IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 20/2024
CA540/2022

CIV-2022-485-308

BETWEEN **CHIEF OF DEFENCE FORCE**

First Appellant

CHIEF PEOPLE OFFICER

Second Appellant

ATTORNEY-GENERAL

Third Appellant

AND [redacted]

First Respondent

Cont.

RESPONDENTS' SUBMISSIONS ON APPEAL
3 OCTOBER 2024

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Cont.

[redacted]

Second Respondent

[redacted]

Third Respondent

[redacted]

Fourth Respondent

AND **HUMAN RIGHTS COMMISSION**

Intervenor

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INTRODUCTION

1. The factual background to these proceedings is set out in the Court of Appeal judgment.[1]

2. Individual readiness requirements are things that members of the Armed Forces must do to be deployable. These things include fitness requirements, security clearance, medical clearance, and receiving the relevant vaccinations.

3. Vaccination has always been part of individual readiness requirements in the Armed Forces.

4. The NZDF maintains two schedules, the "Baseline Schedule" which consists of vaccines all members of the Armed Forces must receive, and the "Enhanced Schedule" which consists of vaccines required only for members of the Armed Forces deploying to specific locations or duties.

Introduction of TDFO

5. The Temporary Defence Force Order 06/2022 (**the TDFO**)[2] was implemented by the CDF on 25 May 2022.

6. The processes implemented by the TDFO on members of the Armed Forces were more stringent and restrictive than the prior approach of Defence Force Orders (**DFO**) 3 and 4 in the following ways:

   6.1 Unvaccinated members of the Armed Forces were not allowed to access camps and bases. This imposed a wide range of restrictions on members, whose welfare and medical support was often on camps and bases. For example, Able [redacted] who was 18 weeks pregnant, was not allowed to access the naval hospital which was her primary healthcare provider, because it was located on in the Devonport Naval Base.[3]

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[1] *Four Members of the Armed Forces v CDF & AG* [2024] NZCA 17, at [1] – [2] [05.0006]; and [35] – [45] [05.0016].
[2] DFO(T) 06/2022 [303.0408].
[3] Affidavit of Able [redacted] of 6 July 2022, at [6] – [7] [201.0056].

6.2 Members of the Armed Forces who chose not to receive the vaccine were subject to mandatory retention review and the decision-making role was taken from the Commanding Officer and elevated to the Service Chief, who had virtually limited awareness of the specific circumstances related to affected members of the Armed Forces.

6.3 The mandatory retention review was not an administrative process without consequences. Indeed, the majority of members of the Armed Forces subjected to this process were discharged, with the minority that remained subjected to an additional mandatory retention reviews within 12 months.

7. The Court of Appeal agreed that discharge was a likely outcome of retention review, stating "the consistent response envisaged by the CDF and CPO in their evidence was discharge, absent clear reasons accepted by the Service Chief for retention, with that retention to be further reviewed not more than 12 months out."[4]

8. Likely discharge was borne out by the statistics, with less than half of the 39 members subject to retention review being retained.[5]

9. It is for all these reasons that the TDFO represented a distinct and heightened limitation on affected rights.

Objective of TDFO

10. Fundamental to the question of whether the limitations on affected rights was justified, was the objective of the TDFO. The High Court and Court of Appeal identified this objective being to maintain the ongoing efficacy of the Armed Forces.[6] However this is never explicitly stated by the CDF in his evidence. Presumably everything the CDF does is for this purpose, which serves to demonstrate:

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[4] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [140] [05.0048].
[5] At [14] [05.0009].
[6] At [5] [05.0007] and [99] [05.0036].

10.1 First, the claimed objective of the TDFO verges on being overly-broad and care should be taken when assessing whether limitations on affected rights are justified,[7] and

10.2 Second, the importance of maintaining the burden on the CDF to adduce evidence as to how the TDFO contributes to this purpose.

Effect of the TDFO

11. Prior to the introduction of the TDFO the approach of vaccination in the NZDF was largely non-controversial for three main reasons:

11.1 Except for the Hepatitis-A vaccine, all of the Baseline Schedule vaccinations were on the National Immunisation Schedule, meaning that most New Zealanders had received them in childhood.[8]

11.2 Baseline Schedule vaccinations were required for acceptance into the Armed Forces, meaning that existing members of the Armed Forces were not normally required to take a vaccine they had not previously received.

11.3 In rare cases when issues of non-vaccination did arise for serving members of the Armed Forces, this was dealt with by their Commanding Officer who at a local level, had the discretion to decide whether a retention review was necessary. The Commanding Officer was ideally placed to assess the specific circumstances that applied to that individual member, and could make a fully informed decision as to whether that member should be retained.

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[7] *Make it 16 Incorporated v Attorney General* [2022] NZSC 134 at [20] and [46].
[8] NZDF Vaccination Schedules, [302.0265].

12. The relevance of the status quo ante that existed prior to the TDFO is twofold:

    12.1 The TDFO presented a greater degree of coercion and therefore a distinct limitation on affected rights which needed justification, and

    12.2 The status quo ante was a less rights limiting alternative, and the CDF was required to satisfy the Court that it was not a reasonably available alternative.

What is being challenged

13. Despite the assertion by the Appellants,[9] and as has previously been made clear to the Crown,[10] the focus of the proceedings on the TDFO is not a concession that vaccine requirements in the NZDF are generally justified.[11]

14. The focus of these proceedings has always been on the TDFO and associated instruments.[12] This is a responsible focus on the situation that presented itself to the Four Members in 2022.

The Role of the CDF

15. The Appellants make much of the role of the CDF and the duties of the NZDF. While it is accepted that the CDF has some unique specific aspects to his role, he is not alone in this regard. There are many institutions in public life which have important and unique constitutional roles – including police, corrections, intelligence agencies, and the judiciary.

16. While the role of the CDF and the duties of the NZDF may have relevance to how evidence is assessed and redress provided, which is discussed further below, these things do not change the fundamental legal principle that the burden is on the CDF to justify his decisions which limit fundamental rights, and it is for the Courts alone to determine the question of law of whether a limitation to rights is justified.

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[9] Appellants' Submissions on Appeal, at [4].
[10] Submissions from Four Members opposing leave to appeal of 8 May 2024, at [29].
[11] Respondents' Submissions on Leave to Appeal.
[12] Amended Statement of Claim 4 June 2022, [101.0034].

THIS APPEAL

17. A summary of the Appellants' submissions is that the Court of Appeal was in error because:

    17.1 The Court of Appeal failed to afford the CDF a "margin of appreciation" as an administrative decision maker. This is the "deference" issue.

    17.2 The approach of the Court of Appeal to the incremental limitation imposed by the TDFO was incorrect.

    17.3 The approach of the Court of Appeal to the evidence of a less rights limiting alternative was incorrect because pleadings on this point were improperly put.

18. The Appellants disagree with the Respondents on all three grounds of appeal. They say further that, even if this Court were to accept some or all the arguments advanced by the Crown, this would not affect the outcome reached by the Court of Appeal.

FIRST GROUND OF APPEAL – "DEFERENCE"

19. 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 the administrative decision-maker's judgement, as part of the proportionality test.[13]

20. The Crown says that deference:

    20.1 Gives transparency to the courts' decision-making.[14]

    20.2 Allows the Court to calibrate the proportionality test.[15]

    20.3 Describes the process by which courts identify the appropriate weight to give to administrative decision-makers.[16]

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[13] Appellants' Submissions on Appeal, at [27].
[14] At [34] and [40].
[15] At [34] and [49].
[16] At [38].

20.4 Requires judicial restraint where the institutional expertise of the decision-maker to whom the legislature has entrusted a decision is engaged.[17]

20.5 Is the exercise of caution by the courts where there is a range of reasonable alternatives.[18]

20.6 Means, in this case, to defer to the CDF's assessment of elements of the justification test.[19]

21. None of the above statements add to an orthodox application of the s 5 test. The Four Members say that, for the reasons below, the position on deference shown to decision-makers is sufficiently settled and was properly applied by the Court of Appeal.

22. There are several questions at the heart of the issue as it relates to deference:

22.1 What is deference?

22.2 Why should the Court afford deference?

22.3 How should deference be afforded, and to what?

What is Deference?

23. "Deference" is an awkward term when used to describe the relationship between the judiciary and other branches of government.

24. The Human Rights Commission take issue with the word "deference" and suggest that better terms are latitude, leeway, weight, or regard.[20] The Four Members agree, but say what matters is the underlying meaning of whatever term is used, and how it is applied in practice.

25. "Deference", in any sense, should mean the degree of regard or latitude a decision-maker needs to be afforded because of the nature or context of the decision being made.

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[17] Appellants' Submissions on Appeal, at [40] and [47] and [50].
[18] At [42].
[19] At [48].
[20] Submissions for the Human Rights Commission, at [7] – [9].

26. The Four Members say that deference requires not submission, but consideration of the reasons offered in support of a decision.[21]

Why Should Deference be Afforded?

27. Professors Taggart and Dyzenhaus discussed the reason for deference, being respect of legislative intent, expertise and experience of decision-maker, institutional competence, efficiency and practicality, and balancing rights and interests.[22]

28. The purpose of deference is described in *Yardley*, Cooke J stating:[23]

> Questions involving expertise, such as those addressed by Dr Town may give rise to institutional limitations on the Court's ability to reach definitive conclusions, particularly when their evidence is only provided by way of affidavit. But ultimately the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. And the Crown has the burden to demonstrate that a limitation of a fundamental right is demonstrably justified.

How Should Deference be Afforded?

29. It has already been established that a Court should consider the expertise of a decision maker, the nature of the decision, and the context of the decision, when deciding whether the reasons for the limiting measure are proportionate to the limits on affected rights.[24] Some regard must be had and respect to where the decision-maker saw the balance as lying.[25]

30. However, "Some regard" does not mean total stepping back. The burden remains on the decision-maker to satisfy the Court that their rights limiting decision is demonstrably justified.

31. At the extreme end of this spectrum is Parliament itself. However, though it may be afforded a high degree of latitude as a democratic lawmaker, is no less free from judicial inquiry than other decision-

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[21] David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in M Taggart (ed), *The Province of Administrative law,* Oxford, Hart, 1997, 279 at 286.
[22] "Proportionality, Deference, Wednesbury" [2008] NZLR 423 at 457 – 461; "The Politics of Deference: Judicial Review and Democracy", at 280 – 286
[23] *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [63].
[24] *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459, at [84] – [85].
[25] At [86].

makers.[26] Neither the voting age nor the making of military orders are entirely political or specialist issues.[27]

32. Practically speaking, there are two ways the Court can afford deference. The first is how evidence is assessed, and the second is redress.

Evidence

33. Courts are well placed to decide the relevance and strength of evidence, and where there is competing evidence, what weight to give respective evidence.

34. In *GF*,[28] Churchman J stated:

> The allegations in this case involve alleged breaches of important human rights and inconsistency with legislation. These are the sorts of issues that the Courts are well suited to determine. However, to the extent that the arguments challenged the Minister's assessment of specialist medical advice that he received, provided the Minister's decision is a rational interpretation of that advice, the Court cannot substitute its own assessment of the evidence.

35. In *Moncrief-Spittle*, this Court said:[29]

> [The Court] would expect to see evidence that [the decision-maker] had identified and weighed the right and give consideration to whether the reasons to cancel (the security and safety concerns) were such as to outweigh the right. That will assist the court in its task.

36. However, deference cannot fill gaps in evidence. If there is no evidence on certain points, to defer to the decision-maker on these points would in fact be abdication.

37. In the absence of such evidence, any deference to the decision-maker could only undermine the cloud the basis of a court's decision. This would be 'deference' in precisely the manner eschewed by Lord Hoffman as an abdication from the Court's role as an adjudicator.[30]

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[26] *Make-it-16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683, at [26] – [34].
[27] At [28].
[28] *GF v Minister of COVID Response* [2021] NZHC 2526, [2022] 2 NZLR 1, at [101].
[29] *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 24, at [84]
[30] *R (on the Application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, at [75]; see also Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423, at 455.

38. A fundamental principle of the justification test is that the elements "should be applied vigorously and will generally require supportive evidence that is cogent and persuasive."[31]

39. Professor Taggart explained this point in this way:[32]

> The court can expect the public authority to explain what it is doing and why. If the public authority has not done so, then it can hardly complain if the court reaches a different result using the proportionality methodology.

40. When the decision-maker does provide some evidence, even if a less structured approach to proportionality is appropriate given the context of a particular decision, this does not mean that a lesser threshold is used when applying the *Hansen* test.[33]

Redress

41. The Court has discretion to make orders appropriate to the circumstances which can be a form of deference. In *Colley v Auckland Council*, Wylie J said, "It is trite law that an order quashing a decision – certiorari – is discretionary and the Court can withhold relief if it thinks appropriate to do so."[34]

42. This gives the Court an important mechanism to give regard to the expertise of a decision maker, the nature of the decision, and the context of the decision.

The Approach of the Court of Appeal

43. The issue was not that the Court of Appeal failed to apply appropriate deference, it was that the CDF fell well short of providing adequate evidence that the limited rights were restricted no more than reasonably necessary, and whether the restriction was proportionate to the objective sought.[35]

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[31] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed), at 1363.
[32] "Proportionality, Deference, Wednesbury" [2008] NZLR 423, at 461.
[33] *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 24, at [91]; see also Submissions for the Human Rights Commission, at [12].
[34] *Colley v Auckland Council* [2021] NZHC 2366, at [128].
[35] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [157] [05.0053].

44. It is difficult to accept the Crown's argument that the Court of Appeal did not give deference to the CDF. As detailed below,[36] deference was afforded to CDF in several ways relating to the evidence, as well as redress.

Simple assertion

45. The Appellants say that the Court of Appeal "dismissed the NZDF's evidence as 'simple assertion'".[37] This characterisation of the Court of Appeal's judgment is not correct.

46. The basis of this argument seems to be the statement made by the Court of Appeal that "The incremental limits on rights effected by the TDFO required justification by evidence drawing on something more than simple assertion."[38]

47. It is clear that the Court of Appeal was not characterising the entirety of the Appellant's evidence as simple assertions, but rather was focused on the specific points relating to parts of the Hansen test that were not met by the CDF. For example, timeframes for additional restrictions and consideration with other less rights limiting alternatives.[39]

48. Turning to the evidence presented by the CDF and his witnesses on the specific points listed by the Court of Appeal, most of the evidence is focused on why it is important for the Armed Forces to be deployable. In deciding that this purpose was sufficiently important to justify the limitation of rights, the Court of Appeal accepted this evidence.

49. What the CDF and his witnesses failed to adequately address were the parts of the Hansen test identified by the Court of Appeal, being:[40]

    49.1 Whether the affected rights were restricted no more than reasonably necessary, and

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[36] These submissions, at [73].
[37] Appellants' Submissions on Appeal at [68].
[38] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [155] [05.0053].
[39] At [155] [05.0053].
[40] At [154] [05.0053].

49.2 Whether the limiting measures imposed by the TDFO are proportionate to the objective sought.

50. Both these points require evidence of how the TDFO contributed to the objective of maintaining the operational efficacy of New Zealand's Armed Forces by ensuring that members are able to be deployed was achieved. The only evidence on this point was, as accurately described by the Court of Appeal, simple assertions:

50.1 From the CDF, who said that the variations implemented by the TDFO were "to achieve consistency in the application of the discharge process"[41]

50.2 From Brigadier Weston, whose evidence was that the process prior to the TDFO was "superfluous" and to ensure "consistency of decision making".[42]

51. The NZDF has conducting operations for many years prior to the TDFO, and there was no explanation from the CDF or his witnesses as to how "consistency in decision making" would meaningfully contribute to the objective of maintaining the operational efficacy of New Zealand's Armed Forces by ensuring that members are able to be deployed. Without a sufficient level of detail, the Court is unable to assess whether the limitation on rights is proportionate to the objective sought.

52. Further, the "administrative consistency" asserted by the deponents is not justification for the limitation of fundamental rights.[43]

53. The Court of Appeal correctly avoided the terms "deference" and "margin of appreciation" as they do not accurately characterise the relationship between executive decision makers and an independent judiciary.

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[41] Affidavit of Air Marshal Kevin Ronald Short of 29 June 2022, at [44] [201.0171].
[42] Affidavit of Brigadier Matthew David Weston of 29 June 2022, at [76.1] to [76.3] [201.0200] – [201.0201].
[43] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [153] [05.0052]; see also Cooke J in *Yardley v Minister for Workplace Relations and Safety*, above n 23, at [77].

54. However, it is clear that the Court of Appeal searched for opportunities to give the CDF latitude on appropriate matters. For example:

54.1 The Court of Appeal explicitly gave close attention to the evidence of the CDF, stating that his evidence was "… central to an assessment of the justification for the TDFO, as required under s 5 of NZBORA."[44]

54.2 The Court of Appeal expressly acknowledged the importance of not intruding on the role and responsibilities of the CDF, stating that "there is force in Ms McKechnie's submission that an overly granular approach on the part of the Court risks intruding on the role and responsibilities of the CDF."[45]

54.3 The Court of Appeal accepted that there was sufficient evidence to justify the importance of having NZDF personnel vaccinated.[46]

54.4 The Court of Appeal made clear that it was not saying it had determined that the limitations were actually unjustified. Rather, it said that the evidence (or lack thereof) was insufficient for the Court to be satisfied that they were justified.[47]

54.5 In its redress decision, the Court of Appeal took only minimal intervention, requiring the CDF to review the TDFO and related instruments.[48] The Court of Appeal expressly considered the need not to engage in an "inappropriately granular way" with the performance of the CDF of his responsibilities in relation to the Armed Forces.[49]

55. It was only where there was no evidence on a point that the Court of Appeal was unable to accept the position of the CDF. In the absence of

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[44] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [55] [05.0022].
[45] At [167] [05.0056].
[46] At [151] and [154] [05.0052].
[47] At [158] [05.0054].
[48] At [168] [05.0056].
[49] At [171] [05.0057].

evidence on a particular point, where the burden is on the Crown to satisfy the Court of that point, the only decision open to the Court of Appeal was to find for the Four Members.[50] Anything less would be to abdicate the role of judicial scrutiny to the executive decision maker.

56. The Appellant submits that there was "a wealth of evidence" about how the measures related to the objectives, but the evidence referred to by the Appellants gives no explanation as to the link between the claimed reasons for the TDFO and objective sought. For example, how does having a truncated warning period, or making Service Chiefs the decision-makers for retention, contribute to the objective of maintaining the operational efficacy of New Zealand's Armed Forces by ensuring that members are able to be deployed? The Appellants do not say, either because they have neglected to do so or because that evidence does not exist.

57. This case was not evenly balanced. The finding of the Court of Appeal that the CDF "fell well short" of providing justifications for the TDFO was only one reason for the decision under appeal.[51]

58. Deference, or leeway, can only help a decision-maker to a point. For example, a mere assertion that a limiting measure is proportionate to a limit on an affected right will not be sufficient.

Unvaccinated members on camps and bases

59. One of the limiting measures of the TDFO was the blanket restriction on unvaccinated members of the Armed Forces from entering camps and bases.[52]

60. Again, there is a paucity of evidence as to how this limiting measure contributes to the objective of maintaining the operational efficacy of New Zealand's Armed Forces by ensuring that members are able to be deployed.

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[50] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [150] [05.0052].
[51] At [157] [05.0053].
[52] TDFO at [17] – [19] [303.0411]; see also *Four Members of the Armed Forces v CDF & AG*, above n 1, at [139] [05.0048].

61. There is no explanation why this restriction was applied only to uniformed members of the Armed Forces but not unvaccinated civilian employees. There was no distinction between those in shared barrack accommodation, with those in individual accommodation or remote locations away from others for example ranges.

62. The Appellants describe the blanket restriction on unvaccinated members of the Armed Forces from entering camps and bases as "evidence based".[53] But there was no evidence adduced by any witness for the CDF, save for the simple assertion that this blanket restriction would contribute to the objective sought.

Other members undeployable

63. The Appellants argue that the Court of Appeal failed to engage with evidence of Brigadier Weston when it criticised the CDF for not engaging with the question of why these measures should apply to members who are already, for other reasons, not deployable.[54]

64. This point relates to the more than one third of the Armed Forces who are undeployable domestically, and the more than half than half who are undeployable internationally.[55]

65. The number of undeployable members make up the majority of the Armed Forces, against the 55[56] unvaccinated members out of a total of 9,251 members of the regular force.[57]

66. The evidence of Brigadier Weston was effectively that some undeployable members could become deployable if they resolved whatever issue was preventing their deployment.[58] No detail was given as to what percentage of these issues might be easily resolved, nor why the same tolerant approach could not be taken for the evolving situation relating to unvaccinated personnel – this point being demonstrated by

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[53] Appellants' Submissions on Appeal at [78].
[54] At [82]; *Four Members of the Armed Forces v CDF & AG*, above n 1, at [155] [05.0053].
[55] Exhibit DR-2 to Affidavit of Major Daniel Reddington [301.0079].
[56] *Four Members of the Armed Forces v CDF* [2022] NZHC 2497 at [108] [102.0360].
[57] Affidavit of Air Marshal Kevin Ronald Short, dated 29 June 2022, at [9] [201.0162].
[58] Affidavit of Brigadier Matthew David Weston dated 29 June 2022 at [26] [201.0185].

the retraction of COVID-19 vaccine booster requirements shortly after the Court of Appeal judgment.[59]

67. This issue was why Cooke J set aside a previous vaccine mandate that applied to member of the Armed Forces, in part because it was not apparent that this mandate made a material difference to achieving the objective sought.[60]

68. Unboosted personnel are effectively unvaccinated six months after the primary vaccination,[61] there is no explanation from the Appellants as to why their continued service is able to be tolerated but subjecting a very small number of unvaccinated members to the heightened limitations caused by the TDFO.

Further evidence

69. The Appellants say that 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."[62]

70. This is not correct. The Court of Appeal said that the limitations on rights "… required justification by evidence drawing on something more than simple assertion."[63] The Court of Appeal then went on to suggest some examples of what this evidence could be, but this did not impose any explicit requirement on the CDF other than meeting his fundamental obligation to satisfy the Court that the limitations on rights were demonstrably justified.

71. It is not accepted that the TDFO was a "minor procedural change" as is suggested by the Crown.[64] Regardless, the nature of the procedural

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[59] Affidavit of Colonel Charmaine Maurita Tate of 17 March 2023, at [12] – [13] [401.0006].
[60] *Yardley v Minister for Workplace Relations and Safety*, above n 23, at [105].
[61] Affidavit of Dr Town of 7 September 2022 at [70] [201.0241].
[62] Appellants' Submissions on Appeal at [85].
[63] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [155] [05.0053].
[64] Appellants' Submissions on Appeal at [87].

change is not the issue. It is the resulting limitation on rights which, as detailed above, was substantial.

72. That the TDFO was enacted during the COVID pandemic is not a reason for the CDF to avoid normal judicial scrutiny. The COVID vaccine first became available in the NZDF on 26 February 2021.[65] The TDFO was not implemented until 25 May 2022, a period of nearly 15 months.

73. The implementation of the TDFO followed a sequence of legal challenges to vaccine requirements on members of the Armed Forces:

73.1 On 16 December 2021 the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 (**the Order**) was enacted, which imposed a vaccine mandate on members of the Armed Forces and Police.

73.2 On 25 February 2022, following an application for judicial review from members of the Armed Forces and Police, Cooke J set aside the Order as unlawful because it was an unjustified limitation on rights.[66]

73.3 On 12 April 2022, the CDF issued CDF Directive 13/2022, which provided direction regarding vaccination of members of the Armed Forces in a way that limited affected rights.

73.4 On 13 May 2022, following an application for judicial review by members of the Armed Forces, the CDF rescinded CDF Directive 13/2022.

73.5 On 25 May 2022, the CDF issued the TDFO, which is the subject of these proceedings.

74. This sequence of cases, which were all brought by individual members of the Armed Forces, show that the CDF was abundantly on notice that if he imposed vaccine requirements in a way that limited affected rights, that limitation must be justified.

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[65] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [37] [05.0016].
[66] *Yardley v Minister for Workplace Relations and Safety*, above n 23, at [108].

75. The CDF, who is in command of a well-resourced and large government entity, had ample time to collect information to justify the limitations on rights caused by the TDFO.

UK approach and other reasonable alternatives

76. The Appellants are critical of the evidence that the UK Armed Forces required its members to receive the COVID vaccine depending on the duties they were undertaking, and that the consequences of declining vaccination when required were determined on a case-by-case assessment by local commanders.[67]

77. The Appellant says that the difference in approach between the NZDF and UK Armed Forces is essentially what schedule – baseline or enhanced – the COVID-19 vaccine should be placed in. The Appellate say that this was not part of the proceedings, and so it was not an issue before the Court.[68]

78. This argument fails to recognise the reason that this evidence was put forward – it was a less rights limiting alternative to the TDFO. The burden was on the CDF to satisfy the Court why this alternative was not reasonably available, and he did not do so.

79. This was not the only less rights limiting alternative put forward by the Four Members:[69]

    79.1 The COVID-19 vaccine could have been added to the enhanced schedule, but not the baseline schedule.

    79.2 The vaccination requirements could be applied to people joining the Armed Forces, but the small number of unvaccinated existing members could be permitted to continue serving.

80. These alternatives were also advanced during the High Court hearing.[70] The evidence from the Appellants on these points was either non-

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[67] Appellants' Submissions on Appeal at [92]; Exhibit DR-7 of Major Reddington of 8 September 2022 [301.0142].
[68] At [93].
[69] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [145] [05.0050] – [05.0051].
[70] Transcription for Wellington High Court hearing [102.0280].

existent or inadequate. The Appellants did not apply for leave to adduce further evidence in the Court of Appeal or Supreme Court.

81. When counsel for the Appellants was asked what evidence the CDF had given that these less rights limiting alternatives were not available, she conceded that there was a "gap" in the evidence on those points.[71]

82. The Crown contends that evidence before the Court on less rights limiting measures was 'extraordinarily slender given the weight the Court [of Appeal] placed on it'.[72] This is misconceived for two reasons:

82.1 First, the evidence in question was required to do no more than put the CDF on notice that a different, less rights limiting measure might be available. Once that purpose had been fulfilled, the CDF was required to address the point by adducing the appropriate evidence. The CDF failed to do this, which leads to the second issue:

82.2 The Crown's contention misconstrues where the burden of proof lies at this point in the s 5 test, just as it did before the Court of Appeal.[73] The CDF had every opportunity to adduce evidence to address the point.

83. It is a fundamental principle of law that as part of its burden in justifying limitations on rights, it was for the CDF to satisfy the Court that there were no less rights limiting alternatives available. There was inadequate evidence on this point, and no amount of deference can save the Appellants.

Approach to Deference in this Case

84. There is common ground between the parties in relation to some points of law:

84.1 The CDF is an executive decision maker whose decisions are subject to judicial scrutiny.

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[71] Memorandum of Four members of 26 April 2023, at [20] [102.0471], see also *Four Members of the Armed Forces v CDF & AG*, above n 1, at [145] [05.0050].
[72] Appellants' Submissions on Appeal, at [91].
[73] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [151] [05.0052].

84.2 The *Hansen* test, applied in accordance with the relevant authorities is the correct test to assess if a limitation on an affected right is justified under s 5 of NZBORA.

84.3 The courts should not exercise any degree of deference in relation to questions of law,[74] these being the sole domain of the courts to determine.

84.4 The ultimate question of whether a purported limit on guaranteed rights is justified is a legal question to be determined only by the courts on their application of the s 5 analysis.[75]

84.5 The burden is on the CDF to satisfy the Court that his rights limiting measures, in this case the TDFO, are justified on an application of *Hansen*.

Approach to deference was appropriate

85. There is a counterpoint to the degree of regard that may be afforded. The implementation of the TDFO was not a decision which is at the more extreme end of the spectrum of technical or constitutionally important decisions the CDF may make. For example, the issuing of operational rules of engagement, or operational doctrine, would be areas the Court may have greater regard to the CDF in relation to.

86. Relevant to this point is that the CDF already enjoys considerable legal protection in relation to how he commands members of the Armed Forces. For example:

86.1 The CDF may declare certain activities exempt from the application of the Health and Safety at Work Act 2015, which would otherwise afford a degree of protection to members of the Armed Forces.[76]

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[74] Appellants' Submissions on Appeal, at [40].
[75] At [1].
[76] Health and Safety at Work Act 2015, s 7(5).

86.2 Members of the Armed Forces are not "employees", meaning that they cannot raise a personal grievance or otherwise access the Employment Relations Authority or Employment Court.[77]

87. These additional legal restrictions on members of the Armed Forces limit how the CDF is subject to judicial scrutiny and should temper the Court's regard to how the CDF can limit the rights of members of the Armed Forces, especially in relation to their continued service as in this case.

88. CDF is empowered by the Defence Act 1990 to make secondary legislation subject to a caveat – that secondary legislation must not be inconsistent with any other enactment.[78]

89. The TDFO was made under this provision and as such it was secondary legislation. It was not a written order as you would see in an operational setting, nor was it mere policy. The Four Members submit that the more caution should be taken before affording heightened deference when assessing secondary legislation.

Deference to evidence

90. In criticising the Court of Appeal judgment, the Crown invites this Court to compare the evidence filed by each party. In doing so the Crown makes two errors:

90.1 First, the burden is on the CDF to satisfy the Court that less rights limiting measures were not reasonably available. This was not done for any of the alternatives advanced by the Four Members, even the availability of the more targeted Enhanced Schedule, which would have been well known to the CDF.

90.2 Second, the Appellants attempt to compare evidence of the reasons for the TDFO against evidence filed by the Four Members discussing the existence of less rights limiting alternatives.[79] This comparison is inappropriate as each piece

[77] Defence Act 1990, s 45(5).
[78] Section 27(1).
[79] Appellants' Submissions on Appeal at [8].

was adduced to address different limbs of *Hansen* and were therefore subject to different burdens and thresholds. There was no burden on the Four Members. It is difficult to understand what comparing evidence on these different points would achieve, except perhaps to undermine the fundamental principle that the burden was on the CDF to satisfy the Court that that limitation on rights was justified.

91. The Crown contends that "It is no abdication of the judicial role to defer, when appropriate, to the decision maker's assessment of elements of the justification test".[80] This can only be true to the extent that the decision maker has in fact assessed the elements in the test and produced evidence that said assessment has been made. Outside of this, any deference afforded would be to a mere assertion that the element in question was justified.

92. This point was the focus of Cooke J in *Four Aviation Security Service Employees*:[81]

> As Lord Hoffmann observed a question of law is a question for the Court. Here there is no question of deference. The Court is not reviewing the decision of the Minister, it is reviewing the legality of the measure that was imposed by his decision. So it is not a question of deferring to the views of the Executive.

93. The Four Members submit that for this Court to allow the appeal based on deference to the CDF in the manner submitted by the Crown would be to defer on a point of law within the s 5 test.

94. In fact, the Court of Appeal explicitly stated that it was not saying that the measure was unjustified, just that at least insofar as the TDFO provided for mandatory retention reviews, this had not been shown to be a reasonable limit on the appellants' rights that can be demonstrably justified in a free and democratic society.[82]

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[80] Appellants' Submissions on Appeal, at [48].
[81] *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26, at [82].
[82] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [165] [05.0055].

95. The use of the words "demonstrably justified" in s 5 of NZBORA reinforces the fundamental principle that it is for the decision-maker to demonstrate, beyond simple assertions, that where guaranteed rights are limited, that limitation is justified.

96. The CDF is anxious that the Court grants him "deference" mainly due to what he says is his unique constitutional position. But this goes both ways, and the CDF must defer to the Courts in determining questions of law.

97. The Crown relies on this Court's judgment in *Moncrief-Spittle*. That case featured a "one-off" decision made in an operational context,[83] whereas the TDFO is a policy affecting all members of the Armed Forces, and is a framework which individual decisions are made within. While it is true that latitude or leeway afforded to decision-makers will vary according to the context, the Four Members invite the Court's caution on how these circumstances differ from those in *Moncrief-Spittle* and other cases in which considerable latitude was afforded to decision-makers.

98. This appeal is not a case in which evidence submitted by the CDF justifying the particular limitations was persuasive. If competing evidence was put forward by the CDF on the relevant points, weight may have been afforded to his consideration of evidence, and latitude given due to his expertise. However, the CDF produced no evidence to suggest that he had assessed reasons why the approach under DFO 3 and DFO 4 was insufficient to achieve the relevant objectives, and how the TDFO cured that insufficiency.[84]

Deference in redress

99. The Crown asserts that the Court of Appeal erred by "effectively stepping into the shoes of the expert CDF, leaving him with no discretion to choose between a range of reasonable measures…".[85] This is incorrect. The redress ordered by the Court of Appeal was only that the CDF reconsider his decision to implement the TDFO, and he was free to

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[83] *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 24, at [85].
[84] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [155] [05.0053].
[85] Appellants' Submissions on Appeal at [7].

implement whatever reasonable measure he wishes – provided it is lawful. It is difficult to conceive of a less intrusive remedy and greater regard to the CDF on this issue.

Deference: No Error of Law

100. The Crown says that the Court of Appeal "did not consider the expertise of the CDF at all as part of the proportionality test. No leeway was given."[86] This is wrong, for the reasons below.

101. The Court of Appeal had regard to the CDF and the context of the case wherever possible, as detailed above.[87]

102. It was not that the CDF gave evidence that was disregarded by the Court of Appeal, nor that the Court of Appeal resolved conflicts in evidence against the CDF. The Court of Appeal found that CDF did not provide focused justifications for the limitations on rights cause by the TDFO. There was a simple lack of evidence. The Court of Appeal assessed the evidence of the Appellants as "falling well short" of providing justification.[88]

103. The Crown also says that the Court of Appeal "did not demonstrably give any weight to the CDF's judgement in considering whether the measure was justified."[89]

104. The difficulty with this submission is that the question for the Court of Appeal was never whether the measure, being the TDFO, was justified. The issue was whether the limitation on affected rights was justified which is a question of law. This is an important distinction, because while the Court can have regard to CDF opinion on whether a certain course of action is justified, the CDF cannot ask the Court to defer to him on whether a limitation on rights is justified because this is fundamentally a question of law.

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[86] Appellants' Submissions on Appeal, at [32].
[87] These submissions, at [73].
[88] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [157] [05.0053].
[89] Appellants' Submissions on Appeal, at [5].

105. The HRC correctly argues against the use of the term "deference" because they describe an abdication by the Court from its role. The Four Members submit that the arguments of the Appellant go to far, and amount to a suggestion that the Court abdicate its constitutional role as a check on executive power.

106. The Four Members agree that *Moncrief-Spittle* is one leading authority in this matter. However, the Court of Appeal's judgment was entirely consistent with *Moncrief-Spittle* and other relevant authorities.

107. This Court should take care not to examine the issue of deference, which is advanced as a question of law by the Crown, in a way that in effect is a rehearing of the case.

108. The Court of Appeal adopted a cautious approach to this matter, giving full and proper consideration to the evidence and arguments of the Appellants. There was no error of law.

SECOND GOUND OF APPEAL – "INCREMENTAL" LIMITAITON

109. The TDFO is a limitation on rights distinct from limitations imposed by DFO 3 and DFO 4 because it was specifically focussed on COVID-19.[90]

110. The Court of Appeal and Crown have chosen to conceive the TDFO by reference to the preexisting policy under DFO 3 and DFO 4, making it an incremental or additional limit to the status quo ante. Regardless of how the TDFO is framed, it amounts to a greater limitation on rights and it is for the CDF to satisfy the Court that this limitation is demonstrably justified.

111. Under the TDFO, any member not vaccinated against COVID-19 was to have their continued service reviewed,[91] the outcome of which was likely discharge.[92] This was a more severe approach to vaccination against COVID-19 than under DFO 3 and DFO 4.[93]

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[90] Appellants' Submissions on Appeal, at [1], the Crown appreciates the nature of the TDFO being specifically geared towards COVID-19.
[91] DFO(T) 06/2022 at [12] [303.0408]; *Four Members of the Armed Forces v CDF & AG*, above n 1, at [48].
[92] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [140] [05.0048].
[93] At [153] [05.0052].

112. The Crown's assertion that the right to refuse medical treatment is "binary" ignores the manner and degree to which the right has been limited.[94] This is not a case where members are "unable" to refuse medical treatment, as the Crown claims.[95] Rather, the consequences of non-compliance with the TDFO impose coercive pressure on the members ability to refuse.

113. The s 5 analysis test requires the nature and degree of limitation to be considered. This is done in two ways:

113.1 First the proportionality assessment. It would be impossible to meaningly compare the limitation of a right with the importance of the objective sought, if the limitation could not be considered in degrees.

113.2 Second, whether there are other less rights limiting measures available. If a right is either limited or it is not, then there could be no other "less" rights limiting measures.

114. In *New Health*, this Court discussed degrees to which s 11 could be limited in the context of fluoridated water. This Court found that, relative to the minimal intrusion on s 11 imposed by fluoridation, more rights limiting scenarios were conceivable.[96] This conclusively demonstrates the incremental or distinct way that s 11 may be limited.

115. Regardless of whether the TDFO is conceived as an incremental or distinct limitation on s 11, the policy under the TDFO is unique and must be demonstrably justified. It is dogmatic and overly absolute to consider the limitation of rights in a binary way.

116. The NZDF has, for decades, required vaccination without legal challenge being brought. It was only when the TDFO and other COVID related measures were implemented, and the degree of coercion on affected members of the Armed Forces increased, they application was made to the High Court for judicial review. This does not mean that the Four

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[94] Appellants' Submissions on Appeal, at [100].
[95] At [100].
[96] *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, at [135] per O'Regan J.

Members concede that the previous requirements were justified, nor are the Four Members required to challenge the wider vaccine requirement. This case is, and has always been about, the TDFO and the resulting limitation on affected rights.

117. In *Moncrief-Spittle* this Court stated: "The extent of any reasonable limits is a legal question".[97] The use of the word "extent" clearly supports the view that it is not just the fact that an affected right has been limited, but the nature and quality of that limitation.

118. Whether the Court agrees that the TDFO is a distinct limitation, or it is an incremental limitation, is immaterial to the fundamental principle that the CDF must satisfy the Court that any limitation on affected rights is demonstrably justified. This ground of appeal should not succeed.

THIRD GROUND OF APPEAL – PLEADINGS

119. The Crown challenges the Court of Appeal's approach to the pleadings on two grounds:

119.1 That the pleadings themselves were improperly raised, and

119.2 That the evidence was nevertheless insufficient.

120. Both limbs of this challenge fail to address where the burden in s 5 lies. It is for the authority imposing the limitation to satisfy the elements in s 5.[98] This includes identifying the relevant alternatives and explaining, by reference to evidence, why those alternatives are unavailable.[99] The Crown's attempts to challenge the pleadings shows it has misunderstood this burden and its purpose.

121. In any case, the Court of Appeal accepted that evidence of less rights-limiting measures was available to the CDF, holding that the NZDF was

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[97] *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 24, at [84]
[98] *R v Hansen* [2007] NZSC 7 at [108] per Tipping J.
[99] Amended Statement of Claim 4 June 2022 at [103] – [112] [101.0044] – [101.0045]; see also Submissions for the Human Rights Commission, at [43], referring to the "core principle" in s 5 of NZBORA.

"squarely on notice" of this pleading.[100] On a proper application of the s 5 test the CDF would need to justify its "more intrusive measures".[101]

122. The decision of the CDF must have been justified at the time it was made.[102] Some of the alternatives argued by the Four Members in the High Court were things that should have been plainly obvious to the CDF and his advisors. For example, the alternative that the COVID-19 vaccine be on the enhanced NZDF Vaccination Schedule would have been apparent because this schedule existed for other vaccinations for years prior to these proceedings.

123. Justification also needed to explain why DFO 3 and DFO 4 were insufficient to achieve the relevant objectives.[103]

124. In any event, the CDF was well and truly on notice of all specific alternatives prior to the High Court hearing,[104] and had every opportunity to adduce evidence in response in the High Court, and by leave in the Court of Appeal and Supreme Court. They have not done so.

125. In the absence of this evidence, challenging the sufficiency of pleadings and the degree of deference afforded to the CDF was the only avenue of appeal open to the Crown.

APPEAL OUTCOME AND COSTS

126. If the Supreme Court does not allow the appeal, the Court of Appeal judgment will stand.

127. However, if the Supreme Court decides to rule on any question of law advanced by the Appellants, for the reasons below it is submitted that the Court of Appeal outcome as it relates to the parties should remain undisturbed.

128. As well as being relevant to the issue of costs, in resisting interim orders in the High Court, the CDF made several undertakings relating to

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[100] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [156] [05.0053].
[101] At [156] [05.0053].
[102] *Yardley v Minister for Workplace Relations and Safety*, above n 23, at [80] and footnote 40.
[103] *Four Members of the Armed Forces v CDF & AG*, above n 1, at [155] [05.0053].
[104] Written submissions of 8 September 2022 filed by the Four Members prior to the High Court hearing, at [121] – [122] [101.0232] – [101.0233].

affected members of the Armed Forces which are contingent on the outcome of these proceedings.[105] Therefore, even though the TDFO has now been withdrawn following the Court of Appeal judgment, the outcome of this appeal is not moot.

129. Further, while the CDF has now withdrawn the TDFO, upholding the ruling of the Court of Appeal that the relevant parts of the TDFO were unjustified is an important measure in promoting a culture of justification and fairness to the parties.

130. This is especially important given the litigation background to this case, which is detailed above.[106] These proceedings were brought by individual members of the Armed Forces at considerable personal expense and to date the CDF has failed to satisfy the Court that the series of vaccine mandates he has implemented have been lawful.

131. The Four Members, who as members of the Armed Forces are limited in how they may challenge decisions made by the CDF, have brought proceedings responsibly on an issue which is of considerable public interest. These proceedings also were brought on an issue which affected people other than the Four Members.[107]

132. The Four Members ask the Court to exercise its discretion to allow an uplift of 50% in the normal daily rate of costs and that the Court adopt the daily rate of $3,800 as in Trans-Tasman Resources.[108]

133. Further, this Court is asked to make no direction to the costs award in the Court of Appeal other than that it stand, and remit this the issue of costs for the High Court proceedings back to that Court with an order that it be determined in favour of the Four Members.

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[105] CDF Memorandum Opposing Interlocutory Application of 21 October 2022, at [6] – [7] [102.0379] – [102.0380].
[106] These submissions, at [73].
[107] Amended Statement of Claim of 4 June 2022 at [5] [101.0036]; see also affidavits of witnesses in Evidence Volume 1 at tabs 7-18 [301.0056] – [301.0144].
[108] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2022] NZSC 63, at [9].

CONCLUSION

134. In conclusion, the appeal should not be allowed because:

134.1 The Court of Appeal afforded the CDF appropriate latitude and regard. It was only on points for which the CDF gave wholly inadequate evidence, or no evidence at all, that the Court of Appeal appropriately did not acquiesce to the CDF's position.

134.2 The TDFO imposed a limit on affected rights that was distinct from previous approaches, for which it was incumbent on the CDF to demonstrably justify. The Court of Appeal correctly focused on the specific limitations caused by the TDFO and related instruments, which has always been the focus of these proceedings.

134.3 The Appellants pleadings were adequate, because they squarely included in their pleadings that the TDFO was an unjustified limitation on their rights, which inherently contains an assessment of whether there are less rights limiting alternatives available. Further, there was no procedural unfairness to the Appellants who were on notice of the specific alternatives argued by the Four Members prior to the High Court hearing.

135. In *Moncrief-Spittle*, the Court declined to provide more definitive direction on the issue of regard to be given to the decision-maker.[109] In his seminal article, Professor Taggart says: "It is impossible to articulate a clear set of rules in relation to deference. All attempts degenerate into lists of factors, with contestable weights. As we know, context is everything."[110]

136. The Four Members say that the same reasoning applies here. Further judicial direction on this issue is not needed or desirable, and the appeal should be dismissed.

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[109] *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 24, at [86]
[110] "Proportionality, Deference, Wednesbury" [2008] NZLR 423 at, at 458.

137. Even if the Supreme Court agrees with the Appellants on any specific points of law, the Supreme Court should uphold the outcome of the Court of Appeal because this affects the affected members of the Armed Forces.

138. The appeal should be denied. The Respondents seek costs as detailed above.

3 October 2024

Matthew Hague | Isaac Woodd

Counsel for the Respondents

TO: The Registrar of the Supreme Court of New Zealand

AND TO: The Appellants

AND TO: The Human Rights Commission

LIST OF AUTHORITIES

Statutes

1. Defence Act 1990.
2. New Zealand Bill of Rights Act 1990.
3. Health and Safety at Work Act 2015.

Cases

New Zealand

4. *Four Members of the Armed Forces v CDF & AG* [2024] NZCA 17.
5. *Make it 16 Incorporated v Attorney General* [2022] NZSC 134.
6. *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.
7. *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459.
8. *GF v Minister of COVID Response* [2021] NZHC 2526, [2022] 2 NZLR 1.
9. *Colley v Auckland Council* [2021] NZHC 2366.
10. *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26.
11. *R v Hansen* [2007] NZSC 7.
12. *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2022] NZSC 63.

Overseas

13. *R (on the Application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185.

Secondary Material

14. Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423.
15. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggart (ed), *The Province of Administrative law,* Oxford, Hart, 1997, 279.
16. Philip A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021).

AGREED CHRONOLOGY

#	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 amended to include the COVID-19 booster vaccination in the NZ Vaccination Schedule.		[[102.0248]]

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 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.		[[301.0056]]
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		[[303.0408]]

		(meaning retention review process was initiated).		
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 for non-boosted members were to be discontinued.		[[304.0740]], [[304.0741]]
19	18 October 2022	DFO(T) amended through the issuing of DFO(T) 18/2022.		
20	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	[[401.0006]], [[401.0009]]

			the basis of vaccination status.	
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 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.		[[303.00742]]
24	15 August 2023		[redacted] will be subject to a further retention review process	[[401.0009]]