative Instruction 01/2022 at [3] [303.0664]

The Administrative Instruction required the Service Chiefs to take into account eleven "minimum criteria".

26. The criteria included whether the member had critical skills needed by the service, whether the member had received the primary COVID-19 vaccination, whether the member was able to be employed in a role that is not required to meet Output 4 or 5 and whether there were "exceptional welfare reasons that support retention".[33]

SUBMISSIONS

THE FIRST ERROR OF LAW – MARGIN OF APPRECIATION

27. The first ground of appeal is that the Court of Appeal erred in law by failing to ask itself whether there was any reason for deferring to or placing weight on the administrative decision-maker's judgement, as part of the proportionality test.

The proportionality test

28. The parties to the proceeding accepted that the court should follow the four stage *Oakes* test in assessing proportionality,[34] as set out in *Hansen*.[35] Although the Supreme Court in *Moncrief-Spittle* endorsed a "less structured approach" in the circumstances of that case, the *Oakes* test remains good law (the Supreme Court observed there is "no immutable rule").[36]

29. The proportionality test was set out by Churchman J as follows:[37]

    (a) Is the purpose of the proposed restrictions sufficiently important?

    (b) Is there a rational connection between the limit and the purpose?

---

33 CPO Administrative Instruction 01/2022 at [7.k] [303.0665].

34 *R v Oakes* [1986] 1 SCR 103.

35 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

36 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [91].

37 High Court decision at [38] [102.0305].

(c) Does the limit restrict a right no more than reasonably necessary?

(d) Is the limit proportionate to the objective?

30. In applying the *Oakes* test to an executive decision, the court should ask itself what weight it should apply to the decision-maker's judgement, and how that influences each of the four limbs of the *Oakes* test. In *Moncrief-Spittle* this Court made clear that the extent of any leeway given to a decision-maker's expertise would vary according to the circumstances. While the Court must be satisfied of the reasonableness of the limit, that conclusion may require restraint through respect for the decision-maker's expert judgement or by giving latitude to their assessment of where the balance lay. [38]

31. In the High Court weight was given to the CDF's judgement when assessing the third limb of the proportionality analysis. The Court recognised the limit of its institutional competence to determine matters of military necessity and also that reasonableness may differ as between military and civilian contexts.[39]

32. Despite the clarity in the High Court that an issue of institutional competence and deference to an expert decision maker was at issue, and contrary to the approach in *Moncrief-Spittle*, the Court of Appeal did not consider the expertise of the CDF at all as part of the proportionality test. No leeway was given. It was only at the relief stage that the Court, obliquely, addressed the relative competence of the Court and the CDF in the matter.[40]

33. The nature of the decision and the decision-maker – and the highly unique context - should all have been addressed as part of the proportionality test. If they had been, the Court may not have erred as it did.

---

38 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [85]. See also *Mangawhai Ratepayers and Residents Association v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [68] per Miller J.

39 High Court decision at [125] [102.0324].

40 Court of Appeal decision at [167] [05.0056].

Deference - part of the proportionality analysis

34. Explicitly considering what weight should be given to the decision-maker's judgement – as this Court has made plain in *Moncrief-Spittle*, *New Health*, and *Hansen* - gives transparency to the courts' decision-making. It also allows the Court to calibrate the proportionality test to the specific reason for which deference is given (for example, institutional expertise might be more relevant to the third limb, minimal impairment).

35. Doing so ensures the Court remains within its constitutional role - independent determination of, as a matter of law, whether a limit is justified (a mixed question of fact and law) - without overstepping the constitutional boundary.

36. Unlike administrative law outside the human rights context, where comity between the courts and the executive is maintained through a focus on process and the unreasonableness standard of review, the developing s 5 NZBORA proportionality test lacks a mechanism through which these issues can be accommodated if they are not expressly addressed by the Court.

37. Before applying these principles, the language in this area of law is addressed.

Deference – the language barrier

38. Deference is one of several terms that have been used to describe the process by which courts identify the appropriate weight to give to administrative decision-makers. Other terms sometimes used include margin of appreciation, margin of judgment, and respect.[41] Taggart preferred "due deference".[42] Churchman J in the High Court used "level of latitude";[43] and this Court used "the extent of any *leeway* accorded".[44]

---

41 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [64]; *Begum v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765 at [70]; *Bank Mellat v Her Majesty's Treasur (No 2)* [2013] UKSC 39, [2014] AC 700 at [165].

42 "Proportionality, Deference, Wednesbury" [2008] NZLR 423 at 454.

43 High Court decision at [125] [102.0324].

44 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [85] (emphasis added).

39. Because of potential overtones of "servility" the use of "deference" can be problematic,[45] but the term is difficult to avoid: it features in much of the case law (especially in Canada) and the relevant commentary. Lord Cooke used it in *Daly*: "[t]he depth of judicial review and the deference due to administrative discretion vary with the subject matter".[46]

40. The appellants are not submitting that deference in a s 5 NZBORA determination means the Court is limited to process and reasonableness or that it should defer to anyone on lawfulness. What matters is that - no matter what language is used to convey the concept - the s 5 analysis transparently conveys whether, why and how a court gives weight to the primary decision-maker's judgement. This is how the appellants say the needle is to be threaded: by an explicit consideration of deference as part of the s 5 proportionality analysis. That will enable the courts to assess an administrative decision against a human rights standard (a legal question), while recognising when decisions may require restraint due to the institutional expertise of the decision-maker to whom the legislature has entrusted the decision.

Deference - authorities

41. The most recent authority in this Court confirms that a Court should consider what leeway should be given to the decision-maker's judgement in recognition of the "expertise of the decision-maker" as part of the proportionality test.[47] The Court also held that "some regard may be had and respect given to where the decision-maker saw the balance as lying",[48] i.e. the fourth-limb of the *Oakes* test.

42. Similarly in *New Health*, O'Regan and France JJ quoted with approval McLachlin J's observation in *RJR-MacDonald Inc v Canada* that "careful tailoring" of the law to impair rights no more than necessary is required;

---

45 *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 per Lord Hoffmann; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379] per Hammond J.

46 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at 549.

47 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [85].

48 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [86].

providing some leeway to the legislator and exercising caution where there is a range of reasonable alternatives.[49]

43. Justice Tipping's now familiar shooting target metaphor described the margin of discretion left to the decision-maker: the limit may fall outside the bullseye but within the relevant target.[50]

44. Considering discretion as part of the proportionality analysis as this Court did in *Moncrief-Spittle* is consistent with comparable commonwealth courts. Although each jurisdiction has developed its own distinctive approach, the United Kingdom, Canada and Australia have all developed proportionality tests that explicitly consider what weight should be placed on the decision-maker's judgement.

45. The United Kingdom, which applies its version of the *Oakes* test to the review of administrative decision-makers under the Human Rights Act 1998, has recognised that "[t]he fact that the court is the arbiter of proportionality does not mean that there is no room for appropriate respect and weight to be given to the views of the executive or legislature".[51] In *Secretary of State v Rehman* Lord Hoffmann observed that democratic legitimacy might be a further basis for the Court's deference to the decision maker.[52]

46. The Canadian Supreme Court applies a standard of review that is "guided by a policy of deference", including because of "the decision-maker's expertise and its proximity to the facts of the case".[53] The Canadian approach includes deference on questions of law, which is not part of New Zealand or English law and the appellants do not propose otherwise.

47. In Australia, Victoria and Queensland have enacted human rights statutes that include versions of the *Oakes* proportionality test. The Court of Appeal

---

49 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132], citing *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [160].

50 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [119].

51 *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172, [2024] 1 WLR 3327 at [14].

52 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 at [62].

53 *Doré v. Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 at [30] and [54].

in Victoria confirmed that "the decision-maker's expertise and experience may be taken into account" without any "precondition" that the decision-maker must be given "deference, respect or latitude".[54] It held that the first instance judge had failed to place "appropriate weight" on the evidence of the governor of the prison, who had ordered random drug testing.[55] The judge had dismissed the governor's evidence of conversations with prisoners and prison officers "over the years" as "anecdotal", but the Court held that did "not accurately reflect the nature and quality of that evidence".[56] The Queensland Supreme Court has addressed these issues in the context of vaccination mandates that applied to the Police and ambulance workers.[57] The Court adopted previous Queensland authority that one way of "not drifting into merits review" was by "affording weight and latitude to the acts and decisions of primary decision-makers".[58]

48. It is no abdication of the judicial role to defer, when appropriate, to the decision maker's assessment of elements of the justification test; whether due to expertise or for another reason such as democratic legitimacy.[59] Compliance with s 5 must avoid the Court stepping into the shoes of the decision-maker or otherwise blurring the constitutional lines between branches of government. As s 5 is a mixed question of law and fact it engages value judgements and may not be capable of being framed entirely as a legal question admitting of a single right answer. Determining the legal question s 5 poses – is the limit justified in a free and democratic society - requires a clear analysis so the courts transparently make room for the decision-maker's judgement where that is appropriate.[60]

---

54 *Thompson v Minogue* [2021] VSCA 358, (2021) 67 VR 301 at [100].

55 *Thompson v Minogue* [2021] VSCA 358, (2021) 67 VR 301 at [274].

56 At [264] and [265].

57 *Johnston v Carroll* [2024] QSC 2, (2024) 329 IR 365

58 At [432], quoting *Patrick's Case* [2011] VSC 327; (2011) 39 VR 373 at [317].

59 Rishworth et al *The New Zealand Bill of Rights* (2003) at 194. See also Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed) at [6.14.2].

60 Hanna Wilberg "Settling t he Approach to Section 5 of th e Bill of Rights in Administrative Law: Justification, Restraint and Variability" (2021) 19 NZJPIL 97 at 104.

A more transparent and calibrated proportionality test

49. Explicitly addressing deference as part of the proportionality analysis renders the courts' decision-making more transparent for two reasons. The reader can identify why and how the court chose to defer to the decision-maker's judgement but, also, different reasons for deference may apply at each stage of the *Oakes* test. By asking itself why it is choosing to defer and how it does so, the court calibrates the proportionality test with greater precision.[61]

50. Institutional expertise is one of a range of matters that may cause a court in appropriate cases to defer to a decision-maker on a specific aspect of the proportionality test. Others include that the decision-maker has relevant democratic credentials, or it may be appropriate for the court to give weight to Parliament's choice about who the decision-maker should be.[62] These matters are likely to engage different aspects of the proportionality test. For example, institutional expertise is especially relevant to minimal impairment, but the weighing of the limit on the right against the importance of the objective is not a matter on which institutional expertise – whether on military necessity or public health or prison safety – is likely to be relevant (although the decision-maker's democratic credentials may be). Whatever the reason for deferring to the decision-maker's judgement, however, the s 5 framework should facilitate the court to transparently weigh such matters appropriately.

51. In his final article, Professor Taggart made a similar point:[63]

> To my way of thinking, it is precisely the articulation and application of deference in the particular context that should be encouraged. Only by courts weighing up the relevant deference factors will they appropriately calibrate the intensity of review in the particular case, and, as importantly, provide some guidance to advisors and later courts in the process. In this way, they will slowly but surely put signposts on the review rainbow or map.

---

61 Mark Elliot "Proportionality and Deference: The Importance of a Structured Approach" in Forsyth et al (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford, 2010) 264, at 268 and 276.

62 The power to discharge an officer is delegated to the Chief of Defence Force by the Governor-General pursuant to s 32(1A) of the Defence Act 1990 [302.0396].

63 "Proportionality, Deference, Wednesbury" [2008] NZLR 423 at 459.

Deference enhances the distinct roles of the executive and the courts

52. Applying the proportionality test without consideration of deference risks the Court exercising a discretion that has been entrusted to the executive.[64] By asking itself how much latitude to give to the decision-maker's judgement, the court maintains its important constitutional role of assessing – independently - the lawfulness of administrative decision-making against statutory human rights standards, without stepping into the shoes of the executive.[65]

53. Deference enables the courts to consider, weigh and accommodate the executive decision-maker's judgement in its s 5 analysis. For example, by respecting the CDF's judgement call that the Service Chiefs should conduct the retention reviews - in order to ensure operational effectiveness and because the Service Chiefs were best placed to take account of the needs of the Service as a whole – the High Court avoided taking that assessment for itself.

Without deference, proportionality lacks a strategy for preserving comity

54. The tension between maintaining the court's role in reviewing the lawfulness of administrative decisions while ensuring the executive remains responsible for administrative decision-making precedes the Bill of Rights Act. As Professor McLean has observed, "traditionally, judicial review has developed a number of strategies to deal with these concerns".[66] By focussing on process and maintaining the unreasonableness ground at a high standard, the courts are able to maintain comity and avoid stepping into the shoes of the executive, which remains responsible for administrative decision-making. Similarly, Professor Elliott has observed

---

64 *R (SB) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [34] per Lord Bingham, *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [31]-[32] per Lord Sumption, *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [13], per Lord Bingham; *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 at [130] per Lord Sales; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [164] per Lord Neuberger: "the judiciary's power to review decisions of the executive must be exercised bearing in mind that responsibility for the decision lies with the executive, not the judiciary, and judges do not have the relevant expertise or experience of those responsible for the decision".

65 Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (2009) at 169 and 172-173.

66 "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZLR 377 at 394.

that deference is hard-wired into the traditional approach to substantive review.[67]

55. The traditional "strategies" of judicial review for maintaining separation of powers are absent from proportionality, with its focus on the substantive outcome. Any deference must therefore be explicitly articulated and applied. The court must expressly ask itself whether there is any call for deference arising from the facts of the decision, as the *Oakes* proportionality test does not otherwise engage these concerns.

The Court of Appeal judgment – what went wrong

56. The Court of Appeal accepted that the first limb of the *Oakes* proportionality test was met: the objective (maintaining the Armed Forces in a state of readiness) was sufficiently important.[68] But the Court was unpersuaded that the changes to the retention review process "restricted [the right] no more than reasonably necessary, and [that] the restriction was proportionate to the objective",[69] i.e. the third and fourth limbs of *Oakes*.

57. As submitted above, where deference is prompted by the expertise and experience of the decision-maker, this will likely be most relevant to the third limb: whether the measure impairs the right no more than reasonably necessary. Here the TDFO was issued by the CDF, who has held a number of senior roles in the Armed Forces (including overseas) since joining the RNZAF in 1976. He gave evidence about the "unique and critical function" performed by the Defence Force and its distinctive "nature of service", which is "unlike other employment or membership of any other organisation".[70]

---

67 Mark Elliott "From Bifurcation to calibration Twin-Track Deference and the Culture of Justification" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review Traversing Taggart's Rainbow* (Hart Publishing, 2017) at 80.

68 Court of Appeal decision at [154] [05.0052].

69 At [155] [05.0053].

70 Affidavit of Air Marshal Short at [2], [10] and [18] [201.0161].

58. However, the Court of Appeal gave no weight to the CDF's judgement about issues of military necessity. After concluding (wrongly, see below) that the TDFO created "more prescriptive and more stringent consequences of failure to be vaccinated", the Court stated that "it was for the respondents to show that the outcome would be materially different in terms of the overall effectiveness and deployability of the Armed Forces with the additional measures".[71]

59. The Court concluded that:[72]

> The incremental limits on rights effected by the TDFO required justification by evidence drawing on something more than *simple assertion*: for example, *data-based analysis of different scenarios*, or *comparisons with the measures taken by the Armed Forces of other countries*, and their relative effectiveness.[73] The justification needed to explain why the approach provided for in DFO 3 and DFO 4, without the TDFO, would be insufficient to achieve the relevant objectives. It needed to engage with the likely time frame for which any additional restrictions would be justified, and *whether permanent discharge of unvaccinated members was necessary to achieve the objectives given that time frame*. It also needed to engage with the question of why these measures should apply to members who are already, for other reasons, not deployable (as noted above, a very significant proportion of the Regular Force): it is difficult to see how retaining those members would affect the deployability of the Armed Forces.

60. This part of the judgment is where the Court's failure to consider whether there was a special context and expertise to be considered led it into error.

TDFO was not more stringent with more restrictive consequences

61. The Court's conclusion that the changes to the retention review process led to "more prescriptive and more stringent consequences" is wrong.[74] It is not supported by the evidence which shows that the TDFO process had the same potential consequences as DFO 3 and 4 but was procedurally different (truncated timeframe and more senior decision makers, with a view of the whole service).[75]

---

71 Court of Appeal decision at [151] [05.0052].

72 At [155] (emphasis added) [05.0053].

73 Compare *Hudson v Attorney-General* [2023] NZCA 653 at [71].

74 At [139] [05.0048].

75 See Air Marshal Short's affidavit at [41] and [43] [201.0170]; Brigadier Weston's First affidavit at [43] and

62. Changes to the formal warning period and the decision-maker altered the process for the retention review, but not the potential consequence of discharge, which was already a consequence of the failure to comply with the vaccination schedule.

63. The TDFO made two variations to the retention review process, neither of which reduced the flexibility of the ultimate decision of whether to retain or discharge the member.

64. First, the formal warning periods were truncated. Brigadier Weston explained the reason for this in his evidence.[76] The COVID-19 vaccinations had been part of the readiness requirements for a year, and the boosters had been included for approximately three months. Natural justice did not require a further warning period for members who had refused to meet readiness requirements in respect of vaccinations, and a shortened notice period was appropriate for members who had not received the boosters. The CDF also gave evidence that he was advised that "a formal written warning period did not have a maximum and may lead to inconsistency in application … Sufficient notice had already been provided and members had sufficient time to comply".[77]

65. Second, the Service Chiefs were made the decision-makers for all retention reviews of unvaccinated members, removing the usual practice of delegating this decision for members with more junior ranks. The CDF explained that the Service Chiefs "have sufficient strategic overview of the impact retention or discharge would have on the Service, and the need to maintain operational effectiveness".[78] In order to ensure the decision was elevated to the Service Chiefs, the usual ability of the Commanding Officer to determine that no further action is required was removed. Brigadier Weston stated that "we wanted to ensure consistency of decision making"

[72.2] [201.0193].

76 First affidavit of Brigadier Weston at [76.1] [201.0200].

77 Affidavit of Air Marshal Short at [44.2] [201.0171].

78 Affidavit of Air Marshal Short at [44.1] [201.0171].

and the Service Chiefs "have sufficient strategic overview of the impact retention or release would have on operational effectiveness".[79]

66. These variations also promoted consistent and efficient decision-making while maintaining the members' rights to natural justice. The Service Chiefs had a broad discretion whether to retain or discharge: the Administrative Instruction provided 11 criteria but specified that "the criteria are not exhaustive".[80]

67. The Court of Appeal also stated that: "[w]e read the TDFO and CPO Administrative Instruction as providing a strong steer that discharge would be the likely consequence of a failure to be vaccinated against COVID-19".[81] This is not supported by the evidence. The TDFO varied only the process for retention reviews. The outcomes of the unvaccinated members' retention reviews, which are set out in Brigadier Weston's second affidavit, illustrate that discharge was far from inevitable.[82] For Navy/Army/Airforce there were 6/12/4 discharges and 6/10/1 decisions to retain the member.

The NZDF evidence was not "simple assertion"

68. The Court dismissed the NZDF's evidence as "simple assertion" which is inaccurate given the volume of evidence outlining and supporting the decision-making that led to the TDFO, including the relevant military context. Also inaccurate was the Court's characterisation of the TDFO as leading to "permanent discharge of unvaccinated members". The evidence does not support this finding.

69. The Court of Appeal's suggestion that the NZDF should justify the "permanent discharge of unvaccinated members" is difficult to understand, as the TDFO did not require discharge. As stated above, 17 of the 39 members whose retention were reviewed were retained.

---

79 First affidavit of Brigadier Weston at [76.3] [201.0201].

80 CPO Administrative Instruction 01/2022 at [6] [303.0665].

81 Court of Appeal decision at [140] [05.0048].

82 Second affidavit of Brigadier Weston at [7] [201.0214].

70. The TDFO varied the retention review process and prevented members who had not received the primary COVID-19 vaccinations from going onto base. Those are the measures that needed to be justified through the proportionality analysis, and the Defence Force provided a wealth of evidence about how the measures related to the objectives.

The variations to the retention review process

71. We have set out above (at [64] and [65]) the evidence of the CDF and Brigadier Weston explaining the basis for the variations to the retention review process. These are more than "simple assertion". The reasons given for the variations are coherent and proportionate.

72. The variations better met the CDF's objective of ensuring military readiness than the existing process where a member refused to meet a readiness requirement.[83]

Preventing unvaccinated members from going onto the base

73. The TDFO also restricted members who had not received their primary COVID-19 vaccinations from going onto base, at least until a decision had been made to retain them.

74. The decision to restrict unvaccinated members from the base needs to be understood in the context of the pandemic in 2022. The CDF gave evidence about the reason for this measure[84] and Colonel Tate, the Director Defence Health, described that at the time COVID-19 remained a "notifiable disease with isolation for household … contacts".[85] The isolation requirements for Defence Force members were set out in the "NZDF COVID-19 Positive Case Exposure" and required that household contacts self-isolate for seven days, only returning to the base if they tested negative on days three and seven and after approval by their Commanding Officer or manager.[86] Barracks were considered households where there were shared sleeping rooms,

---

83 Affidavit of Air Marshal Short at [44], [46]-[63] [201.0171].

84 Affidavit of Air Marshal Short at [55] [201.0174].

85 First affidavit of Colonel Tate at [58] [201.0145].

86 NZDF COVID-19 Positive Case Exposure [302.0267].

partitions only between the rooms, or where barrack personnel used communal spaces without masks or distancing.

75. Colonel Tate also explained how alternate mitigation measures, such as masks and distancing, were "not always practicable during military operations or training".[87] It was therefore important that "all of NZDF serving personnel are fully vaccinated [so that] commanders are free to apply the control measures that are practical for the tasks they require".[88]

76. Colonel Tate's evidence relied on more detailed vaccination data set out in the affidavit of Dr Town, Chief Science Advisor at the Ministry of Health. Dr Town concluded that although less effective against Omicron, the vaccinations were "nevertheless likely to be effective in limiting the spread of Omicron within the community and reducing the incidence of hospitalisation among those who have been affected".[89]

77. By preventing unvaccinated members from going onto the base, the TDFO ensured that members of the Armed Forces were less likely to become infected with COVID-19 or require hospitalisation because of COVID-19, maintaining the Armed Forces being more likely to be able to be deployed, including at short notice.

78. The justification for the decision that unvaccinated members should not go onto the base was appropriately evidence-based and relied on more than "simple assertion". Limiting the transmission of COVID-19 and reducing the incidence of hospitalisation were rationally connected and proportionate to the Defence Force's objective of maintaining the Armed Forces "in a constant state of deployment readiness".[90]

Other relevant contextual evidence

79. The NZDF evidence illustrates the unique military context, including the critical importance of readiness. The Defence Force is the only agency of

---

87 First affidavit of Colonel Tate at [65] [201.0147].

88 First affidavit of Colonel Tate at [66] [201.0148].

89 Affidavit of Dr Town, 7 September 2022, at [95] [201.0248].

90 Affidavit of Air Marshal Short at [5] [201.0161].

state that "maintains disciplined forces available at short notice", ready to conduct military operations as and when directed by the Government.[91] COVID-19 was a particular challenge to the requirement to maintain Armed Forces for deployment, for a range of deployments.[92] The need for short notice responses in this operating environment was clearly illustrated in the examples set out in Brigadier Weston's affidavit:

79.1 August–September 2021 deployment within 24 to 72 hours to a non-combatant evacuation operation in Afghanistan, in a high-risk COVID-19 environment.[93]

79.2 December 2021 deployment within 24 to 72 hours, for a stability and support operation in the Solomon Islands, an environment which was pursuing an elimination strategy for COVID-19. It was important that the deployed troops did not then become vectors for transmitting the disease.[94]

79.3 The Armed Forces also deployed in a humanitarian support mission to Tonga following an eruption and tsunami. There were strict COVID-19 protocols imposed as a result of Tonga's success in eliminating COVID-19.[95]

80. Brigadier Weston also provided evidence of domestic situations which required Armed Force members to aid and assist people who had COVID-19, for example during floodings in Auckland during the Alert Level 4 lockdown.[96]

81. This wider context paints the obvious picture that the decision to issue the TDFO was deeply rooted in the context of the COVID-19 pandemic and the necessity to maintain the Armed Forces in a state of immediate readiness.

---

91 Affidavit of Air Marshal Short at [11] [201.0163].

92 Affidavit of Air Marshal Short at [5] [201.0161], [11] [201.0163], [14] [201.0165]; First affidavit of Colonel Tate at [50] and [51] [201.0143]; DFO 18 Defence Health [301.0149].

93 First affidavit of Brigadier Weston at [34.7.1] [201.0189].

94 First affidavit of Brigadier Weston at [34.7.2] [201.0190].

95 First affidavit of Brigadier Weston at [34.7.3] [201.0190].

96 First affidavit of Brigadier Weston at [34.8] [201.0191].

Defence Force personnel are in roles where exposure was highly likely.[97] And given the potential for deployment within 24-72 hours, a "proactive approach" to mitigate the risk of COVID-19 was necessary.[98]

82. The Armed Forces vaccination schedule is an example of a proactive mitigation strategy to reduce the risk of detrimental health outcomes and to support operational effectiveness.[99] As Colonel Tate observed in her evidence, a deployed environment is austere, often without easily accessible health services.[100] There could be a "significant detrimental impact on [a deployed military force's] operational effectiveness" if there was a spread of infectious disease amongst the members.[101] Further, border restrictions were evolving and some countries required proof of full vaccination.[102] The refusal of a member of the Armed Forces to be vaccinated would degrade the operational effectiveness of their unit.[103] For some specialised skill areas there may be limited redundancy built into the workforce.[104] Where unvaccinated members remain in their role, the Force may be unable to accommodate appropriate respite for those members who are deployable.[105]

Evidence about members who are not deployable for other reasons

83. The Court of Appeal was also critical of the Defence Force's evidence for "not engag[ing] with the question of why these measures should apply to members who are already, for other reason, not deployable".[106] Of 9,251 Regular Force members, 3,124 did not meet the readiness requirements for service within New Zealand and 4,547 did not meet the readiness requirements for international service.[107]

---

97 First affidavit of Colonel Tate at [52] [201.0144].

98 First affidavit of Brigadier Weston at [34.7] [201.0190].

99 First affidavit of Colonel Tate at [26] [201.0140].

100 First affidavit of Colonel Tate at [23] and [59] [201.0139] and [201.0141].

101 First affidavit of Colonel Tate at [22] [201.0138].

102 First affidavit of Colonel Tate at [95.6] [201.0155].

103 First affidavit of Brigadier Weston at [86] [201.0203].

104 First affidavit of Colonel Tate at [57] [201.0157].

105 Second affidavit of Brigadier Weston at [5] [2-1.0213].

106 Court of Appeal decision at [155] [05.0053].

107 Letter from Air Commodore AJ Woods to Sarah Shaw dated 4 July 2022 [301.0048]. Churchman J

84. However, evidence was provided on this issue, which was not addressed by the Court of Appeal. Brigadier Weston explained that, as at 23 June 2022, there were many members who did not meet the physical fitness test, medical standards or dental requirements.[108] His evidence was that many of the reasons for not meeting readiness requirements were resolvable in the short-term. Some of the readiness requirements arose because of the pandemic, for example, because access to the appropriate tests and appointments was more difficult.[109] These temporal or logistical reasons are quite different to those members who refuse to meet the readiness requirements and who indicated they would continue to refuse.

Expectation of further evidence was unrealistic

85. The Court of Appeal suggested that in order to justify the TDFO, the CDF should have filed evidence setting out "data-based analysis of different scenarios, or comparisons with the measures taken by the Armed Forces of other countries, and their relative effectiveness".

86. There are three difficulties with the Court of Appeal's approach.

87. First, "data-based analysis of different scenarios" would have been disproportionate to the variations the CDF was considering for the retention review process. These were minor procedural changes, truncating the formal warning notice period and ensuring consistency in decision-making through elevating the decision to the Service Chiefs. The Chief People Officer gave advice to the CDF, who should not have needed data-based analysis or "comparisons with the measures taken by the Armed Forces of other countries" to conclude, for example, that the retention reviews should be carried out by the Service Chiefs and not delegated.[110]

---

mistakenly referred to 5,547 members not meeting the Readiness Requirements for internation service [102.0322]. The correct figure is 4,547.

108 First affidavit of Brigadier Weston at [25] [201.0185].

109 First affidavit of Brigadier Weston at [26] [201.0185].

110 Cf the approach in *Thompson v Minogue* [2021] VSCA 358, (2021) 67 VR 301 in which the Court gave weight to the prison governor's evidence of his conversations with prisoners over the years, at [274].

88. Second, the Court of Appeal's approach is unrealistic in the context of maintaining deployment readiness during a pandemic.[111] As set out above, the New Zealand Armed Forces is required to be able to deploy to emergency situations within 24 to 72 hours. The Defence Force must be able to take decisions quickly, sometimes without the benefit of robust data, which may not be available. The speed and changes of the COVID-19 pandemic, and New Zealand's changing response, illustrate the issue. As Colonel Tate observed, "long term studies on consequence, impact and forecast of future behaviour is just not possible with a novel disease such as COVID-19".[112] The Defence Force must be able to make decisions even where the information available is limited and changing.

89. Third, the decisions to include the COVID-19 vaccinations in the vaccination schedule, and to issue the TDFO, were informed by the data available and comparable overseas approaches, within the limits of an evolving pandemic. Dr Town's affidavit sets out the available data on the safety and effectiveness against Omicron of the various vaccines. This includes both clinical trials, and observational studies in a 'real world' setting.[113] Colonel Tate observed that she "gave much attention to the reputable national and international bodies that regulate such matters",[114] and that she "discussed issues of vaccine policy for military populations with international colleagues and looked closely at the health and disability sector mandates and context".[115]

The Court was wrong to find the UK's approach was less "intrusive"

90. The Court of Appeal wrongly found that the TDFO was "more intrusive" than comparable measures in the United Kingdom, and that the Defence Force had failed to justify its "more restrictive approach".[116]

---

111 In *Johnston v Carroll* [2024] QSC 2, (2024) 329 IR 365 the Court took into account the fact "that these directions were given in … an emergency" and that "the knowledge available about the virus, its variants, its virulence, and its transmissibility was limited and being added to on an almost daily basis", at [457].

112 First affidavit of Colonel Tate at [50] [201.0143].

113 Affidavit of Dr Town at [82] [201.0244].

114 First affidavit of Colonel Tate at [79] [201.0151].

115 First affidavit of Colonel Tate at [87] [201.0153].

116 Court of Appeal decision at [156] [05.0053].

91. The evidence before the Court about the approach of the United Kingdom Armed Forces was extraordinarily slender given the weight the Court placed on it. It was a two-page document of generic information obtained from the internet.[117] This was a scant and unsafe basis for the Court to conclude that those measures were less restrictive than the variations to the retention review process introduced by the TDFO. However, to the extent that the UK "evidence" establishes that a case-by-case assessment to dismissal was taken, that appears the same as the CDF's approach.

92. The United Kingdom Ministry of Defence's letter is dated 21 December 2021. It provides that the UK has not "at present" put COVID-19 vaccination on its list of required vaccines and that where deployment does require COVID-19 vaccination, the consequence to be considered on a case-by-case basis through the Chain of Command.[118]

93. On the limited information before the Court, the difference between the Armed Forces of the United Kingdom and New Zealand appears to be the decision whether to include COVID-19 vaccines in each country's vaccination schedules. But there is no challenge here to the lawfulness of the decision to include COVID-19 vaccines in the NZDF vaccination schedule. In the United Kingdom there was no change to the deployment status of members who declined to be vaccinated, because COVID-19 vaccines were not treated as an "Occupational Vaccine". That issue is not before this Court.

94. To the extent that the United Kingdom and New Zealand approaches can be compared, it appears that both forces approached the issue on a case-by-case approach. In New Zealand, 17 of 39 members who declined to receive the vaccine were retained – each member's retention was considered individually.

---

117 The evidence for the approach adopted by the United Kingdom Armed Forces is a two-page response by the United Kingdom Ministry of Defence to a request under the Freedom of Information Act 2000, annexed to an affidavit filed by [redacted] 11 days before the High Court hearing. In his affidavit [redacted] explains that he retrieved the response on a "United Kingdom internet site"; no other context is given: second affidavit at [6] [201.0132].

118 [301.0142].

The UK and NZ approaches were within the range of reasonable alternatives

95. While any comparison is necessarily speculative, it may be possible (although we simply do not know) that the United Kingdom and New Zealand Armed Forces considered different factors in assessing retention: for example, in the United Kingdom a key factor would likely have been (on the information we have) whether the member was likely to be deployed to a situation that required vaccination.

96. Such differences in approach are small. Both would have been within the range of available alternatives open to the CDF. The Court of Appeal's approach, in requiring that only the least restrictive be adopted, leaves the CDF no discretion.

97. The third limb of the *Oakes* test is often described as minimal impairment, but some latitude is given to the decision-maker by requiring that the limit is no greater than is "reasonably necessary".[119] In *Bank Mellat*, Lord Reed observed that this approach is necessary "if there is to be any real prospect of a limitation on rights being justified" because "a judge would be unimaginative indeed if he could not come up with something a little less drastic".[120]

98. The Court of Appeal's approach illustrates the difficulty when deference is not included as part of the proportionality analysis. If all administrative decisions for which the court is able to imagine a less rights-infringing alternative are unlawful, the decision-maker is left with no discretion and the Court becomes the effective decision-maker.

THE SECOND ERROR OF LAW – INCREMENTAL JUSTIFICATION

99. As explained above, it was the inclusion of COVID-19 vaccines in the vaccination schedule that put members who declined to be vaccinated at risk of discharge, but there was no challenge to the lawfulness of that decision. Therefore in considering whether the TDFO and Administrative

---

119 See Tipping J in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [126].

120 *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [75].

Instruction unjustifiably limited the right to refuse medical treatment, the Court framed the issue as whether the TDFO created a further limit on a right that was already limited:[121]

> The incremental limits on rights effected by the TDFO required justification by evidence drawing on something more than simple assertion …
>
> The evidence filed by the deponents provided a clear explanation of the desirability of COVID-19 vaccination for members of the Armed Forces. But it did not provide focussed justifications for the incremental limits on rights effected by the TDFO.

100. However, the right to refuse medical treatment is binary: either a member has a choice whether to accept the treatment or they do not. It is accepted that the threat of loss of a career in the Armed Forces may create sufficient pressure that the patient feels they have no choice and the right is limited. But once the member is unable to refuse medical treatment the right cannot logically be further (or incrementally) limited.

101. The Court did not directly apply its incremental construct to the freedom to manifest religion which two of the members had alleged was limited by being required to have a vaccine that could not be proved to have been developed using no cells descended from cells taken from an aborted foetus. Such a freedom may be capable of more, or less intrusive limits. But in this case the limit of the freedom was by the vaccines being entered on the base list. Restoration of the freedom could only be achieved by removing the vaccines from the base list or by exempting the affected members. The members did not become less free to manifest their religious belief on account of the consequences of their refusal to be vaccinated being brought forward because of the TDFO.

THE THIRD ERROR OF LAW – PLEADINGS

102. If an applicant intends to argue that a rights-limiting measure is unjustified because there is a less rights-limiting alternative available, it should be pleaded.[122] Otherwise the court will need to determine the lawfulness of

---

121 At [155] and [157] [05.0053].

122 *Benmarroc Estates Ltd v Molyneux Management Ltd* HC Dunedin CIV-2007-412-735, 23 June 2009 at [8]; *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [63]; relying

an administrative decision without relevant evidence that could have been filed had the Crown been on notice of the applicant's intended argument.

103. In the courts below, the applicants argued that the TDFO was disproportionate because the approach in the United Kingdom was an available alternative that was less rights-infringing. However, that alternative was not pleaded,[123] and it relied on evidence filed after the Crown's evidence, only 11 days prior to the High Court hearing.

104. The Court of Appeal, acknowledging this evidence was "not extensive", nevertheless found that the NZDF was "squarely on notice" that it needed to justify its "more intrusive measures".[124]

105. It is not clear that the United Kingdom approach was less "intrusive". But had it been, proper pleadings were required on which the applicants could argue that the United Kingdom approach was an available alternative measure. Failure to plead means the court did not have the relevant evidence. That was not relevant in the High Court but became pivotal in the Court of Appeal. [125]

106. The CDF's evidence did respond to the alternative option that had been pleaded.[126] He explains why an order, enforceable pursuant to the Armed Forces Discipline Act 1971, requiring personnel to receive the vaccine was adverse, disproportionate and not required.[127]

107. There may be situations in which an alternative measure is so obvious that the Crown should file evidence explaining why the measure would not meet the objective, even without it being pleaded. However, this is not that

---

on *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17; See also McGechan on Procedure at HR5.26.03.

123 ASoC at [103]-[112] [101.0044]; cf the Four Members' Court of Appeal submissions at [121] [101.0232].

124 Court of Appeal decision [05.0053].

125 In the High Court, counsel for the CDF submitted the evidence was filed late and there had been no possibility of filing evidence in response and sought to file further evidence if the late evidence was pivotal. The Judge did not consider it pivotal and thought that it might be a matter for submission: transcript, at [102.0282] and [102.0290].

126 Affidavit of Air Marshal Short at [68] [201.0178].

127 Affidavit of Air Marshal Short at [69] and [70] [201.0178].

case: the United Kingdom was affected very differently by the pandemic compared to New Zealand, and its response was very different. Its armed forces is much larger and not directly comparable (for example it does not have an important role in the Pacific). It does not go without saying that the CDF should have considered the United Kingdom approach as an alternative less rights-infringing measure.

CONCLUSION

108. The appellants submit the Court of Appeal decision, and the continued interim orders, should be set aside. The appellants seek costs in the usual way.

12 September 2024

U R Jagose KC/ D P Neild / S R Hiha
Counsel for the appellants

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The respondents.

LIST OF AUTHORITIES TO BE CITED BY THE APPELLANTS

INDEX

Statutes

1. Armed Forces Discipline Act 1971, s 72

2. Defence Act 1990

3. New Zealand Bill of Rights Act 1990

Cases

New Zealand

4. *Benmarroc Estates Ltd v Molyneux Management Ltd* HC Dunedin CIV-2007-412-735, 23 June 2009

5. *Hudson v Attorney-General* [2023] NZCA 653

6. *Low Volume Vehicle Technical Assoc Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808

7. *McCartin v R* [2016] NZHC 1807

8. *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459

9. *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612 [2016] 2 NZLR 437

10. *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948

11. *New Zealand Defence Force v District Court of New Zealand* [2022] NZHC 3559, [2023] 2 NZLR 512

12. *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998

13. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1

14. *R v Jack* [1999] 3 NZLR 331 (Courts Martial Appeal Court)

United Kingdom

15. *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700

16. *Begum v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765

17. *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL)

18. *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172, [2024] 1 WLR 3327

19. *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408

20. *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167

21. *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532

22. *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945

23. *R (on the application ProLife Alliance) v British Broadcasting Corp* [2003] UKHL 23, [2004] 1 AC 185

24. *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100

25. *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153

Canada

26. *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395

27. *R v Oakes* [1986] 1 SCR 103

28. *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199

Australia

29. *Johnston v Carroll* [2024] QSC 2, (2024) 329 IR 365

30. *Thompson v Minogue* [2021] VSCA 358, (2021) 67 VR 301

Texts

31. Aileen Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, New York, 2009) at 167-232

32. Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 182-213

33. Forsyth and Ghosh *Wade & Forsyth's Administrative Law* (12th ed, Oxford University Press, New York, 2023) at 313-324, 445 and 446

34. Hanna Wilberg "Settling the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability" (2021) 19 NZJPIL 97

35. Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377

36. Mark Elliott "Proportionality and Deference: The Importance of a Structured Approach" in Forsyth and others (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, New York, 2010)

37. Mark Elliott "From Bifurcation to calibration Twin-Track Deference and the Culture of Justification" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review Traversing Taggart's Rainbow* (Hart Publishing, 2017)

38. *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at HR5.26.03

39. Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423

40. Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 186-194

	Date	NZDF action	Appellants event	Reference
1.	18 October 2005	Defence Force Order 4 (DFO 4) issued.		[[**303.0515**]]
2.	23 November 2009	Defence Force Order 3 (DFO 3) issued.		[[**303.0434**]]
3.	3 March 2021	Health Instruction 017/16 amended to include the COVID-19 Vaccination in the NZDF Vaccination Schedule.		[[**102.0248**]]
4.	23 March 2021	Members of the armed forces advised, via the Intranet, that COVID-19 Vaccines are now a part of the 'readiness requirements' for deployable armed service personnel.		[[**303.0576**]]
5.	2 July 2021	Members of the armed forces advised, via the Intranet, that guidance will be issued to commanders on how to manage uniformed members of the NZDF who have voluntarily declined a COVID-19 vaccination.		[[**303.0578**]]
6.	9 February 2022	Members of the armed forces advised, via the Intranet, that COVID-19 boosters are now a part of the 'readiness requirements'.		[[**303.0581**]]
7.	11 February 2022	Health Instruction 017/16 is further		[[**102.0248**]]

	Date	NZDF action	Appellants event	Reference
		amended to include the Covid-19 booster vaccination in the NZ Vaccination Schedule.		
8.	25 May 2022	Defence Force Order 06/2022 (**DFO(T)**) is issued. DFO(T) varies the process to be followed when reviewing members service in respect of the 'readiness requirements', in relation to the COVID-19 vaccinations.		[[**102.0249**]] [[**303.0408**]]
9.	27 May 2022	Warning date for unvaccinated members of the Armed Forces (retention review initiated).		[[**303.0408**]]
10.	31 May 2022	CPO Administrative Instruction 01/2022 issued.		[[**303.0664**]]
11.	22 June 2022	Initial directed warnings to members of the Armed Forces in service who have received their COVID-19 vaccination but not any COVID-19 booster vaccines (retention review initiated).		[[**303.0408**]]
12.	23 June 2022	DFO(T) amended through the issuing of DFO(T) 07/2022.		[[**303.0428**]]
13.	28 June 2022		Commanding Officer Recommendation on the retention	[[**301.0056**]]

	Date	NZDF action	Appellants event	Reference
			Review report of [redacted] was made. Review recommended that [redacted] is retained within a non-deployable post until the end of his current engagement being 1 February 2024.	
14.	5 August 2022	Initial directed warning to members of the Armed Forces in reserves who have received their COVID-19 vaccination but not any COVID-19 booster vaccines (meaning retention review process was initiated).		[[**303.0408**]]
15.	8 August 2022	DFO(T) amended through the issuing of DFO(T) 09/2022.		[[**303.0740]]**
16.	12 August 2022	Approval authority decision to be made for members of the regular force who have not received their primary COVID-19 vaccinations.		[[**303.0423**]]
17.	12 August 2022		[redacted] received a letter from the Chief of Army advising him that he was to be discharged because of his vaccination status.	[[**201.0080**]] [[**301.0054**]]
18.	7 September 2022	DFO(T) amended through the issuing of DFO(T) 13/2022. This meant that any retention reviews raised		[[**304.0740**]] [[**304.0741**]]

	Date	NZDF action	Appellants event	Reference
		for non-boosted members were to be discontinued.		
19.	18 October 2022	DFO(T) amended through the issuing of DFO(T) 18/2022.		
[a]	21 October 2022	Termination date for members of the regular force who have not received their primary COVID-19 vaccinations and whose approval authority determined that they would be discharged (in accordance with Annex B of DFO(T) 06/2022 and DFO(T) 13/2022).	[redacted] was discharged. [redacted] was retained.	[[**303.0423**]] [[**201.0038**]] [[**201.0046**]] [[**201.0050**]] [[**201.0080**]] [[**301.0055**]] [[**402.0009]]** [[**304.0740**]]
21.	14 March 2023	Booster doses of any type for COVID-19 removed from NZDF baseline requirements.	[redacted] and [redacted] are no longer subject to a retention review on the basis of vaccination status.	[[**401.0006**]] [[**401.0009**]]
22.	1 June 2023	If the NZDF vaccination schedule did not get amended, the retention reviews of members of the Armed Forces that have received their primary COVID-19 primary vaccination but not booster doses would have commenced.	[redacted] and [redacted] would have been subject to a retention review on the basis of vaccination status if the NZDF Vaccination Schedule did not change.	[[**401.0008**]]

23.	1 August 2023	If the NZDF vaccination schedule did not get amended, the submissions of the final report		[[**303.00742**]]
		the retention reviews of members of the Armed Forces that have received their primary COVID-19 primary vaccination but not booster doses was due to the Approving Authority. The approval authority decision was required to be made no later than four weeks after that retention review was provided to the approval authority. The terminal date would have been 21 days after the approval authority decision.		
24.	15 August 2023		[redacted] will be subject to a further retention review process	[[**401.0009**]]