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IN THE SUPREME COURT OF NEW ZEALAND SC 20/2024

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 17

BETWEEN **CHIEF OF DEFENCE FORCE**

CHIEF PEOPLE OFFICER

ATTORNEY-GENERAL

Appellants

AND **FOUR MEMBERS OF THE ARMED FORCES**

Respondents

Hearing:	08 October 2024
Court:	Glazebrook J Ellen France J Williams J Kós J Miller J
Counsel:	U R Jagose KC, D P Nield and S R Hiha for the Appellants M I Hague and I B Woodd for the Respondents A S Butler KC, R A Kirkness and W H Ranaweera for Te Kāhui Tika Tangata | Human Rights Commission as Intervener

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CIVIL APPEAL

SOLICITOR-GENERAL:

E ngā Kaiwhakawā, tēnā koutou. Kei kōnei mātou mō Mr Nield, mō Ms Hiha mō te Karauna. Your Honours, we're grateful for your Honours' leave for Colonel Kennedy-Good to sit at counsels' bench.

ELLEN FRANCE J:

Tēnā koutou.

MR HAGUE:

May it please this honourable Court. Counsel's name is Hague and I appear for the respondents along with Mr Woodd.

ELLEN FRANCE J:

Tēnā korua.

MR BUTLER KC:

Ata mārie, e ngā Kaiwhakawā. Ko Andrew Butler tōku ingoa me Robert Kirkness me Hansaka Ranaweera tēnei mō Te Kāhui Tika Tangata. Butler, Kirkness, Ranaweera, for the Human Rights Commission.

ELLEN FRANCE J:

Tēnā koutou. Before you start, Ms Jagose, a question for you, and then a couple of questions that are really to put everyone on notice, of the questions the Court has. In terms of the question for you, we'd be assisted if you would go through and identify the changes that were made to DFO 3 and just explain the justifications in relation to each of those. Obviously you can do that at a time that works for you, and then I'll ask Justice Miller to put a question, which is a more general one, followed by Justice Glazebrook.

MILLER J:

Just to let you know how I'm disposed to see the scope of the case, if you like, we indicated to counsel that it was, we're interested in the question of deference, and if I use that term understand that we appreciate that there is a

controversy about it, you can call it latitude if you wish, we're aware of that. It seemed to me that deference mattered in a couple of respects, and they derive from the Armed Forces Discipline Act 1971, particularly section 72, which wasn't used here but which contains a number of considerations which seem relevant here. The first is the idea of operational effectiveness, which requires that individual staff be ready to deploy, that the unit is ready to deploy, and there'd be an upstart in reserve, and that seems connected to the deployment in New Zealand of the Armed Forces during the COVID pandemic, and second is the idea of military discipline, the importance of complying with an order, in this case that order effectively happened when the vaccine was put on the schedule, and so those, the question is to what extent those considerations require a civilian court to defer, and at what stage of the analysis, is it just at the remedial stage or is it at the point where one gauges both necessity and proportionality.

SOLICITOR-GENERAL:
Thank you your Honour.

ELLEN FRANCE J:
Justice Glazebrook?

GLAZEBROOK J:
Yes, my question was perhaps also a wider one in the sense that as soon as it is conceded, which it seems to be here, that making the vaccine compulsory was necessary and justified, when you get to the means to bring that into operational necessity I suppose, and what the consequences are, should the Court be looking at those consequences in any way other than it would look at in a judicial review, unless you're looking on an individual level, where an individual level a person would be able to say, well, these operated unfairly to me for these reasons, and so individually, and taking into account the Bill of Rights, I should have been dealt with in this way. So are we really looking

at a systemic issue or are we looking at it at an individual basis where in any sense it would have to be taken into account at that stage.

SOLICITOR-GENERAL:
Thank you your Honour.

ELLEN FRANCE J:
Right, away you go.

SOLICITOR-GENERAL:
Happy to say to begin that all of those matters will be addressed as we go. With your Honours leave I propose to divide – sorry, I should mention the timetable. We've agreed, as between us, that the Crown will take until 12.15, the respondents until 3.00, the Human Rights Commission then half hour from 3.00, and we'll divvy up what's left in reply as is necessary.

ELLEN FRANCE J:
Thank you.

SOLICITOR-GENERAL:
I propose to lead on the first ground of appeal your Honours, that the Court was wrong in finding the TDFO, the Temporary Defence Force Order, unlawful and we say the Court went wrong by not giving any leeway or any weight either to the context or to the CDF's assessment of what was required for all the objectives of force readiness.
1010

Mr Neild will lead on the second and third grounds. The error we say occurred in thinking about an incremental limit on rights and the challenge that we say where the Court found against us was not part of the case as pleaded and we say that's important here because the scope of any challenge will determine the burden of evidence that the Crown has to meet, and Ms Hiha will be working the ClickShare I'm happy to say.

I'll begin by outlining the key aspects of the context and the facts and the Court of Appeal's decision. But first can I start in the High Court in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 19 NZELR 125 because that's relevant to the facts here where His Honour Justice Cooke set aside the Minister's COVID order that would have required all police and all NZDF members and civilians alike to be vaccinated. His Honour noted that in respect of the NZDF there were already orders in place that required regular forces to be vaccinated.

Your Honours don't need to go there but if you want the paragraph references are 82 and 83. Chief among the reasons for the Court setting aside that order as not being a justified limit on rights was the finding that the evidence didn't satisfactorily show why a relatively small number of unvaccinated people in those work forces made a material difference. And as the evidence in this case shows, with that order set aside, the CDF made the Temporary Defence Force Order, which I'm going to call the TDFO, and through that order amended the existing processes that address a member's failure to meet the readiness requirements and, as the evidence will show in this case, does show, the relatively small number of unvaccinated members of the Defence Force makes a material difference.

So those processes, the ones that already existed, and the entry of the COVID-19 vaccination requirement onto the list of vaccines, as your Honour began with, on the baseline schedule aren't challenged here. And we say that the CDF, the Chief of Defence Force, has provided the Court with evidence to show that requiring COVID vaccination for Defence Force members is required to meet the objective again unchallenged as an important objective of having an armed force maximally and flexibly ready to meet the demands required of him to have a Defence Force ready.

I want to highlight the unique constitutional context to maintaining the Armed Forces of New Zealand. If I can ask that – your Honours probably already have the Court of Appeal judgment in front of you and Ms Hiha will bring up these matters that I want to go through. Chief of Defence Force, I'll start

with him, Air Marshal Short, which is at [201.0161] and you'll see there at paragraph 5 –

KÓS J:
So this is the affidavit, not the judgment?

SOLICITOR-GENERAL:
Yes. "To exercise effective command of the Armed Forces, it must be maintained [that] [sic] a constant state of deployment readiness…". I don't need to read this all out to your Honours but his assessment of what a sufficient force protection measure – sorry: "This includes sufficient force protection measures to avoid sustaining capability deficits – whether in advance of deployment[s], during, or on return. Force protection includes standards of physical and [mental] [sic] fitness that are required of all members of the Armed Forces, which ensures they can discharge the duties… Individual Readiness Requirements, which incorporates vaccination requirements, ensure that all members meet the minimum standards for military service and deployability."

And if you can jump ahead to paragraphs 10 and 14, here he is setting out the constitutional significance of the NZDF: "…unique and critical function… The primary function… is to protect New Zealand from security threats and to work with…allies. The NZDF is the only agency of state that maintains disciplined forces available at short notice and which operates large-scale and integrated fleets of ships, vehicles and aircraft. As such, the NZDF is ready to conduct military operations as directed…and is able to quickly respond to military crises…also stands ready to assist civil authorities in times of emergency by providing specialised support to government agencies and first responders…"

He goes on at paragraphs 12 and 13, which I certainly won't read out, listing the strategic defence policy statement requirements of NZDF and the activities in paragraph 13 that the NZDF conduct to fulfil those roles.

So at 14: "The NZDF must be ready for a broad array of potential events and to respond to situations that are dynamic and evolving… Recent international

events demonstrate that New Zealand is facing an increasingly volatile strategic environment, requiring NZDF to focus on building and maintaining readiness to generate capabilities (including combat capabilities) so they are available to Government as and when required."

So that objective, force readiness, flexibility in being able to deliver those capabilities that are required, is critical to understanding the justification here, and it isn't actually challenged that this is an important objective that is being pursued. So I want to emphasise it but not spend too much time on it, given the lack of challenge to it.

MILLER J:

Can I just ask a detail about this because it's clear that perhaps unusually the Defence Force was being deployed in New Zealand in a time of peace and I see that that's authorised under section 9 of the Defence Act 1990, can be used "to perform any public service; or to provide assistance to the civil power in time of emergency". To what extent is the nature of the COVID-19 pandemic and the need to serve New Zealand a driver here, because it's not, one can see it implicit in some of the evidence, but I expected to see something express about the impact of the pandemic and the need, for instance, to service the MIQ facilities.

SOLICITOR-GENERAL:

There is some reference to that, although by the time that these decisions taken, May 2022, MIQ was no longer required.

MILLER J:

Finished.

SOLICITOR-GENERAL:

By the beginning of that year the MIQ requirement had gone, so there's some evidence about the requirements to maintain that workforce, but actually by the time we got to the TDFO that wasn't a driving feature.

MILLER J:
It would be useful to have the references.

SOLICITOR-GENERAL:
It will be in – I just might come back to your Honour on that.

MILLER J:
Yes.

SOLICITOR-GENERAL:
Rather than distract myself if I may. It will be in Colonel Tate's evidence. But in times of emergency, I mean of course we see the Forces being deployed, for example the Christchurch earthquakes, or Dunedin floods, and so on. So we'll come back to your Honour with those references.

The Court of Appeal accepts at paragraphs 151 and 154 that the objectives being pursued were important ones that could sustain limits on the relevant rights. Oh, I don't have the right. Sorry, it's 151 there, "Ms McKechnie", counsel for the Crown, "submitted that there was abundant evidence to justify the importance of having NZDF personnel vaccinated, and there was no evidence that outcomes would have been different on a case-by-case basis…". The Court accepts the first limb, but that wasn't the issue here. The issue wasn't whether this was an important objective being pursued.

And over, sorry, on 154 at the bottom of that page: "The relevant objectives identified… are maintaining the efficacy of the Armed Forces during the pandemic, including maximising the number of members who are deployable. We agree with the Judge", that was Justice Churchman in the High Court, "that maintaining the ongoing efficacy… is sufficiently important to justify certain limitations on the rights…". The question, of course, here is does it justify these particular limits. I want to also –

KÓS J:

So that's why Justice France asked the question, which I think we're all anxious about, which is what the particular limits that are challenged here are, because these are very generalised justifications, whereas we're looking at changes made effectively in May 2022, and which are relatively quite minor compared to the baseline, the unchallenged baseline.

SOLICITOR-GENERAL:

Quite so.

KÓS J:

One would think. Obviously the respondents don't see them as quite minor. But we need to identify what they are.

SOLICITOR-GENERAL:

Yes, I can identify what there are now, because there are three. First of all, the change was made to – sorry, the existing process – I was going to take your Honours to these documents, maybe I'll do it there, but I'll just summarise briefly the three changes.

1020

ELLEN FRANCE J:

Yes, because I think it would be useful to look at the documents.

SOLICITOR-GENERAL:

Yes, I intend to go there in a moment after I've done some context setting. There were three. The existing process commander officers could run a process to determine what the impact and consequence should be of a member's failure to meet readiness requirements and the CDF changed that in the TDFO to remove that delegation so putting it back to service – the original rule is service chiefs or delegates. So the TDFO removed that and put it back to service chiefs for the reason, as we'll go to, but they have the best strategic view of the forces and what is required for that part, Army, Navy, Air Force, to be ready.

The second change was to remove the notice requirement to be vaccinated or to meet that readiness requirement. As the CDF says, it would be more than a year that this has been a requirement and he didn't understand that he needed to provide any further natural justice about the notice requirement for that. There were notice requirements for boosters. The third change is to prevent unvaccinated members from attending bases and camps and other facilities unless that was needed for health or welfare support reasons.

ELLEN FRANCE J:

And just in terms of that last aspect, that didn't apply by this point to civilian –

SOLICITOR-GENERAL:

Quite so, your Honour, yes. The order that was set aside in *Yardley* had intended to reach civilians and was set aside and, as Colonel Tate sets out in her evidence, which we will go to, one of her documents sets out how it is proposed and why that there's a requirement for vaccination on members and a recommendation for vaccination and other measures for civilians. So we will come to those documents very shortly.

There's one further thing I want to make, a point I want to make about context, is to emphasise that service discipline and maintaining command is part of the requirement for the forces to be ready. CDF –

MILLER J:

Can I just interrupt you there. You're effectively asking us to say that *Yardley* was wrong and so it wouldn't matter that the military then had to draw a distinction between Service members and civilians on base?

SOLICITOR-GENERAL:

I don't need to say that *Yardley* was wrong.

MILLER J:

No.

SOLICITOR-GENERAL:

In fact I would put it a different way, which is to say that in the face of *Yardley* the evidence that was brought by the CDF was to address the point that the Judge found lacking there so why does it matter. Why does it matter if some people aren't vaccinated? I'm summarising, unfairly perhaps, Justice Cooke's question but that is a big press of the evidence here and the reasoning. You'll see it in the TDFO where the CDF expresses why he is making these changes. Really to attend to what was criticised in *Yardley*, I would submit.

MILLER J:

Yes, I appreciate you don't need to say it, well you don't need to show that *Yardley* was wrong, but in substance you are saying that that was an intervention which the Court should not have made and from our point of – if we were to take that view then this distinction that's being drawn between civilians and a uniformed staff wouldn't matter, it would just be a case of the military doing their best to respond to something that had been imposed on them by the Court.

SOLICITOR-GENERAL:

Mmm.

MILLER J:

Well you carry on.

SOLICITOR-GENERAL:

Well *Yardley*, I mean there were so many differences too. *Yardley* was an administrative, sorry a decision of a Minister for which the Judge thought well I don't need to defer on a matter of policy, in the same way we would say now is required. So there are too many differences, Sir, to sort of readily accept your invitation to say that *Yardley* was wrong. We certainly think *Yardley* was wrong in some respects, we might come to that, about what is the evidence, what is the evidence that was required because in large measure we will submit this is about judgement formed by the CDF about what he needs to deliver his obligation to have forces ready for anything at any time.

I was just emphasising that service, discipline, and maintaining command are a necessary part of the context here. They are part of the readiness requirements as CDF says at paragraph 34. "Concepts such as command and morale are uniquely important to the effective functioning of a military force and are essential to our ways of working."

The Chief People Officer, I've forgotten his title, Brigadier Weston, also makes this point at 88. "There are some ranks and / or positions where refusal to meet an individual readiness requirement will have an impact on service discipline. For example, if the Commanding Officer or Regimental Sergeant Major of an Army unit refused to be vaccinated, and this meant that the Commanding Officer or Regimental Sergeant Major could not undertake certain duties", his example there is MIQ, although as we just discussed that's a bit earlier in time, "this would inevitably have a negative impact on morale and service discipline."

So these are important parts of the context of what does it mean to hold an armed force ready. A range of factors go towards that, as your Honours will see shortly when we go to DFO 3. Vaccinating, being vaccinated against common infectious diseases is just one requirement, and as Brigadier Weston says, we don't need to go to it, has been a requirement of readiness in the armed forces for decades to meet the vaccination requirements.

MILLER J:
Since 1940 I think.

SOLICITOR-GENERAL:
Thank you Sir.

MILLER J:
The first time a specific – no, maybe earlier a specific vaccination requirement was introduced.

SOLICITOR-GENERAL:

And of course COVID was added to it considerably later. The final point about the context I just want to point out is that joining the armed forces in Aotearoa is done voluntarily, and it does require people to make a choice about some of the liberties that they might otherwise enjoy. I can only take that point so far of course, and perhaps it's obvious but I want to emphasise anyway, that the nature of the work one agrees to undertake means you can be ordered to be in harm's way, whether it's in peacetime or in war. You may have freedoms of movement, or freedoms of expression that are limited for reasons, say, of operational security. Vaccinations is one of those limits that are agreed to in advance and it's highly relevant, we say, to the proportionality assessment that is to be done here.

Colonel Tate deposes that on recruitment people are told they must meet baseline vaccines requirements, among other things, and to decline they wouldn't be permitted to enter the armed forces. She says that at 28 to 34. I just note that the respondent's counsel appear to say that this has been uncontroversial because until now vaccines were only required, the vaccines required were ones that most New Zealanders had received in their childhood. There's no evidence to that submission, but in any event, it seems like a rather singular lens to take, because not everybody who turns up to join the armed forces will have been, I'm also making that submission without evidence, but it seems obvious that not everybody is going to have had their vaccinations as children. So that is the context that I wanted to set.

KÓS J:

Well that's part of the context but there is some slipperiness in the way in which the Defence Force then dealt with that, and there was room for discretion, clearly in response to personnel, the service person who didn't want to undertake or follow particular directions, whether they're vaccinations or otherwise. They weren't immediately court-martialled. They weren't immediately dealt with in service breach terms. There was room for appreciation.

SOLICITOR-GENERAL:

There was some, thank you Sir, yes, that's a helpful point to have raised. That the, in fact the pleaded alternative of using section 72 of the Armed Forces Discipline Act, which would have made refusal a crime, a court-martialable crime, wasn't used, and the CDF says, well he didn't want it to be like that. He wanted it to be using the ordinary processes by which people were, met their readiness requirements.

ELLEN FRANCE J:

Just in relation to that, so you would say that could, it could have been done in that way?

1030

SOLICITOR-GENERAL:

Well it was possible to use section 72, which is an order to do something. I don't need to, and I don't want to say whether that would have been able to have been justified but it is a potential order that could have been considered and as, sorry potential power, and as the CDF says could have issued, sorry he says this at 68, which is 201.0177: "…I could have issued an order pursuant to section 72… allows for a medical officer or a competent officer…to order a person…to submit for a medical procedure 'if any such treatment or procedure, whether preventive, protective, or curative, is stated by the medical… officer who gives the order or advice to be, in his opinion, essential in the interests of the health of other members of the Armed Forces, or to be such that refusal or failure to submit thereto would constitute a potential menace to the health of other members of the Armed Forces or would prejudice the operational efficiency'…"

All three of those reasons in the section, which CDF is quoting there, are met here by the evidence that COVID vaccine was, and the health director, that's Colonel Tate, in her opinion essential in the interests of the health of other members COVID spreading a potential menace, sorry, or prejudicing the operational efficiency of any part of the Armed Forces. So to answer your Honour's question, yes it was available.

MILLER J:

Don't overlook that middle one. I haven't yet been able to track down the source of that. It seems to be in traditional legislation or rules governing the military relating to mutiny. So it's a question of service discipline I think is the history, so that's the other consideration if you like. One is discipline, another is operational efficiency.

SOLICITOR-GENERAL:

Sorry, Sir, when you say "the middle one"…

MILLER J:

The potential menace to the health. That phrase seems to have antecedence in old provisions about military discipline essentially.

SOLICITOR-GENERAL:

As opposed to the first one it's in the interest of the health of other members?

MILLER J:

Yes.

SOLICITOR-GENERAL:

I see, thank you, Sir, yes.

MILLER J:

Yes, that's right.

SOLICITOR-GENERAL:

So the CDF goes on to say, but I chose to put it on the baseline requirement for service because "it was a matter of service, rather than [of] discipline". He goes on to make the obvious point about the consequence: "Had such an order been made, all those…who [didn't] have the vaccine would have been subject to disciplinary proceedings and may have faced punitive consequences (which could have included custodial sentences and fines)." The adverse impact on individuals was lessened by his treating it as a baseline requirement. Also he

says at 70 that allowed individuals to make a choice about whether to continue in the Armed Forces and be vaccinated or leave the Armed Forces and that wouldn't have been a choice if he'd used section 72. They would have been required to comply unless he agreed to withdraw the order for the person to voluntarily discharge.

Then he goes on, I think while we've got the page open at 71: "Further, providing COVID-19 vaccination as a baseline individual readiness requirement was consistent with how NZDF manages other infectious disease threats and vaccination requirements." Over the page: "Finally, providing for vaccination as a baseline individual readiness requirement, rather than ordering…much more individualised…", to your point Justice Kós, "where a member declines vaccination. As is clear…it is possible for a person to remain in service notwithstanding a refusal to be vaccinated…they will just be limited in the duties they can undertake."

So if I can now pick up the Court of Appeal judgment, just the last point I want to make before we go to these documents that I know your Honours want to see, is just the narrowness of where we say we are at following the Court of Appeal's decision and if we start at paragraphs 9 and 10: "We agree with the Judge that the respondents have established that there was sufficient justification for the limits on those rights that resulted from adding the COVID-19 vaccinations to the NZDF Vaccination Schedule, including the potential for a member's service to be reviewed for failure to meet readiness requirements…"

Now I'm highlighting, well I'm emphasising the word "the potential" because, as we'll come to, adding COVID vaccines to the vaccination schedule required that the service was reviewed if a person continued to fail to meet that requirement. Indeed the Court says the lawfulness of adding the vaccine wasn't challenged. "However the respondents have not demonstrated that there was a justification for adopting more prescriptive and more stringent consequences for failure to have" the vaccine as compared to other vaccines. "In particular, they have not shown that the objective of maintaining the ongoing efficacy of the Armed Forces could not have been achieved by a less rights-limiting measure:

namely, retaining the more flexible approach that applies in relation to failure to obtain other vaccinations…". So to that extent, the Court of Appeal says, the TDFO and related instruments are inconsistent.

So to the extent that it's different from how other vaccines are dealt with, they say it was unlawful, and we say that to that extent is very narrow indeed. That the DFO 3 and DFO 4 required meeting vaccines as part of the readiness requirements, required a process to be conducted by Commanding Officers to assess and encourage a person meeting those requirements, leading to a decision as to whether to maintain them as a member, or to dismiss them as a member, for continued not meeting that requirement.

So to the extent that the TDFO is different, and I've run through those three differences, the Court says that was unlawful, and we're critical of this for two reasons. One, there's a vanishingly narrow distinction being drawn, in our submission, between what was the process, and what the TDFO did, but also we think the Court is wrong to say that it was more prescriptive and with more stringent consequences. The consequences, we say, were the same.

ELLEN FRANCE J:

Well that's why I think it is important to be clear about what the changes are. So they're not getting on the base is that, that's not the position in relation to other vaccines?

SOLICITOR-GENERAL:

Well it's not express in the DFO 3, but Colonel Tate does say that one of the things to think about in vaccinations is not to put a person into the position where they might be vulnerable to the thing they're not vaccinated for, which in COVID is an endemic, as COVID became endemic, becomes everywhere, as opposed to a different vaccine. Measles, is that a good example. It might be a good example. So to be clear the DFO didn't say you can't go to Defence areas if you're not vaccinated, but Colonel Tate says the practice is to stop the unvaccinated person going to a place where that vaccine was necessary to protect you and maintain the Force.

So I'm still on the Court of Appeal judgment, because then at 144 –

KÓS J:

Presumably that could have been the subject of a separate order, on a case-by-case basis. I mean it must be possible for a military commander to say to a service person, do not come to the base, for some reason.

SOLICITOR-GENERAL:

Yes, and the – yes, quite so, it could have been, and the reverse was so that in the failure to have the vaccine meant you couldn't go into the base until you had had your review, because if you were maintained in the Force, then you were able to be managed into the base and facilities with health protection measures in place.

WILLIAMS J:

So this is about the scale of the problem, is it not, is that the point you're making?

SOLICITOR-GENERAL:

Yes. So the Court of Appeal are saying to the extent that it was different we find it's inconsistent, and as I just want to point up in paragraph 144: "The reduction in flexibility", they refer to it, "brought about by the TDFO is not as absolute as… in *Yardley*. But the same questions arise: has it been demonstrated that the reduction in flexibility, and associated increase in pressure to be vaccinated, is justified in order to achieve sufficiently important objectives?"

And at 165 I emphasised before the Court of Appeal saying "to the extent that", retaining flexibility. In paragraph 165 they say that: "It follows that the TDFO, at least insofar as it provides for mandatory retention reviews, has not been shown to be a reasonable limit… to that extent, inconsistent…" and unjustified. 1040

I'm going to go to documents DFO 3, DFO 4 and the Chief People Officer's Admin Instruction. Let's us start with DFO 3. Well, perhaps this is a good time, before I get the documents up, is to explain the first paragraph in the appellant's written submissions because in light of all of that emphasis about the narrowness, the written submissions say: "It is accepted… that the challenged decision…", the TDFO, "imposed a limit on protected rights by creating a process to respond to" when a member refused vaccination. And as this case has become more and more narrow, it is becoming harder to see how did the TDFO limit rights. They were already limited by the schedule and the DFO 3 and 4. But the Crown has always submitted that the right to refuse medical treatment is limited when there is a requirement on a person who faces consequences for the failure to do so. That engages section 11. We have maintained that view here because the TDFO was – it is the challenge decision and it was – you have to see it in part of its bigger setting, even though it itself on its own, you'd really question whether that actually limits a right.

KÓS J:

I'm not quite sure what you're saying there. Are you inviting us to set aside DFO 3 and 4 as well despite the fact the pleadings were all limited?

SOLICITOR-GENERAL:

No, thank you. Sir, I'm trying to explain why an unusual starting proposition when I'm emphasising to you what TDFO threat, sorry what the TDFO did were these three minor things and you might think well how did they limit the right because we see quite fairly you have to see that and it was hooking up to something else that required, that it required a vaccination which is a limit. That's what I'm trying to explain.

ELLEN FRANCE J:

Although you might get into other rights, I suppose, like freedom of movement and so on.

SOLICITOR-GENERAL:

Yes, that's right and Mr Neild might cover that point about how a TDFO might be examined for that, exactly for what are the limits on rights and are they reasonable in the context.

So I want to go to the DFO 3, it's at 303.0433, so it's as you can see it's called a Human Resource Manual. I won't take your Honours to all of it but starting at 9.6.1: "[NZDF] is required by the Government… to provide individuals and units/ships to meet contingencies within specified Degrees of Notice… This Order –

ELLEN FRANCE J:

Sorry, just if we wait until we get that, thanks.

SOLICITOR-GENERAL:

Sorry. There it comes. Is that what your Honour was after?

ELLEN FRANCE J:

Yes, yes, thanks.

SOLICITOR-GENERAL:

Yes. "This Order provides the guidance and framework for managing the individual readiness of members of the Armed Forces. Readiness, like combat viability, deployability and sustainment, is a component of operational preparedness. Therefore individual readiness needs to be applied within the context of the… operational preparedness requirements." Just a little bit down in that same paragraph: "This Order provides the minimum individual readiness requirements needed for operational preparedness."

9.6.11: "The intent of this Order is to ensure as many members of the Armed Forces as possible are ready to deploy in order to meet NZDF output requirements. The impacts sought by this Order are: (1) to ensure members…" are ready… "achieve and maintain individual readiness, and (2) the number of members meeting their individual readiness requirements is maximised leading

to unit/ship readiness." That's an important emphasis which Brigadier Weston certainly makes in his affidavit that readiness has to be thought about. It can be thought about at an individual basis, or a unit basis, or a force's, and this, the objective here is thinking about the force-readiness. At 9.6.13 –

MILLER J:
So when we speak of force-readiness, we're talking about the force concerned, that's the Army or the Navy or the Air Force? Is that what… I'd understood force-readiness to refer to whatever was the relevant unit.

SOLICITOR-GENERAL:
No, I would say that it will be seen at all of those levels. Brigadier Weston makes the comment that these are key performance indicators for Commanding Officers to have their unit ready in order to have the particular service ready, for force-readiness is the three services, so it is a combined concept.

MILLER J:
All together, right.

SOLICITOR-GENERAL:
This section explains the different levels of readiness and you'll see down that index, "Fitness Standards". That is going to be an important point. At [9.6.16], a couple of pages on perhaps you'll see the Armed Forces – so the categorisation of four readiness levels, no impediments. "Administrative or command issues need resolving but readiness can be achieved within response times. Ability to deploy is limited by factors that prevent readiness being achieved...". Then the fourth one: "Not deployable: Impediment(s) to ability to deploy."

So: "By the last day of each month, COs are to have reviewed and recorded on", some system that I don't recognise the letters for sorry, "any changes to the readiness level of members of the Armed Forces under their command. Command Guidance: as many members of the Armed Forces as possible must

attain Level 1 or 2 readiness within their unit/ship's DON. Where individuals do not manage the aspects of readiness that are within their control or do not appropriately escalate those which are not appropriate corrective actions should be taken."

Just the next page [9.6.17] sets out elements of the fitness standard, which you'll see that at number (17) is vaccinations, and vaccinations becomes relevant again at 9.6.36. Vaccinations "are to be maintained according to the NZDF Vaccination Schedule. Additional vaccinations may be required for specific deployments." Your Honours may recall Colonel Tate, the health officer, sets out that on the other schedule, the enhanced schedule, there are the sorts of vaccines that you might need if you are going to a particular, typhoid for example, if you are going to a particular area that might mean that you need that vaccination.

A couple of points down at [9.6.38], required fitness standards may be waived or varied "based on the nature of the deployment and projected role that the member of the Armed Forces is being considered for". 9.6.50 –

KÓS J:

Is that the Commanding Officer? Who is that acronym?

SOLICITOR-GENERAL:

I'm going to guess that it's the Commanding Officer. Commanding Officer of – oh the Joint Forces, right, Commanding Officer of Joint Forces of New Zealand, so that's a higher level again of where waiver can occur.

At 9.6.50: "Where members of the Armed Forces are assessed as being unable to maintain individual readiness for reasons within or beyond their control, their continued service is to be reviewed…". Now I'm emphasising those words because that was one of the errors, we say, the Court of Appeal made was to find that the TDFO brought in a mandatory service review that was part of the DFO already, "their continued service is to be reviewed".

MILLER J:

So you say this approach applied to any vaccine, if you refused to have a typhoid vaccine, you were going to be deployed overseas, your readiness would, your continued service would be reviewed. COVID is not, in that sense, distinctive?

1050

SOLICITOR-GENERAL:

In fact, any readiness requirement.

MILLER J:

Right.

SOLICITOR-GENERAL:

So it might be a fitness, it be a health, it might be yes another vaccine.

GLAZEBROOK J:

Wasn't the point made though that this was done at a lower level to decide whether in fact a review would occur in that particular case as against a mandatory review. I think that was what the, that despite this it wasn't actually a review, it was a decision whether you would or you wouldn't review taken at a lower level.

SOLICITOR-GENERAL:

That appears to be the Members' case, although the submission I'm making is that it wasn't what the DFO required and, as I'll come to when I get to the TDFO, the Chief of Defence Force makes the point that he's having to remind his Commanding Officers of the obligation to review service when people are not meeting their requirements.

KÓS J:

Well, where does 9.6.50 take you next, to be reviewed by whom? What the next –

SOLICITOR-GENERAL:

Thank you, Sir, to 11.8.8. Perhaps I've – Single Service Chief or delegate, although I might need to go to DFO 4 to answer your question in more detail. This is in fact the authority for an NZDF-initiated discharge. It can be the Single Service Chief or delegate and, as we know, the Commanding Officers were delegated this function. That is the thing, that change, thing one that changed in the TDFO was removing that delegation saying "no I want Single Service Chiefs to do it."

KÓS J:

But how do we move from 9.6.50 which provides for continued service to be reviewed which seems to imply a range of possibilities.

SOLICITOR-GENERAL:

Yes.

KÓS J:

To an initiated discharge which seems to imply a limited range of possibilities?

SOLICITOR-GENERAL:

And so the answer to that is in DFO 4.

KÓS J:

Right.

SOLICITOR-GENERAL:

Which sets out the process by which we move between these steps. Just before we go to 4, can I just point up, where was I, I was just at 11.8.8. 11.8.25, these I have leapt right through the process that gets us to here, "Reason for Release, Discharge or Dismissal". A Defence-initiated discharge on a performance basis can be for the reason that the person "[i]s inefficient or ineffectual in performance of duties and has shown insufficient improvement after formal written warning. This includes the inability to meet single Service physical fitness requirements." And you'll remember that earlier we saw that

one of those was vaccinations. And again there's the Single Service Chief, that's Army, Navy, Air Force, or their delegate.

I next want to go to DFO 4 which is at 303.0513 and the first part that I want to take your Honours to is at 16.104. So, 104 really repeats the provision that I just came off from DFO 3 where the Service member "[i]s inefficient or ineffectual" which includes "inability to meet single Service physical fitness requirements". "Discharge (Category DE) may be invoked…". So, if that is considered to be the factual setting, then this report, this DFO 4 goes on: "…the Commanding Officer is to raise a report, or appoint an officer to raise a report, detailing" what the shortcoming is, what actions have been taken by the Service to correct that shortcoming and that the "member's retention is under consideration". The report then is given to the member, that they are to read it and comment on it. They've got seven days. Your Honours, I won't go right through this process, but it is a process in which a member can be given assistance in preparing comments. They get to acknowledge that they have been given it. They might make no comment. I'm just scrolling down through the paragraphs. They might have new information that might require evaluation and a further report to be provided to them by the Commanding Officer before any decisions are taken. A decision has to be taken about whether a formal written warning is necessary, and during that period the Commanding Officer is to request regular reports. They are to review the member's performance at the end of the warning period. A further report is to be raised that is to summarise the member's performance over that warning period. It is to conclude that it is either satisfactory and the process ends, or not satisfactory, either extending the formal warning period, recommending a reversion in rank, recommending a reassessment in trade, or reassignment to another more suitable appointment, or recommending discharge.

Then it goes on at [16.116]: "If the decision is to recommend discharge, the Commanding Officer is to ensure that the report raised…" includes all of the details of the situation, the action taken, including the written statements by the member. They are to consider the whole of their service record, their performance, their personal circumstances, whether the performance

difficulties are not normal, or where they part of a pattern of poor performance. That's for the individual. Whether they can be moved to another place which is better suited to their abilities and the effect of the performance on the operations of the unit, ship or base. Any recommendations from a medical officer or psychologist.

Then that report gets given to the member. They get interviewed and explained what's happening. They get to comment. If the Commanding Officer is satisfied with their comments then no further action is required. If the Commanding Officer is not satisfied they are to forward the recommendation for discharge through to the normal command channel for decisions by the appropriate Service Chief or delegate. That was the process that DFO 4 anticipated should be followed.

Can I take your Honours to the admin, the CPO – actually, we need to look at the TDFO. Can we look at the TDFO.

KÓS J:

Can I get a sense of what rank the Commanding Officer is likely to be. How far above the – if this is simply a private, what rank is the Commanding Officer likely to be at?

SOLICITOR-GENERAL:

The Commanding Officers, we might come back to your Honours on that, because I do actually have the answer to that from my instructing solicitor, whether I can remember it offhand, but the Commanding Officer tends to be a reasonably senior rank of Commander of the Navy, Lieutenant Colonel of the Army or Wing Commander of the Air Force. So they are about five from the top. That tends to be the Commanding Officer level. Anyway, you had a – if it's helpful to provide you with the ranks ranked, we can do that.

KÓS J:

No, I think we know those.

SOLICITOR-GENERAL:

Thank you. So 303.0408 is the TDFO.

KÓS J:

I mean the reason for my asking the question is it doesn't follow that the Commanding Officer will necessarily have any kind of personal relationship or knowledge of the person at issue. They will in some cases, that's a senior.

SOLICITOR-GENERAL:

Do you mean the Service Chief?

KÓS J:

No, Commanding Officer. I'm trying to see the difference, because that moves then from being a Commanding Officer who is a Lieutenant Colonel, to the Service Chief who is obviously three rungs, at least, above.

SOLICITOR-GENERAL:

Yes, that's right, but that process that we've just gone through would deliver to the decision-maker a very detailed assessment of what is said to have gone wrong, and what is the Members' response to that, and what has been done to try and ameliorate that short-coming. Because they might not, you're right, the Service Chief, indeed the Commanding Officer might not literally know the person, but they will know a lot about them and their circumstances and why they say they're not meeting this readiness requirement because of the process.

1100

The TDFO should be up on your screens. Yes, it is. So you see the purpose is to direct all members of the NZDF regarding a requirement to be vaccinated. It sets out some definitions. And even though it's not actually before the Court here, just at paragraph 7 you'll see the rationale for including the vaccination on the vaccination schedule including consideration of the following key factors; any border entry limits, clinical evidence that vaccinations reduce the risk of serious illness or poor health outcomes, reduces the chance of onward

transmission given that Armed Forces' members live and work closely together, infectious diseases can spread rapidly and could render large numbers of people unwell or having to isolate.

So, the other relevant part of the context, sorry your Honours, that I didn't touch on, which was that at this point we New Zealanders under the traffic light system and we were at Orange which left – Colonel Tate does mention this in her evidence – that meant some gatherings were permitted but we still had the isolation on a positive test requirement. So, that provision here, it goes on to say: "Such a situation would quickly impact critical outputs, including safety related components of duty tasks." There's some transitional things where earlier orders are cancelled.

At 10: "Members of the Armed Forces have been on notice since mid-2021, that being vaccinated… is a requirement of continued service in the Armed Forces. Every effort has been made… to educate and reassure members as to the need for the vaccine. This has included, use of work time to attend vaccination and medical appointments for members of the Regular Force and educational information via command chains, Defence Health Centres and via internal and external communication channels. It has also been communicated… that failure… may lead to a review of retention in the Service" and there the TDFO refers back to the provisions we've already just been in DFO 3. "Consequently, any member of the Armed Forces who is not fully vaccinated… is ineffectual" that's using language of DFO 3 "and is to have their continued service reviewed".

Some implementation timeframes there which I don't think I need to detain us on. Access to bases and camps. At 17 to 19, if you haven't received your primary vaccination, members "are not to access any NZDF camp, base or facility unless for the purpose of seeking health or welfare care, or support; and are to remain on COVID-10 isolation leave." Territorial Force, same restriction, although they're not on leave given the nature of their service. They won't be at the Armed Forces. The third one, people who have had the primary vaccine but haven't been boosted, haven't had their booster shots, can access those

bases within constraints that will be reviewed and so they might be health-related, sorry health protection measures restrictions. So that's the access to bases and camps change.

Then 20 is the next change: "Service Chiefs are the approval authority for Discharge… on the basis of a failure to meet individual readiness requirements… This delegation is not to be sub-delegated."

MILLER J:

Can I just ask a question, a point of detail about paragraph 18. There's evidence that one service, a woman who was pregnant, was denied access to her base, was that a mistake or did it pre-date this?

SOLICITOR-GENERAL:

As I recall, her evidence was that she was worried she would be refused.

MILLER J:

I see, okay, she wasn't actually refused. I took it that – the respondent's position certainly was that she was refused.

SOLICITOR-GENERAL:

[REDACTED] I –

MILLER J:

She was a **[REDACTED]** I think. We can come back to it if you like.

SOLICITOR-GENERAL:

Thank you, Sir. That is how I recall it although – here it is: "I have been allowed to phone the Navy Health Unit, but I am worried that if something goes wrong I will not be able to access in-person care."

MILLER J:

Right, so it didn't actually happen?

SOLICITOR-GENERAL:

Not on that, no. She doesn't say it did happen.

WILLIAMS J:

Well, not on that occasion but did she say it happened on an earlier occasion?

SOLICITOR-GENERAL:

No.

WILLIAMS J:

No. So it was just a –

SOLICITOR-GENERAL:

Well, she says she hasn't been allowed to enter the naval base. That's the restriction.

WILLIAMS J:

Which is where the clinic is, yes.

SOLICITOR-GENERAL:

That's the restriction. No it doesn't say that she has been stopped from going for health or support care as the TDFO allows. Was that responsibilities. Delegations are not to be sub-delegated. "The CPO", Chief People Officer, "is to issue criteria to guide Service Chiefs' decisions on discharge or retention…". We'll come to that shortly.

KÓS J:

Is that a difference from the DFO 3 and DFO 4?

SOLICITOR-GENERAL:

Yes. Well. DFO 3 does anticipate that the health chief may issue health and other related guidance. I can come back to that. I can't think of where that is off the top of my head. But the specific criteria for COVID decisions, yes, is new.

KÓS J:

Right.

SOLICITOR-GENERAL:

Fair point that it is new. So where a Service Chief decides to retain a person then they are subject to those same limitations we saw earlier as to not being able to deploy "overseas on a tour of duty, temporary posting, permanent posting or operational deployment; or domestically as part of any national contingency response capability". Not allowed to "participate in any domestic activity with a COVID-19 vaccination requirement". So that's the implication of being retained. Then they will be immediately subject to a new retention review if they are required for output class 4 or 5 deployments, and the CDF describes what they are. He says at paragraph –

ELLEN FRANCE J:

Sorry, if you just keep to the microphone.

SOLICITOR-GENERAL:

Sorry your Honour, yes. He says at paragraph 58: "It… requires a further retention review to be conducted if the member is required for a deployment for one of the following NZDF outputs", and the footnote there is that outputs are those that NZDF is funded by the Government to achieve. Output classes 4 and 5 are those that relate to conducting operations internationally and domestically including military operations, disaster relief, and other civil and community support roles. So he sets out at 58.1 and .2 what output class 4 and 5 are that are referred to in this TDFO. Protection of New Zealand and New Zealanders, MCA is just multi-category appropriation, and then operations contributing to security, stability and interests. Then if they're not one of those members required for those then 12 months on it gets reviewed again. That's if they are – that's obviously if they're not dismissed.

The annexures I don't think I need to go to. Well, maybe it's useful to look at annex A where the –

ELLEN FRANCE J:
The variations I think.

SOLICITOR-GENERAL:
Yes, the TDFO is sort of applied across the DFO 3 and DFO 4 about how the existing processes are to work. You see there at small c, subparagraph (a): "The Commanding Officer is not authorised to approve retention" as they can under DFO 4. They must forward that report, including any submissions made by the member, to the relevant approving authority, and that's the Service Chief, head of Navy, head of Army, head of Air Force.

I'm just scrolling through myself just to see if there's anything else to pull out about those annexures, but they really are about making sure that the processes map.

If we head down to 2(e) and 24, the final report after going through the slightly amended process in DFO 4, the Commanding Officer is to forward the final report to the approving authority, including any submissions by the member. The approving authority is to review and either authorises a discharge or retains them with being notified of conditions of their retention.
1110

Annexure B just has dates. Annexure C is something to point out which shows permanent amendments to DFO 3 and 4. So those ones have been amendments to deal with COVID-19.

KÓS J:
Is there any sub-delegation from the Service Chief?

SOLICITOR-GENERAL:
For the retention or dismissal process?

KÓS J:
Yes.

SOLICITOR-GENERAL:

No. The TDFO makes that –

KÓS J:

So those very senior officers have to deal with each of these applications personally?

SOLICITOR-GENERAL:

Well, yes, yes. The process through the Commanding Officers gets them the document, yes, and then they must – we saw in the TDFO earlier "this must not be sub-delegated" says the Chief of Defence.

KÓS J:

That's right.

GLAZEBROOK J:

But that's just the final decision, isn't it, rather than the process because the process seems to be much the same as before in terms of getting all the information. Is that right? Perhaps I should ask that as a question.

SOLICITOR-GENERAL:

That is what we say is the case. That the process, it has some amendments to accommodate the COVID vaccine and the boosters, but the process that we went through in DFO 4 of the Commanding Officer taking the process steps and getting the member to respond and putting matters to the member and so on continues, and then they give all of that to the, in this case, to the service chief and the decision must not be delegated. Paragraph 20 is where that must – the delegation is not to be sub-delegated.

The admin instruction. So one of the changes, one of the parts of the CPO is that the – sorry the TDFO, is that the CPO's admin instruction was to be given, [303.0544], and this comes from Colonel Tate. She gives evidence about this but here is the admin instruction and at 3, I'm sorry at 2: "This Administrative instruction is a general order [under] section 39(b) of the Armed Forces

Discipline Act 1971." At 3: is to provide additional guidance to assist Service Chiefs in deciding to retain members who fail to meet the Individual Readiness Requirement (IRR) for the COVID-19 vaccination. And I do observe that wording I think is useful that the instruction is about how you might decide to retain a member.

Remember one of the criticisms we make of the Court of Appeal is that they thought it was more likely that this process would lead to a dismissal and we say that's wrong. It is as likely as the last process. In fact, the admin instruction is about, this is to help you decide whether to retain a member.

So at 5, reference A directs a change in the approval authority to Service Chiefs. We've gone through that. At 6, the criteria guidance. They're not exhaustive. They're minimum criteria to consider and at 7 we see set out the minimum criteria. Are they in a strategically significant trade or have critical skills needed by the Service to meet Outputs 4 or 5? I just took your Honours to the CDF's description of what they were. Are they subject to a ROSO which is a requirement of service order? It's like a bond. Are they subject to a bond? Are they critical to the successful introduction of key capabilities in the next 12 months? Are they in a trade and/or a rank group with an attrition rate that is significantly higher than the service 12-month rolling average? Does the retention of them delay the promotion of others who do meet the requirement for COVID vaccination? Are they a single point of failure for key organisational outputs? Are there other things they don't meet for individual readiness requirements? Do they hold a rank or permission where their continued refusal to be fully vaccinated undermines service discipline? Can they be employed in another role that's not required to meet outputs 4 and 5? Are there exceptional welfare reasons that support retention?

Coming to your Honour Justice France's question right at the beginning – sorry, I think it was Justice Glazebrook's question, the challenge here is to the rule, not to the individual decisions that have been taken. So, to that extent, it's a system or a systemic challenge, and here we see the criteria that are being given as baseline kind of ideas, not directions but guidance, and in them you

can see some of the criticisms, sorry, you can see dealt with some of the criticisms that the Court of Appeal had. What about timeframes? Where can we see more information about how you're thinking about this stuff, and because this is about a challenge to the rule, not a challenge to its implementation in a particular case, we say you can see these things here. Are they critical to the successful introduction of key capabilities in the next 12 months? Are they in a trade or a rank with an attrition rate that's significantly higher than the 12-month rolling average? These are thinking about the person and their circumstances, I was going to say in the moment, but in the relative moment for what the force needs for its readiness requirement objective.

That just reminds at 8 that if people are retained they will be subject to the limitations in the TDFO.

KÓS J:

Is there an equivalent instruction that pre-dated this when the decision was to be made by the Commanding Officer?

SOLICITOR-GENERAL:

For COVID?

KÓS J:

Yes, or indeed any retention decision.

SOLICITOR-GENERAL:

I don't recall that, Sir, so – but can I come back to you on it?

KÓS J:

Thank you. Again, we're just, we're trying to see the differences and this instruction seems to add a whole set of criteria which you say are sort of recipient friendly but I mean I'm interested in whether they're recipient deferent.

SOLICITOR-GENERAL:

And my submission is to say that to the extent that they are different, that difference is vanishingly small because the DFO already required such a process and here we are met with a rule, not about whether someone breaks their leg, or is unable to have the COVID vaccine because they've just had COVID, or a whole lot of reasons that you might say well you're not ready to deploy, but here the CDF is met with a small group of people who are just refusing a readiness requirement. To that extent, they're dealt with in the same way that just refusing readiness requirements are dealt with.

So this is – having gone through those documents, and I don't intend to take your Honours through any other documents I don't think because I've been wanting to spend my time setting this context for the submission that we say what the Court of Appeal got wrong was in showing, with respect, very little leeway or latitude or deference to the context, the CDF's judgement, all of the evidence we say that was before the Court to explain why this was, to the extent that the TDFO was a limit, why it was one that was readily justifiable.

WILLIAMS J:

Is that a difference issue, deference issue, or is it just that the Court of Appeal appeared to either be unaware or attach no weight to what you say is a nuanced list of considerations?

SOLICITOR-GENERAL:

Well, thank you, your Honour, because we've gone round that question ourselves. To what extent is this a deference issue, or if the evidence is compelling, why is deference even relevant? But I think that why we say – I submit that why we say it's a deference issue is that when a court is met with really not being sure or thinking does that make sense, is that logical, why is that so, you know things beyond their ready understanding, deference simply requires them to think about what is the context, who is the decision-maker, is there any reason why I should put some more weight to their assessment of what was necessary than my own.

1120

And, with respect, one of the best examples of this approach of a court showing deference was this Court in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 saying: "Mr Macrae was in a better position than we are to assess matters such as the ability to manage security concerns, the costs of that exercise, and how the features of the venue would affect risk."

So, we say it is a deference question, and actually going through the evidence that was provided to show the judgement wasn't just a casual matter thought of by the CDF but actually building on a process that has existed for decades requiring vaccinations as a readiness requirement and how that process went, the Court of Appeal, if it had been, if it had deferred to that context and that judgement, it would have been able to see that those limits, such as they were, were reasonable ones in the context where the status quo DFO 3 and the vaccine schedule, COVID had been added to the vaccine schedule, had been in place for more than a year and the CDF was still being met with a force that wasn't maximally and flexibly able to deploy.

So he took these additional steps, that's quite clear in the narrative, and the Court also took the view that the changes meant it was more likely than not that the person would be discharged, and the evidence was that of 39 reviews, 17 had been retained, so you might say more likely than not given that 17 is less than half of 39 but it isn't inevitable that you were going to be dismissed. In fact, 17 members who refused to meet requirements were able to be maintained. So, the Court also was wrong about you will require –

MILLER J:

Do we have any evidence about the rationale for retaining them? Some of them, for instance, had religious objections because they believed that the vaccines had been developed in a way which involved human tissue. Were they retained for that reason, or were the reasons for retention related, for instance, to them being a single point of failure or a critical trade or

something? You don't know? I wouldn't be surprised if you couldn't answer it because I appreciate this is a level of principle case we're dealing with.

SOLICITOR-GENERAL:

And the appellant has not put in evidence that outlines that material that respondents – I don't think they had, no I don't think there is any evidence to that point.

WILLIAMS J:

This goes to the point that Justice Glazebrook raised earlier which is, is this really better dealt with at the retail level rather than the, I think we heard you giving argument about that in a case not that long ago, rather than at the wholesale level?

SOLICITOR-GENERAL:

Well this –

WILLIAMS J:

Of course, I mean you've got to deal with the case that's in front of you but –

SOLICITOR-GENERAL:

Which is a challenge to the Order.

MILLER J:

Can I ask a question about that? What's the rationale for deference here? Sometimes it's relative competence, and it seems to me that the Court of Appeal has seen it that way because it's seen it as essentially a process issue. The considerations which we've been talking about in terms of discipline and readiness though suggest it might be more of an institutional consideration, so it goes to the legitimacy of a civilian court deciding these questions and presumably the wellspring of the military's legitimacy is ultimately Parliament because one looks to the legislation to see where the Chief of Defence Force derives this authority.

SOLICITOR-GENERAL:

And so our submission is that both things are in play here. One is the constitutional setting of the military requirements, as the CDF says, but as the statute also sets out, quite a unique place in our system that we have a Defence Force that CDF must maintain ready to deploy to meet the government's requirements at any time but also it's an expertise matter too because the CDF is, we say, best able to deliver the judgement that understands how that works. I mean already, your Honours, and I have been in some exchange about was this the whole Force, what about if a unit is ready, but the whole force is not? CDF and his Service Chiefs, that's why he didn't want it delegated, Service Chiefs could have that strategic view about what is needed here to be maximally and flexibly, both things are important, really.

GLAZEBROOK J:

I suppose one of the difficulties I'm having with this is that once you do say, for all of these reasons this mandate was necessary, and we're not being asked to look at that, how it's then operationalised seems to me not as a matter of deference because I think it would apply whoever was operationalising this, that there were a variety of ways to do that and I think it's more in the sense of a margin of appreciation how you go about doing that. So you have to be outside of those ways of dealing with it, rather than having to choose the absolutely most least rights-limiting. I just don't think we're even in the right test when we're looking at that if we're looking at operationalising something that is already accepted. I just have that worry that people are going to be going, well, I've decided all of these things, and I'm totally justified in doing so, but I've got to go round and justify why I don't do this administrative measure as against another administrative measure, and here there's all of the natural justice that one might wish.

Of course individual decisions could be wrong, and individual decisions as I think I mentioned at the beginning, of course, could be challenged. You could say, well look, when you went through this process you didn't take account of A, B and C, and you could bring up human rights issues at that stage, obviously. But it seems to me as it's not so much deference. It would certainly be

deference in some of those larger issues that were being talked about in terms of constitutionality and expertise, but I'm just not sure that you're doing it when you're actually looking at how you operationalise it.

SOLICITOR-GENERAL:

And your Honour might be on the point that we are soon to come to, and Mr Neild will lead on, is criticism of the Court of Appeal taking this idea of an incremental justification rather than identifying or having perhaps provided, given some leeway or greater weight to the CDF's assessment of what is required. Are there are a range of options that are reasonable that can be used to implement that? The Court went on to say, which I think is your Honour's hesitation, there's this incremental justification required about the way in which he did that, which, I don't want to steal Mr Neild's thunder, but we fear will take us to a court looking for, well I can think of something less rights-limiting, the *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, or at least referencing there an American Court saying would be an unimaginative judge if he can't come up with something that's a bit less drastic or a bit less restrictive in almost any situation, invoking the court's proportionality assessment which, of course, is a matter of law.

So that's where we come to our second challenge on that basis. I'm just conscious of time.

ELLEN FRANCE J:

Just one thing. In terms that the further changes were made because of the decision that it was still not, that meant the Force was still not maximally flexible, where's the best evidence that that was the driver?

SOLICITOR-GENERAL:

Of what the objectives were?

ELLEN FRANCE J:

Of the decision that changes needed to be made in order to ensure maximal, I'm not sure what the word will be, maximum flexibility.

SOLICITOR-GENERAL:

Yes, well certainly it's the Chief of Defence Force, through his evidence.

ELLEN FRANCE J:

Yes.

SOLICITOR-GENERAL:

But also Brigadier Weston.

ELLEN FRANCE J:

If just at some point you give me the particular paragraph numbers?

SOLICITOR-GENERAL:

Weston 53, that's starting at 53. Brigadier Weston gave a second affidavit too where he talks to force generation in his whole second, or most of his second affidavit is about that doctrinal concept of having the suitably skilled, trained, equipped and prepared people to conduct military operations within timeframes required, and he talks about regeneration and reconstituting capability. He talks to allowing for downtime, that's not the right word, but as people come back off deployments.

ELLEN FRANCE J:

Yes, yes.

1130

SOLICITOR-GENERAL:

All of those things are part of that regeneration that he talks to in his second affidavit.

KÓS J:

But isn't that a systemic proposition, and here you're talking about 39, you self-describe it as a small group of people refusing to conform to readiness requirements. We're talking about 39 people out of a Defence Force of, what is it, 15,000 or something?

SOLICITOR-GENERAL:

That's right, and also Brigadier Weston he deals with that in his first affidavit, which is at 201.0180. So the CDF, we've already been to that paragraph so I won't take it up again, but the CDF makes the point that – no, sorry, this is Brigadier Weston. At 34 he says: "Almost all NZDF deployments are part of a coalition force." So they are often expected that everyone will arrived vaccinated. He says: "… a person who is unvaccinated may be denied access to coalition force health services. As a small military, the NZDF relies heavily on partner nations." So a person might be prevented from deploying.

They, there's a second deployment thing there, or the fourth one actually in [34.4], fulfilling tasks given to it by the Government, pointing out that delivering vaccines for the Cook Islands and Tokelau, but also "humanitarian assistance efforts in Tonga would not have been possible" and this goes to the flexible point that CDF says, that needing everybody able to be moved because, in fact, the CDF says it's also – I'm going to have to come back to where this is. Unlike a civilian workforce it has a job, you know, you have a job in a job description. In fact Defence Forces have their primary function, a secondary function, and a tertiary function, and need to be able to be put where they're needed.

KÓS J:

I mean all this makes total sense, but we're dealing with a very small group of recusants, plus you also have quite a substantial number of other people who are not ready for deployment.

SOLICITOR-GENERAL:

Yes.

KÓS J:

So I'm not quite following Justice France's question, I'm not quite sure where I see the max, whatever the word is, maximal availability point striking home.

ELLEN FRANCE J:

Perhaps we should come back to that after, and how are you going for time?

SOLICITOR-GENERAL:
Not as well as I want to be, but I will just make sure I touch on a few points I need Mr Neild to cover the incremental point. Not too badly I would say.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.51 AM

REGISTRAR CONFIRMS AVL PARTIES ONLINE

SOLICITOR-GENERAL:
Your Honours, I am conscious of time. I'm going to romp along. I want to make three more points and then really rely on our written submissions where we have gone through in quite a lot of detail the specific issues and the specific evidence.

Numbers, we left just before the break on numbers. At our written submissions at paragraph 83 we address why the Court of Appeal was wrong to be critical of the number of other, the number of people who were not ready for other reasons than COVID vaccine.

KÓS J:
Which paragraph?

SOLICITOR-GENERAL:
83 of our written submissions.

KÓS J:
Thank you.

SOLICITOR-GENERAL:
And at paragraph 155 of the Court of Appeal judgment, the Court says that the justification in the evidence "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."

That in my submission was a sign to the Court that there might be a reason that it needed to think about. It might be a judgement that it needed to defer to or give weight to because, in fact, the evidence shows that while there were a large, relatively large number of people who didn't meet all the readiness requirements, Brigadier Weston goes through this, they were things like not meeting a physical fitness test which could be ameliorated or waived depending on what the deployment requirement was, or as we saw through DFO 4, put into a warning process so that the member brings themselves back to readiness.

MILLER J:
Or just a time lag I think he said.

SOLICITOR-GENERAL:
That was on medical and – some medical and dental requirements quite so. He said that they were resolvable in the short term, that if you didn't have your six monthly medical or dental check that might be another reason but he said that was the primary reason that people weren't meeting readiness requirements, or they were temporal or logistical, as we say in our written submissions, quite different to a small number of people who say we're not going to meet that requirement. We're not going to meet that readiness requirement. Not that we can't or we haven't had time to get to the gym or to the dentist or the doctor but actually no thanks we don't want to meet your requirement. So that does bring in the discipline aspect of the question of small numbers too.

So, the second point I want to make about numbers is that while they are perhaps to our eyes seemingly a small part of the Force, discipline is definitely a relevant point to that. I've just made that point. But also Brigadier Weston in his first affidavit, at 201.0180, he gives an example only but at paragraph 86: "If a member…who does not meet individual readiness requirements is in a role

or position that needs to deploy and retaining them in service means that another person cannot be promoted into that position, this degrades the operational effectiveness of the relevant unit. For example, if a person is the chief engineer on board a ship, and there is only one such position, them remaining in service may hold up the promotion of one of the other officers in the engineering department. If the chief engineer is not able to deploy… the operational effectiveness of the ship" is degraded. So even one person might have an impact on a greater capability because, as I think has already been submitted, and CDF certainly says it, readiness is individual unit force, you know you can't isolate any one of them. He goes on, Weston goes on to say just putting the person into another position might seem like the solution but that doesn't meet our requirement for – the NZDF flexibility requirement to post personnel into positions that best suit their training and experience in order to best support operations.

We've already touched on paragraph 88 about discipline but also in his second affidavit, 201.0211, I've already taken your Honours to the point about force regeneration but he also says there: "Unvaccinated members… not only reduce the force numbers that are able to be deployed, but in occupying non-deployable roles/positions may also reduce the capacity for force rotation and… opportunities for respite." That was the word I was grasping for earlier: "respite". "For some ranks or trades in particular, this adversely impacts on the personnel who are fit for service as" they can't have respite sufficiently often as they would need and he gives the example of the Navy "managing the impact of vaccination status and sea/shore posting ratio across their ranks and trades, which is challenging to balance. Those who are fit for sea duties cycle back to sea more quickly as unvaccinated personnel have reduced the pool of available personnel who are fit for sea duties. While there are personnel that are unfit for sea for other reasons, such as being medically downgraded, vaccination status is compounding the posting challenges to ensure respite… placing a higher requirement on those who are fit for sea service to go to sea, particularly where trades have higher numbers of unvaccinated personnel, and reduces the respite period for those personnel."

And coming back perhaps to the question is this deference, what sort of deference is this, here is a good example of the expertise type of leeway or deference or weight. It's really quite a specialist concept to manage the sea to shore ratio in that example and to work out how the flexibility and the maximum requirements actually can be impacted on by a small number of people.

Just while that page is open, at paragraphs 9 and 10, Brigadier Weston deals with that question and I just said that it was somewhere and I couldn't remember where, just before with the break, the point about civilian staff having job descriptions at 9 compared with Force members who have got primary duties, secondary duties and contingency duties and vaccinating members of the force is considered to be – sorry, unvaccinated members having them absent from the work force is the best Force health protection and individual health protection measure. It was intended as temporary while the reviews were undertaken. So that was a point I had just said but not given a reference to.

So, that's what I wanted to say on numbers. The last point to raise which is not – written submissions deal with a lot more, is the point about the evidence about the United Kingdom and I think I can deal with this quite shortly. At 156 the Court of Appeal says: "Similarly," similarly being criticisms about where they didn't see that there was the evidence "although the evidence about the approach adopted in the United Kingdom… was not extensive, it was sufficient to put the respondents squarely on notice that they needed to explain why more intrusive measures were justified…".

And as we say in our written submissions, well first of all it was quite an understatement to say that that evidence was not extensive. It was a two-page document printed off the Internet and not heralded in advance and given just before, a few days, maybe a week or more, before the High Court hearing but in any event, as best as we can understand that two pages – could you bring that up, it is at 301.0142 – as best as we can understand that document, it shows that as far as we can understand, that it says that the United Kingdom has not at present, has not put COVID-19 on its list of required vaccines.

1200

Well we know that New Zealand did, and that is not challenged, so that is one difference, and in any event where a deployment requires COVID-19 vaccination, so if we had COVID on the other schedule, enhanced schedule, then the consequences to be considered on a case by case basis to the chain of command. Well that's the same as what we have here. So in our submission that was a very slender basis for the Court to really focus quite strongly on that, and pivot, sorry, it ended up sort of being pivotal in the respondent's case, saying it was incumbent on the respondents to identify these and to provide evidence showing that a more restrictive approach was justified. The approach wasn't more restrictive.

Mr Neild will deal with why we say that was a pleading question. So your Honours, I'm at 12 o'clock I know. Those are the matters I wanted to emphasise and address to you. Mr Neild has a couple of points to make on the second and third grounds of challenge. Unless you want anything else from me, you can ask Mr Neild.

ELLEN FRANCE J:
Thank you.

SOLICITOR-GENERAL:
Thank you your Honours.

MR NEILD:
E ngā Kaiwhakawā, tēnā koutou. Ko Neild tōku ingoa. So yes, I am going to just orientate ourselves, in written submissions I'm speaking from paragraph 99 with the second point of appeal which is around the way the Court of Appeal framed the TDFO as an incremental or further limit on section 11. What the Crown says is that this framing approach that the Court of Appeal took led it into error because section 11 is not a right that can, is capable of incremental limits. That's because section 11 is binary. Either the right is limited, you don't have it at all, or you have the right in its fullest sense. Either the member can choose whether or not he or she will be vaccinated, or that choice is taken away

from them, and they're coerced, and the Crown has always accepted that the threat of loss of a job is sufficiently coercive to limit, to take away that choice, but once that choice is taken away, it can't be further or incrementally limited.

Of course, that can be compared with other rights in BORA, like freedom of expression, or in fact in this case the freedom to manifest religion, which are capable of incremental limits, although we say that TDFO can't doff from the DFO 3 and the amendment to the vaccination schedule to establish a separate limit. So the Crown's position is that the TDFO by itself isn't a rights-limiting measure. It's only rights-limiting when it's combined with the DFO 3 and the amendment to the Vaccination Schedule.

As the Solicitor-General has already outlined, the TDFO made minor procedural changes to the existing process, and so for that reason, as the Solicitor-General has already outlined, the TDFO, as I've already said, can't by itself limit section 11, but also section 11 isn't capable of a further or incremental right.

ELLEN FRANCE J:

If you put to one side the idea that it's an incremental limit on the right, could the Court not say you needed to justify the further changes? The changes that were made because you've got a limit on the right. In other words, I suppose I'm questioning how central the idea that this was an incremental limit on the right is.

MR NEILD:

Well, there might be a couple of different ways of answering that. One might be Justice Glazebrook's suggestion that actually this is just operationalising an existing limit on the right. And in that case we would say no it wouldn't be appropriate to go through the full proportionality, the right's already been limited, the justification has already been established, this is simply a question of operationalisation and you might still have an availability to review that operationalisation through orthodox judicial review means but the proportionality test under section 5 wouldn't be engaged.

There might be situations where a decision-maker, and this is getting into hypotheticals, but there might be situations where decision-makers are choosing between different measures, which all limit section 11, and the Court may have to engage in comparing those different measures. We would say that you can't say that one measure limits section 11 more than another but you could still engage in the analysis under the third step of *R v Oakes* [1986] 1 SCR 103 which is the step around which is the less intrusive but that might be more about how different measures limit other rights or other interests protected in the common law.

I can give an example of that if that would help and this is very hypothetical but if, I suppose, in the most extreme example were one to hold a person down and administer the medication, then that would be obviously disproportionate and more intrusive, but it wouldn't be more limiting of section 11, but it would be more intrusive because it limits other interests protected under the common law such as bodily integrity but we say section 11 is about the ability to choose which is binary.

WILLIAMS J:

Perhaps, but as your own numbers suggest, there were some people who, despite non-compliance, were nonetheless able to choose according to their conscience and others who were not, so there's no single ruler here, is there?

MR NEILD:

Is your Honour alluding to the fact that some members, the applicants in this case, did actually choose not to?

WILLIAMS J:

Well, chose not to and it didn't have any implications for them. Well apparently.

MR NEILD:

I think that perhaps this goes back to this question about we're approaching this application on a systemic basis and the Crown throughout the COVID, all the different COVID proceedings, has consistently conceded that the threat of a

loss of job creates sufficient pressure, sufficient coercion, that the right is limited, and our point is that once that concession is made, once that choice is taken away, it can't be further limited.

WILLIAMS J:

Yes, but you probably can't have a dollar each way because you say that on the one hand and then the Solicitor said: “Look more than half the people didn’t get thrown out. This isn't the Draconian system problem that it has been portrayed as.”

MR NEILD:

Well we say that the right was limited. I guess this is a question about at what point is the right limited. Is it the point at the retention review or is it earlier? I'm not sure that we need to answer that question for this case but probably the best answer is that when the Vaccination Schedule was amended that introduced that retention review process, so as soon as the Vaccination Schedule was amended, the risk of discharge crystallised, the decision to discharge was still in there but that risk that a member might be discharged because they weren't meeting an individual readiness requirement became present.

1210

I just had one – that’s really all I have to say on that second issue. I just have a couple of small things to say on the issue of pleadings which is from 102 of the submissions. The Crown’s position, and this is really about the UK point that the Solicitor-General ended on. Where an applicant intends at the hearing to rely on a particular measure under that third limb of *Oakes* that there was an alternative measure out there that was less rights-infringing, or less intrusive of the right, that should be pleaded. That should be pleaded both as a matter of fairness to the Court, sorry, as a matter of fairness to the Crown, but also as a matter of fairness to the Court, because otherwise the Court may be left in the situation where it’s being asked to consider the lawfulness of a decision by one of the three arms of government, without evidence that might have been before the Court had the alternative been pleaded, and that’s, of course, illustrated

here because the Defence Force doesn't include evidence about differences between the UK military, and the New Zealand military. Of course the Court might be able to take judicial notice of the fact that the UK military is much larger, the UK generally took a different approach in relation to COVID, and of course the UK does not have a role in the Pacific in the way that New Zealand does. So there are a number of differences.

Now the Crown acknowledges that the burden in section 5 is on the Crown, it's for the Crown to prove that the measure, that a rights-limiting measure is proportionate as a justified limitation. But we say that that is another reason why such an alternative should be pleaded, because in the sequence of pleadings and evidence the Crown, when it comes to file its evidence, has had the benefit of the pleadings, and the applicants' evidence, and the applicant isn't obliged, because of where the burden lies, the applicant isn't obliged to file evidence explaining why it's preferred alternative meets the objective and is less rights-infringing. So if it hasn't been pleaded, the applicant has no obligation to file evidence. When the Crown comes to file its evidence, it has no way of knowing that the applicant is going to intend to rely on this particular alternative, and of course the Defence Force here did file evidence on the matter that was pleaded, the idea of issuing a command through, using the consequences in section 72, but the UK alternative that was proposed, that was another point that we've set out in our written submissions, there might be some alternatives which are so obvious they go without saying, where even without pleading one can expect the Crown to provide evidence on that. But the UK measure here is not of that order. It's a very different military and it, as I've already outlined, doesn't have the role in the Pacific. It doesn't go without saying that the New Zealand Defence Force is going to provide evidence explaining why a UK measure isn't going to be adopted in New Zealand.

MILLER J:

To what extent are you making a general point about pleadings here, which I understand, they have to put up something for the Crown to justify, and to what extent are you complaining about particular pleadings in this case, because if so you're asking us to not consider some of the material that is in the record,

and there you confront Mr Butler's point, which he makes rather obliquely, that you seem to have had an opportunity to try and fix it up in the High Court, or at least seek an adjournment, and then didn't do it.

MR NEILD:

To the first point, I'll come back to the point around whether we had an opportunity.

MILLER J:

All right.

MR NEILD:

On the first point we are both, I don't think I resile from other, we're making a general point around pleadings.

MILLER J:

Yes, I understand.

MR NEILD:

But also we, of course, say that because the UK approach was not pleaded, then the Court shouldn't rely on it, and of course had the – it's interesting to ask, what would the pleading have looked like if the UK evidence had been in, had formed the thinking in the pleading, and really the answer has to be that probably the pleading would have been about the amendment of the Vaccination Schedule, because that's really the difference, or that seems to be the difference on the limited, very limited evidence we have, that the UK did not make COVID vaccinations part of a readiness requirement, and so it wasn't required for deployment.

On the second point your Honour made, I think the Human Rights Commission has suggested that there was a, it was a risk taken by the Crown, and our submission is that is a misreading of the transcript, an unfair characterisation, and the references for the transcript are at our footnote 125. In the transcript the counsel for the Defence Force made it very clear that – in the High Court

hearing the counsel for the Crown, and that's on page, that's that first reference to 102.0282, counsel for the Crown made it very clear that this evidence had come in, it wasn't timetabled, it had come in 11 days before the hearing, and that the Crown said that, I think she makes the point in there somewhere that if: "… I was placed in the impossible position of being unable to respond in any meaningful way to it. I should like to note for you that if that evidence does become pivotal", and it wasn't pivotal in the High Court decision, "then we would seek leave to respond to that with evidence of our own."

Then later at 102.0290, at this point, so that discussion happened before the lunch adjournment I think, and then Justice Churchman read the UK evidence over the lunch adjournment, and he come back in and said, well perhaps he could address it tomorrow, and again Crown counsel said well I'm not really going to be able to file evidence on that, I can't produce evidence on that overnight, and the Judge said: "I'm sure it's a matter of submissions."

So given that indication from the Judge one can understand why the Crown did not consider it was necessary to file evidence in response on that point.

KÓS J:

Well that's your call, Mr Neild, or Ms Thornley's call, and you made it, and the submission has already been made today by the Solicitor-General as to why no weight should be put on the document anyway so…

MR NEILD:

Yes, that's our primary argument. That's all I intend to say on pleadings, unless the Court has any further questions?

ELLEN FRANCE J:

Thank you. Mr Hague?

MR HAGUE:

Thank you your Honours. May it please the Court. I intend on starting with some introductory remarks before turning to the first ground of appeal of

deference. After I speak to that primary ground, I will take more time during these submissions to address that primary ground, I will hand over to Mr Woodd to lead the submissions on incremental limitation on rights, and after that I'll return to speak to the pleadings issue, and then some concluding remarks.

1220

I might start with the situation as it was prior to the implementation of the TDFO because I do want to focus on what the Court has understandably focused on and that is what did the TDFO mean, what were the changes brought by it and, more importantly, what were those limitations on rights that need justifying.

Individual readiness requirements have been part of military life probably forever. Vaccination, as we've heard today, has been around for many decades. These are things that are accepted by service people to serve in the Armed Forces and these things are not the subject of challenge. We understand the importance of the objective of deployability of fitness to serve. That's an important thing that the Armed Forces need to be able to do but, as has been focused on by this Court today, it's how the TDFO operationalised those requirements that is at issue today.

Now there is no challenge to the general ability of the Armed Forces to require vaccination for service people but that's not to say that that point is conceded, that vaccination requirements are lawful at all times. It's simply that the Four Members have rightly focused on the situation that presented itself to them in 2022 with the implementation of the TDFO, and I'll speak about why the implementation of that TDFO made a difference and why the challenge was brought then.

The processes implemented by the TDFO were three-fold and my learned friend Madam Solicitor-General has detailed those well, and I don't intend on focusing on them for long, but first unvaccinated members of the Armed Forces were not allowed to access camps and bases. That was the default rule with some limited exceptions.

And I will just touch on the point of **[REDACTED]** who at 18 weeks pregnant gave evidence, and this is at para 7 of her affidavit, that she was not allowed in the Devonport Naval Base but I will point out that at that time there was a separate instrument implemented by the Chief of Defence Force which restricted members of the Armed Forces from accessing camps and bases in the Auckland region, and I would suggest that that reflects the heightened restrictions that Auckland was under at that time. **[REDACTED]** gave clear evidence about the worrying concern that she had about not being able to access the medical care –

MILLER J:
Sorry, so the cause of this as a separate restriction had nothing to do with the vaccine requirement?

MR HAGUE:
No, it's entirely to do with the vaccine requirement Sir, but it was a separate instrument. The TDFO, that related only to the Auckland region.

ELLEN FRANCE J:
And that's not one that's been challenged?

MR HAGUE:
Yes, yes, Ma'am. But the point made is that the vaccination requirement and the degree of restriction to camps and bases was a limitation that should be justified. It was something imposed by the TDFO that was above the status quo ante that existed prior to that time.

The second important change brought by the TDFO was that the decision-making role was taken from the Commanding Officer and elevated to the Service Chief, and I can speak in more detail about the meaningful, the meaning of that on the Members. A member of the Armed Forces has only one Commanding Officer. There are many Commanding Officers in the Armed Forces. They can be as low as a Lieutenant in the Navy in charge of an inshore patrol vessel when they're operating. They can – they are typically at

about the Lieutenant/Colonel equivalent level which is about half way up the seniority of officers.

MILLER J:

Two ranks removed, is that the requirement?

MR HAGUE:

No, Sir, that's the requirement for the purposes of discipline.

MILLER J:

Right.

MR HAGUE:

But a Commanding Officer can be – in fact, there can be instances where a Commanding Officer is outranked by the person they command which is unusual but possible. A Service Chief, on the other hand, there's only one of them for each service. They are a two-star equivalent. They are very senior. They are the second most senior officer in the Armed Forces.

The difference that matters for this issue is that Commanding Officers are the person who is responsible for the day-to-day command, welfare, management, leadership of that person under their command. They're it. They're in command of that person. While a Service Chief, of course, has command responsibilities for the entire Force, there's a huge degree of difference in the level of understanding that a Commanding Officer will have for the unique situation relating to the individual but also, importantly, the requirement for vaccination as it relates to that unit and their duties because it differs hugely.

On one end of the spectrum you may have Special Forces operating out of Papakura at high readiness ready to deploy at a moment's notice to who knows where. At the other end of the spectrum you might have a staff officer sitting at HQ NZD from Wellington who has done their time on deployment and, in fact, there's virtually no chance of ever deploying again. A Commanding Officer is best suited to assess that and while –

GLAZEBROOK J:

Wasn't the answer to that given by Madam Solicitor that, in fact, all of that information would be contained in the process including the person's answer to that in terms of the material that goes before the Service Chief?

MR HAGUE:

Yes, Ma'am. The answer to that is, while a report goes some way to making the Service Chief alert to the unique issues that are relevant to that member, it is no replacement for the intimate knowledge that a Commanding Officer has of the day-to-day welfare or day-to-day aspects of that person and the duties of that unit.

ELLEN FRANCE J:

That seems to me to potentially cut both ways because it also means they're not necessarily bringing that wider service outlook to it which is what the Service Chief is doing.

MR HAGUE:

Yes, Ma'am, and we certainly accept that a Service Chief does have that strategic overview much more than a Commanding Officer may have. What matters here in our submission is that, when applying the section 5 justification test, the focus is on how the rights of the individual are limited, and while the operational objectives of the organisation are certainly relevant in making that assessment, when we're talking about the limitation caused by the TDFO that's different from the status quo ante. The focus is on the individual.

ELLEN FRANCE J:

Well that may be so but it may suggest that there is, in fact, a justification for what's occurring that is the CDF's view that you do need to have that higher level, if that's the right way of putting it, overview of readiness.

MR HAGUE:

The appellants certainly argue that that is part of the justification. The respondents say that essentially we're talking about what could be called,

and in fact the Chief of Defence Force did call in his evidence, administrative consistency or consistency of decision-making. We say, and I'll move to the specific justification test and the application of that further in my submissions, but it is not justification. It's certainly a factor the Court can take into account and that was taken into account in the Court of Appeal and High Court but not something that would justify the limitations on rights.

WILLIAMS J:

The two issues you've got to confront are: your challenge was systemic and so our lens is necessarily systemic, and the problem being confronted was also and fundamentally systemic, not just for the Armed Forces but for the country, indeed for the world. It would be wrong, wouldn't it, to suggest that there needed to be a balance between these two and a systemic or a strategic approach higher than CO was going to be required somewhere or it could be a complete mess.

MR HAGUE:

So, I would say that the relevance of the issue of the Service Chief versus the Commanding Officer is what we say could be a less rights-limiting alternative, that if we're talking about degrees of coercion and Mr Woodd will speak to this in the incremental limitation ground of appeal.

WILLIAMS J:

Sure, but you do have to confront, I understand that point, you do have to confront the risk that is inherent in that preference to go retail, my favourite word of the day, as opposed to taking it up the line yet, and if you acknowledge that that was a risk, how would it be dealt with, mitigated and removed.

MR HAGUE:

And that's an issue for the CDF and we acknowledge that and it's not for the Four Members, and I know this is not what your Honour is suggesting, but it's not for the Four Members to argue why it could not remain with the Commanding Officer. It's for the Chief of Defence Force to give evidence, sufficient evidence, as to why that aspect of the change brought by the TDFO

was justified, how it contributed to the objective sought, why the status quo ante wasn't acceptable, and I accept and I acknowledge that there is some evidence in the affidavit where he touches on those points, but in the words of the Court of Appeal, in my submission, that falls well short of what is required.

1230

One reason that we say it falls well short is the Chief of Defence Force, Brigadier Weston, and other officers who gave evidence on the CDF's behalf, focused very much on why vaccination is important, why it's necessary to have a vaccination requirement. Well that's not a challenge. The challenge is how the TDFO implemented that requirement, and there's very little evidence on, from the CDF and his officers about how the changes brought by the TDFO contribute to the objective sought, meaning deployability and, jumping forward a bit now, but when we go to the numbers, 55 unvaccinated out of 14,000, half of which are already undeployable internationally –

KÓS J:

I think we're mixing a whole lot of ideas up here.

MR HAGUE:

Yes.

KÓS J:

I mean I must say I have some reluctance to think that this Court, or any Court should second-guess the CDF's preference as to who the decision-maker is, which is the only issue this particular point focuses on. He sees a need for a decision-maker with the same information to be at a higher level. You say it to be more rights-consistent if it was at a lower level. I don't understand, actually, why there's a difference in terms of rights, except perhaps a degree of personal appreciation, but it's not necessarily a question of rights.

MR HAGUE:

Well Sir I think you probably summarised our position accurately, and I take your point. I probably can't take my point much further except to say that is one

reason that we say that the TDFO poses a higher limitation on rights than the status quo ante.

KÓS J:

Thank you.

MR HAGUE:

The final and most important change brought by the TDFO is of course the subjection to a mandatory retention review, and this was not an administrative process without consequences. Indeed the majority of unvaccinated members who are subject to this process were not retained.

MILLER J:

This is not a requirement introduced by the TDFO though, is it? It's in the previous instruments as well. It's always been the case that if you decline for reasons of your own choosing to accept a vaccination that's required, then you're at risk of being dismissed from the service.

MR HAGUE:

Yes Sir. Certainly at risk, but as we saw, those individual readiness requirements under DFO 3, which should, in theory, apply to the 5,000 and odd number of undeployable people, well the Defence Force weren't subjecting those 5,000 people to a mandatory retention review, and so there was a real difference in how the TDFO changed the status quo for affected members and the proof is in the outcome where most people were not retained, and that simply wasn't the case prior, or at least there's no evidence from the Armed Forces that it was the case prior.

MILLER J:

Perhaps because you didn't have widespread refusal to accept the vaccine that had been found medically appropriate, or necessary. Isn't that the difference?

MR HAGUE:

Well Sir I wouldn't agree with the term "widespread refusal".

MILLER J:

Well whatever the number is, it seems to have been a unique problem. Previously people accepted you needed to be vaccinated for typhoid, or cholera, or whatever it was, when you're deploying overseas, there was no question about that, what's unique about this vaccine is some people did not want to take it for their own reasons, reasons which the Defence Force presumably assessed and found unjustified. Doesn't that explain the fact that we have a large number of people whose retention is being considered, rather than the fact that it's a new requirement?

MR HAGUE:

So I would say that the fact that those 55 members declined to be vaccinated for various reasons, was their exercise of a fundamental right to refuse medical treatment, and it's not, in fact the fact that that was the reason, and that engages the section 11 right, and in some cases the section 15, is the reason that the Chief of Defence Force has to justify that limiting measure. So I would argue, Sir, that for that, because it's those members that refused the treatment and engaged that section 11 right, actually they enjoy greater protection than members who were through conduct issues unable to hold a security clearance, or for fitness issues were unable to pass the fitness test, or whatever other issue that might result in non-deployability for those much larger pool of people.

MILLER J:

So, now you're saying it's the refusal to accept the vaccine that engages section 11 rather than the requirement that you have it in the first place?

MR HAGUE:

Well, Sir, I think you need both. I think there needs to be a degree of coercion to engage that right because refusal without coercion I would suggest wouldn't limit the right.

MILLER J:

Right.

MR HAGUE:

But there was coercion in this case.

GLAZEBROOK J:

If it's going to be on the schedule then it becomes uncompulsory, doesn't it?

MR HAGUE:

On the baseline schedule, yes, Ma'am.

GLAZEBROOK J:

And so you've already restricted that choice, haven't you, by putting it there because –

MR HAGUE:

Yes, there's a degree of –

GLAZEBROOK J:

So I'm not quite sure what the incremental risk is in those circumstances.

MR HAGUE:

There's certainly a – there is a limitation of the right –

GLAZEBROOK J:

Even the incremental risk I don't really understand.

MR HAGUE:

Well, the incremental risk, Ma'am, is the being subjected to the mandatory retention, review and likely discharge whereas the inclusion of all those other vaccines on that baseline schedule prior to the TDFO simply didn't have that effect. These, those people –

GLAZEBROOK J:

Well, you can't say that, can you, because one, you had to accept them when you entered the Armed Forces, and presumably if you needed a booster you

weren't on that vaccinated, or if you hadn't been vaccinated you had to become vaccinated, and if you didn’t, weren't you always subject to a review?

MR HAGUE:

You were at risk of review. I wouldn't say that you were subject to mandatory review but certainly, Ma'am, I take your point that when it comes to vaccinations on that baseline schedule you're quite right that all bar one were on the national schedule. Most people receive them during childhood and they were a requirement for entry and so you weren't in the Defence Force unless you had had those. That was the difference posed by the COVID vaccine. It was a new vaccine. It was an addition.

MILLER J:

There would be some that were boosters that you'd require, for instance, is the tetanus vaccine on the list?

MR HAGUE:

Yes, it is, Sir.

MILLER J:

Okay. So, you would need a booster for that during your military service?

MR HAGUE:

Yes, and certainly there are those on the enhanced schedule as well. I do think perhaps it's a combination of issues as to why we’re saying the TDFO poses the limitation. It must be justified it was a new vaccination. It was subject to a much more stringent and restrictive regime of mechanism of implementing it by the TDFO than the other vaccines were and, in the words of the Court of Appeal, they agreed that discharge was a likely outcome and the Court stated the consistent response envisaged by the CDF and CPO in the evidence was that absent clear reasons accepted by the Service Chief for retention, sorry, was discharge absent clear reasons accepted by the Service Chief with that retention to be further reviewed 12 months out, that was a significant and

meaningful change in how vaccination requirements were dealt with in the NZDF. It resulted in a degree of coercion that hadn't previously been imposed.

GLAZEBROOK J:

Well you say that but that doesn't seem to be what the documents say. It might be that just as a matter of course because everybody knew they had to take those vaccines that nobody refused and therefore it didn't arise but that's not the same as saying – because when you sign up you're presumably signing up on the basis that there might be other vaccines that are necessary on an enhanced schedule if you want to go to or you're going to be deployed to a particular case. I mean, you can't say I only signed up on the basis that it was only going to be those vaccines and I wasn't going to be required to comply with other fitness requirements that are brought up later including other vaccinations.

MR HAGUE:

I agree, Ma'am, but what members can say when they sign up is if and when those additional requirements are asked of me, I ask that they be done in a lawful way, and in a way that is a justified limitation on any rights that may be affected.

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ELLEN FRANCE J:

What are the, in that sense, what's the additional requirement you're referring to?

MR HAGUE:

Well, Ma'am, I was responding to Justice Glazebrook's points, as I understood it, to be about members who join the Armed Forces know they do so being subject to certain restrictions, certain requirements, and surely they must accept that there may be other things asked of them including potentially this, and I agree. But what they do say is that those requirements that may be asked of them have to be done in a lawful and justified way.

KÓS J:

How many orders of superior officers would that invitation to debate apply to?

MR HAGUE:

Sorry Sir, could I…

KÓS J:

Well it seems to be an invitation to debate superior orders. That sounds strange.

MR HAGUE:

Well Sir the CDF didn't make it as an order, and certainly it seems strange, and I think the Four Members out of all people understand the significance of being under command and having things required of you. Well this wasn't an order by the CDF and that was conscious on his part. In some ways –

MILLER J:

It did raise questions of good order and discipline, didn't it?

MR HAGUE:

Well the CDF says it does Sir, we don't agree. We say that people declining medical treatment, as they're perfectly able to do under section 11, is not a sign of an ill-disciplined person or a sign of poor morale or cause of poor morale in that unit, far from it. This is someone, in the cases of some of the Four Members who have served for many decades, operationally made many sacrifices. I don't think that's a question at issue. But who are saying, I've made this decision on this case, and this is my decision that I'm permitted to make under section 11.

MILLER J:

So when one of them is told, because a couple of them are officers right?

MR HAGUE:

Yes Sir.

MILLER J:

And one of them is told, you've lost the moral authority to command because you're refusing to accept this vaccination, that's just wrong is it?

MR HAGUE:

Yes.

MILLER J:

That's not a view that the Chief of Defence Force, or the Service Chief could permissibly take?

MR HAGUE:

They're entitled to their view, Sir. I wouldn't seek to restrict them in that view. It's their opinion. It's their opinion of the Chief of Defence Force, but I would say it's a sad position to take when someone is exercising their fundamental rights. It imports a degree of doing something wrong, of being disloyal, and that's simply not the case here.

WILLIAMS J:

If we took a counterfactual. Let's say this was 1919, and there was a vaccine for Spanish Flu, and anyone boarding the ship back to New Zealand was required to be vaccinated. Do you think that would be within the gift of the Commander of the New Zealand Expeditionary Force?

MR HAGUE:

This is where I have to confess my lack of detailed knowledge about the Spanish Flu. I'm aware that it, of course, existed. So I would say, assuming the same Bill of Rights regime existed –

MILLER J:

It was imported from Europe to a number of countries by returning servicemen.

MR HAGUE:

As all section 5 justification analyses would have to be taken on the circumstances and evidence that existed at that time, but the CDF would have the burden of justifying that limitation on rights. I think it probably would, assuming that people returning were New Zealand citizens, would be a limitation on the right to enter New Zealand. That would need to be justified. Whether it would be justified or not would depend on the circumstances of that case.

WILLIAMS J:

Well in hindsight, clearly so, given the body count, and we've got a, we have to understand that in the context of 2021/2022 we were in the middle of it, not looking at it in hindsight. It was very much that vibe at the time, wasn't there?

MR HAGUE:

I think that the, that context of the pandemic is absolutely a relevant factor that the Court can take into account, and as I move into the issue of deference, I might come back to that point. But the burden remains on the CDF to justify his limitations.

WILLIAMS J:

Yes.

MR HAGUE:

And if I could just introduce one contemporary factor into your historic example, and that is, well, what if the CDF said, if you're a member of the Armed Forces returning on those ships you have to be vaccinated, but hang on we'll take anyone who's not in uniform without being vaccinated, well that begins to introduce a degree of challenge of any potential justification, and that's what happened here, which I'll turn to soon.

The objective of the TDFO was to maintain the ongoing efficacy of the Armed Forces. Presumably everything the CDF does is for that purpose. But I've got two criticisms of that objective. First that it's overly broad, and as

this Court said in *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683, care should be taken when assessing whether limitation on affected rights are justified against a very broad objective. Second, the importance of maintaining the burden on the CDF to give evidence as to how the limitation on rights contribute to that objective sought, and while, as I said before there is evidence of the CDF's view on the importance of the objective, and that's not disputed, there is evidence about the reasons that he says he implemented the objective, but there's very little evidence as to how those limiting measures contribute to the objective sought, and that goes directly to the proportionality issue.

I might jump to the UK case, because this is relevant to this point. The UK case was different for a couple of reasons, and as my learned friend said, really it was about the UK approach of putting the COVID vaccination on their enhanced schedule equivalent, and secondly that the decision-making was retained at more of a local level, that first one of the enhanced schedule being a primary argument.

But the enhanced schedule existed in the NZDF, and it was always the case that local commanders made the decision. The point of the UK evidence was to show the Court that this was not some hypothetical alternative dreamed up by the applicants at that stage, but actually it was being done in a comparable military, Five Eyes military, Western military, and of course, and it's not disputed by any party, the burden is on the CDF to satisfy the Court that that less rights-limiting alternative was not reasonably available, and they did not do so.

MILLER J:

Are you now moving to the pleadings point?

MR HAGUE:

No Sir. I was just segueing and –

GLAZEBROOK J:

So you're less rights – well, you don't say a just… should be on an enhanced schedule because you've agreed that it was fine, that it was compulsory, I mean you said you're not necessarily agreeing, but it's not challenged. So what you're really saying is that it's less rights-limiting to have it at a local level rather than a higher level, even though the same information would be put in front of the Service Chief, as it would be in front of the Commander? That's the submission?

MR HAGUE:

It is Ma'am, because the information in that Commanding Officer's head, as he goes about his day-to-day duties, cannot be replicated by a document.

MILLER J:

You're asking us to decide this at a level of principle, systemic level, as opposed to the level of the individual service members who were dismissed?

MR HAGUE:

Yes, the challenge is against the TDFO as a policy, as an order, but the individual examples that we've given in evidence demonstrate the effect that that TDFO had, and that's the relevance of the individual impact.

MILLER J:

You're straddling a stool there, I think, you're having…

MR HAGUE:

Well Sir I think that the section 5 analysis requires a court to take into account all relevant factors and when we're talking about limitation of individual rights, although the challenge is to the policy, it's important and relevant to look at the individual impact. So that extent, yes I am straddling the stool, but I say that it's justified.

ELLEN FRANCE J:

In the context of judicial review, albeit Bill of Rights, if the process gets the information to the decision-maker, isn't it hard to say there's a problem?

MR HAGUE:

It's harder, yes Ma'am. If there was no information going to the Service Chief I would be in a stronger position. There is some information. But when we're talking about degrees of limitation, and maybe the point is that this degree of limitation is, if it is a degree of limitation, is so little that it's almost immaterial. I wonder if that's the point the Court might be exploring. But – and I'm not ready to concede that point.

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MILLER J:

It's whether there's a meaningful additional restriction on the right in circumstances where the same information is available to the decision-maker, it's just a decision-maker further up the chain.

MR HAGUE:

And on that point, Sir, I'd say it's not the same information.

MILLER J:

Because we can presume that there will be information about the particular needs of the unit, or the particular circumstances of the service member that will not be passed up the line?

MR HAGUE:

Yes, I think there's a degree of filtering and a loss that goes with passing service documentation up the chain of command, up that staffing process for a very senior decision-maker who is the Service Chief.

MILLER J:

So, that's a question of fact of course.

MR HAGUE:

Yes.

MILLER J:

Where is the evidence of fact about that?

MR HAGUE:

Well, Sir, that I think is a question for the CDF because the burden is on him to satisfy the Court that the less rights-limiting alternative, which we say is keeping that decision-making at the local level, isn't reasonably available.

MILLER J:

No, it cannot possibly be the case. Do you not need to show that there is a problem here, then the need to justify it steps in? You're saying there's a problem inherent in the idea of moving the decision up the chain, the problem is a factual one, you need to demonstrate that?

MR HAGUE:

I wonder, Sir, I certainly accept that it's for us to satisfy the Court that the rights are limited in that way through elevating that decision-making but once we satisfy the Court of that, and perhaps, Sir, yes you're right on that point, the burden is on us.

WILLIAMS J:

Perhaps, the best argument available is that the further up the chain you get, the stronger the system implications loom and the weaker the individual implications become just structurally.

MR HAGUE:

Yes, Sir, and I wonder if that's what the Court of Appeal referenced when they said that that was the consistent response envisaged by the CDF in elevating it to the Service Chiefs because there's no reason – I mean, if the justification is that the information provided up by the Commanding Officer was sufficient,

well why wasn't the information provided down from CDF about the strategic considerations also sufficient? It goes both ways.

MILLER J:

Wouldn't that be more problematic? So, the Chief of Defence staff says this is a critically important issue for us, people choosing not to have this vaccine because we've got this problem. The extent of the problem is known but we know that it is serious and its potential impact on the readiness of the service as a whole is potentially large, but we don't know what's the Commanding Officer going to do with that information except say: "Well sorry mate you're gone." You would be complaining about that if it had been left to individual Commanding Officers to make this decision faced with the kind of policy imperative like that. Surely there is no one who can make that except someone who's further up the chain.

MR HAGUE:

Well, Sir, I would say that if that's the evidence of the CDF that satisfies the Court that that's the case, then well that's the Court's decision but my submission is that that evidence isn't sufficient.

MILLER J:

Right.

GLAZEBROOK J:

The other issue is consistency of decision-making because if you're an individual and see that somebody's been retained when they meet fewer of the requirements than you do, then you're going to be naturally aggrieved and probably rightly so in any sort of employment terms.

MR HAGUE:

Mmm. Well, Ma'am, I think that the Commanding Officers make decisions about discharge of their people every day. Not every Commanding Officer every day but it happens every day across the Armed Forces and we say there's no justification in this case for COVID for the very, very small number of

unvaccinated people to take that decision from the local level, elevate it up the chain of command to a single person, who's a two-star general equivalent, who simply is not well placed to take into account those individual considerations. The point is that it's a less rights-limiting alternative to keep that at a local level. I just return perhaps to my primary argument that it is the subject to – being subject to that mandatory retention reviews and the likely discharge that was borne out in the evidence, that's the primary limitation here.

I do want to point out, as I move into deference and I'm just conscious of time, perhaps with the Court's permission I'll briefly talk about the role of CDF and then –

GLAZEBROOK J:

Can I –

MR HAGUE:

Yes.

GLAZEBROOK J:

I still don't understand on the basis of documentation why you say that the mandatory retention reviews were a change. One can understand that where you have something that can be fixed up, somebody might say: "Well look you've got 30 days to have your medical," or whatever it happens to be, you're not refusing to, you just haven't got round to it, or you've got two months to get yourself back up to the fitness level that's required. But if somebody just said: "I'm not doing, I'm not going to get my medical. I'm not going to get my fitness up" surely they'd be subject to a mandatory review?

MR HAGUE:

They probably would, Ma'am. I'd suggest there's two key differences, and I'm not being flippant when I say this, but there's no NZBORA right to be unfit so that's one key point of difference with people declining to receive a vaccination. The other point I'd make is that people are subject to retention reviews for not passing the fitness test and a range of other reasons every day and that's dealt

with perfectly adequately by not elevating it, by not subjecting them to that mandatory retention review. Why was it so important for the CDF to make that change –

GLAZEBROOK J:

Sorry, what do you mean "mandatory"?

MR HAGUE:

Mandatory retention review.

GLAZEBROOK J:

Because it would be subject to a mandatory review, wouldn't it?

MR HAGUE:

No, Ma'am, I'll have to – I don't want –

GLAZEBROOK J:

What are you saying? So what's your mandatory, what's your definition of that?

MR HAGUE:

"Mandatory" is that a service person is compelled to undergo that review, whereas for the TDFO and for issues of non-deployability not involving unvaccination, the Commanding Officer has a degree of discretion and perhaps that's best borne out by the fact there are that 5,000 plus members and, as Brigadier Weston said in his evidence, there may be some reasons that are transitory that are not, that wouldn't justify a retention review in those circumstances. There will be other cases that do. But the TDFO took away any discretion of that local Commanding Officer. It was mandatory. It was elevated.

GLAZEBROOK J:

All right, thank you, I understand the point.

MR HAGUE:

Would the Court like me to spend five minutes talking about CDF or?

ELLEN FRANCE J:

Three on mine.

KÓS J:

Well, he is Air Marshal Short.

MR HAGUE:

Yes, although was previously, Sir, yes, and really I'm talking about the role of CDF, I'm not talking about Air Marshal Short personally. But the appellants make much of the role of CDF and his duties as Commander of the Armed Forces and it's accepted that the CDF has some unique aspects of his duties, of his role, but he's not alone in that regard in many ways. There are other institutions in New Zealand, the Police, Corrections, IRD, who have important and unique constitutional roles including as it relates to enforcement.

I'd also make another important point about CDF and that is he enjoys existing legal, I'm going to say protections, protection from judicial scrutiny and that might sound like a controversial thing to say but let me explain why I've said that. This is a – I'll find the right place in my submissions. The first is that the, this is at para 86 of my submissions, the Chief of Defence Force can declare certain activities exempt from the Health and Safety at Work Act 2015. What that means in practice is that most people in charge of a place undertaking a business activity have to have a legal duty to ensure that they've taken all reasonable practicable steps to eliminate or minimise the risk to life or safety of people in that place. Well, a CDF can exempt himself from that legal requirement and therefore the scrutiny of the courts by declaring a certain activity exempt. So it might not have relevance to this case, I'm not suggesting – well the relevance I suggest it has to this case is that members of the Armed Forces can be put into unsafe positions by the CDF who can then exempt himself from the judicial scrutiny that would follow from a WorkSafe or private prosecution.

ELLEN FRANCE J:

So, what's the implication of that for this case?

MR HAGUE:

The implication is, Ma'am, that that's one reason I suggest that deference should be tempered when it comes to CDF because it already has certain legal protections. A second legal protection, and probably more relevant to this case, is that members of the Armed Forces are not employees meaning of course they can't raise a personal grievance. They don't have access to the Authority or to the Employment Court. They're left with very few options. They can either complain internally, which ultimately is determined by the CDF himself, or they can apply for judicial review, which is what's happened in this case. The relevance I say is that any deference that the Court might think CDF should be afforded because of his role should be tempered by the fact that he does have a degree of legal insulation from scrutiny in some respects and that judicial review and the scrutiny of the courts during that process is a very important and one of the few ways that members of the Armed Forces can seek external intervention.

ELLEN FRANCE J:

All right. How are you going for time Mr Hague?

MR HAGUE:

This would be a good place to pause, Ma'am, if that would –

ELLEN FRANCE J:

All right, but we're on track for you both to finish by 3.00 I think was your timing?

MR HAGUE:

Yes, so we've got 45 minutes left of that timeframe. Depending on any questions of the Court, yes we probably are broadly on track.

GLAZEBROOK J:

Should we perhaps come back at 2.00?

ELLEN FRANCE J:

Well that's what I was wondering about.

MR HAGUE:
If the Court would be willing I'd be grateful for just that slight flexibility would be helpful.

ELLEN FRANCE J:
All right, we'll start again at 2.00 then, thanks.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.06 PM

ELLEN FRANCE J:
Mr Hague?

MR HAGUE:
Your Honours, I think I left off having spoken about the role of CDF and, unless there are any questions about that, my intention is to move into deference. As I do, I think it's a good segue into deference to refer to paragraph 1 of the appellants' submission in which they accept that the TDFO does impose a limit on protected rights and, of course, it's only if a right is limited that deference becomes relevant and so I thought that would be a helpful starting point that there is that concession and agreement from the appellant that the TDFO does limit the affected rights.

I'll move through my recent submissions, certainly not word-for-word, but in relative order and I'm starting from paragraph 19. There are several questions at the heart of the issue as it relates to deference. The first is what is deference. Why should the Court afford deference and how should deference be afforded and to what? We agree with the Human Rights Commission that deference can be an awkward term when used to describe the relationship between the judiciary and other branches of government but we say it matters less what word is used and it matters more what the underlying meaning and effect is.

So why should deference be afforded? The Court has several authorities and academic writings on the issue of deference and I suggest they're quite helpful and I'd start with Professor Taggart, who discusses the reason for deference, but really it's what the Court has talked about. It's legislative intent, expertise, experience of the decision-maker, institutional competence and other things, some of which are relevant in this case. But how should deference be afforded? That's the more tricky question and that's where perhaps the controversy arises. We agree that some regard must be had to those things that Professor Taggart says is the reason for deference. Some regard but that does not mean total stepping back and the burden remains, and it's accepted by all parties in the Court, that the burden remains on the decision-maker to satisfy the Court that the limited rights, the limitation on the affected rights is demonstrably justified.

We suggest that practically speaking there's two ways that the Court can afford deference. The first is how evidence is assessed and the second is what redress should be ordered. So turning firstly to evidence. The courts are well placed to decide the relevance and strength of evidence and where there is competing evidence what weight to give respective evidence. In *Moncrief-Spittle* this Court said, and this is footnote 29, paragraph 84 from that judgment, the Court "would expect to see evidence that [the decision-maker] had identified and weighed the right, and gave consideration to whether the reasons", in that case "to cancel (the security and safety concerns) were such as to outweigh the right. That will assist the court in its task." And so it's clear that there is some evidence that's required. Deference cannot fill gaps in evidence. If there is no evidence on certain points to defer to the decision-maker on these points would be wrong.

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In the absence of such evidence, and I'll turn to the evidence in this specific case shortly, any deference would really undermine the basis of a court's decision and role. This would be deference in the manner that Lord Hoffmann said would be an abdication from the Court's role as an adjudicator. Certainly not what anyone is suggesting here.

It is a fundamental principle of the justification test that elements should be applied vigorously and they will generally require supportive evidence that is cogent and persuasive, both those words going to the threshold or degree of evidence required. When the decision-maker does provide some evidence, even if there is a less structured approach to proportionality, even if the Court does decide to afford the decision-maker some degree of deference, leeway, latitude, whatever the word is used, this does not mean that a lesser threshold is used when applying the section 5 justification test.

Talking briefly now about redress. The Court, of course, has discretion to make orders as appropriate to the circumstances which is in itself a form of deference. In *Colley v Auckland Council* [2021] NZHC 2366, Justice Wylie said: "It is trite law that an order quashing a decision… is discretionary and that the Court can withhold relief if it thinks appropriate to do so." And 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 that decision, and as we'll hear shortly, that's exactly what happened in the Court of Appeal.

So we say that the issue was not that the Court of Appeal failed to apply appropriate deference, it was that the CDF, to use the words of the Court of Appeal, fell well short of providing adequate evidence that the limited rights were restricted no more than reasonably necessary and that the restriction was proportionate to the objective sought, and I'm going to talk about specifically how the Court of Appeal expressly afforded deference to the CDF shortly. It's not accepted, the Crown's argument that the Court of Appeal did not give deference is not accepted.

I do want to turn to some specific points made by the appellants in their written submissions and that we heard earlier this morning, and the first is that the appellants say the Court of Appeal dismissed the NZDF's evidence as simple assertion. That submission being at paragraph 68 of their submissions, and we say that characterisation of the Court of Appeal's judgment is not correct. The basis of that argument seems to be the statement of 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”. That’s the only time that term appears in the judgment. But it's clear that the Court of Appeal was not characterising the entirety of the appellants’ evidence as a simple assertion but it was focused on the specific points of that section 5 justification test that were not met by the CDF by some margin.

I've touched on this morning that the evidence presented by the CDF and his witnesses on the specific points raised by the CDF as they relate to that section 5 test was insufficient. The question was asked of my learned friend this morning; can she point to the evidence by Brigadier Weston by others as to the justification for those limitations and what was pointed at was a justification for a vaccine requirement in general but that’s not what is required to be justified. What needs to be justified is the limitation on effected rights and that’s an important distinction because it's within that test that we begin to assess the proportionality of the limiting measure compared with the objective sought, that we begin to explore whether there's less rights limiting alternatives available.

And to be, in my submission, sidetracked by a focus on the overarching reason for vaccination or why deployability is good in the Chief Defence Force, and I am being a little trite in my characterisation there, but really that’s what the CDF and his witnesses focus on. There's a complete lack of evidence on the connection between why we need the TDFO, that mandatory retention review compared with the status quo. Why do we need that to actually achieve the purpose? How is it going to achieve the purpose? We don’t know because that’s not in evidence and that burden was on CDF which he did not meet.

Turning to the specific parts of that evidence. The CDF said at paragraph 44 of 201.0171 that the variations implemented by the TDFO were “to achieve consistency in the application of the discharge process.”

WILLIAMS J:

Give me that paragraph?

MR HAGUE:

Yes, Sir, it's paragraph –

WILLIAMS J:

Has Mr Woodd got the screen up or is that beyond your capacity Mr Woodd?

MR HAGUE:

Sorry, I'll pause.

WILLIAMS J:

And what paragraph was it?

ELLEN FRANCE J:

Paragraph 44.

WILLIAMS J:

Thanks, 44.

MR HAGUE:

And I'm going to jump, now that that evidence is in front of us, to the evidence of Brigadier Weston and Isaac this is at –

ELLEN FRANCE J:

Sorry, so why do you say that’s not sufficient to deal with, for example, in that sense, to deal with the question about who’s doing the – who’s making the decision?

MR HAGUE:

Well, that’s not – what I'm suggesting, Ma'am, is that that’s not the question the CDF needs to answer to satisfy the Court that the limitations are justified. It's not why the decision should be elevated to the Service Chiefs, although that’s only one part of our criticism in case, it's why the limitations, which are accepted by the appellants as being limitations on rights, why those limitations are justified and administrative consistency is, in my submission, an inadequate

reason for justifying any rights by the Court, certainly not bound by the judgment in *Yardley*.

That was the point made by Justice Cooke that in the absence of other evidence in that case, the specified workplace vaccination order contributed towards the operational effectiveness of the police and NZDF, in that case operational expediency or consistency is an insufficient reason. And I would also point out that the reason the objective that the appellants rely on is the operational efficacy of the NZDF by increasing deployability, well there hasn't been that connection made between the claimed administrative convenience or consistency and the operational output of the NZDF. There's a gap there.

WILLIAMS J:
It's not that difficult to work out what it means though in the context of discipline and morale, is it?

MR HAGUE:
Well, discipline and morale is different than administrative consistency.

WILLIAMS J:
Well, so the question that administrative consistency begs is administrative consistency for what and the answer to that was provided by Brigadier Weston, wasn't it, and CDF that this related to operational efficacy and morale.

MR HAGUE:
There was that assertion, yes, but that was the criticism of the Court of Appeal. It was a simple assertion and while –

MILLER J:
It's the evidence that this is why they did it.

MR HAGUE:
This is why they did it?

MILLER J:

Yes, for the reasons that Justice Williams just gave. That is the state of the evidence.

MR HAGUE:

Yes, that's the reasons they gave for implementing the TDFO but –

MILLER J:

To condemn it as mere assertion is to say we needed more in specific evidence in some respect. It's not clear to me what that is.

MR HAGUE:

Yes. Sir, I would submit the respects that more evidence is required is on those key parts of the section 5 justification test, how are those limiting measures connected with the operational effectiveness of the NZDF, and while I hear you, Sir, when you say it – I said at the outset of my submissions presumably everything the CDF does is for the operational effectiveness of the NZDF. That seems to be a primary function of the CDF especially when it comes to a very broad purpose like operational effectiveness. There must be some degree of specificity in the evidence from the CDF on how there is that connection.

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WILLIAMS J:

It's a difficult line to draw though, isn't it, or you do really get right down in the weeds. You're inviting evidence that says, for example, on Thursday so and so contacted their CO saying they didn't wish to be deployed because blah-blah-blah and the only way, I considered the only way to control that particular decision of that particular service person was blah. I mean we clearly are not going there. So, we are either dealing with logical inference from general evidence, or we're leaning over CDF's shoulder on every operational problem they're going to have to confront, in fact, every CO's shoulder and you're not suggesting that, are you?

MR HAGUE:

No, Sir, no. What I am saying is I think that the TDFO can be readily distinguished from the good examples of where the Court certainly would not want to reach down into those decisions. This is a TDFO which is implemented in May 2022, and at the risk of doing math here, but I believe that's 15 months after the introduction of vaccination. It follows a string of legal challenges to the requirement to be vaccinated for that vaccination in the Defence Force. This was not a decision made by the CDF that was needed to be made quickly and it wasn't made quickly. It was a series of decisions that there's no reason why the Court can't expect a greater degree of evidence to justify the limitations on affected rights and that's certainly the context in which this case is that should again temper any deference that the Court decides should have been afforded that for a long period of time, and just the other point in evidence I make there, which is at 201.0200, is from Brigadier Weston which was the TDFO was in place because the process prior was superfluous and to ensure consistency of decision-making.

I don't want to turn to some examples of where this Court can be confident that the Court of Appeal afforded appropriate deference to the Chief of Defence Force in that case before it. So I'm going from para 54 in my own submissions. 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 section 5". The Court of Appeal expressly acknowledged the importance of not intruding into the role and responsibilities of the CDF, stating there is force in counsel's submission that an overly granular approach on the part of the Court risks intruding onto the role and responsibilities of the CDF.

The Court of Appeal accepted that there was sufficient evidence to justify the importance of having NZDF personnel vaccinated. It made clear that it was not saying it had determined the limitations caused by the TDFO were actually unjustified. What it said was that there was a lack of evidence from the CDF, in its words, fallen well short to satisfy the Court that those limitations were justified, and then finally and importantly, in its redress decision the

Court of Appeal took only minimal intervention requiring only that the CDF review the TDFO and related instruments. We say that was a very important way that deference was afforded, that regard was given to the role of CDF and the context he found himself in.

ELLEN FRANCE J:

The appellant refers to the final passage in paragraph 155 of the Court of Appeal's judgment, it's difficult to see how retaining those members would affect the deployability of the Armed Forces. Do you say there was no need to give any weight to what was said about deployability?

MR HAGUE:

What was said about deployability I think was an area the Court could and did give weight to. It's clearly an important objective, the deployability of the NZDF, but where I think the Court of Appeal struggled was making that connection between the continued detention of those 55 people and –

WILLIAMS J:

The problem with that is that it cuts both ways, doesn't it? The fact that it's difficult to see could be either because there's no logical connection or because the courts lack the institutional expertise to see the connection. I mean that's deference country, isn't it?

MILLER J:

Also your 55 number is merely the number who ended up unvaccinated after having been told that they should be. If the requirement to get vaccinated was itself an unreasonable intrusion then none of them should have been required to be. They should have been asked to accept vaccination and we would not necessarily be looking at 55 people. We might be looking at hundreds or thousands who've simply chosen not to get vaccinated. So the whole premise of this notion that there's only a very few people and that can't possibly or we were prepared to assume that can't possibly affect deployability seems to me wrong.

MR HAGUE:

I think I can assist your Honour on that point. There was evidence in the CDF affidavit that the rates of vaccination in the Armed Forces were significantly higher than the civilian population and –

WILLIAMS J:

Prior to the mandate?

MR HAGUE:

Yes, prior to this TDFO, yes, Sir.

WILLIAMS J:

No, but there was a mandate before that.

MILLER J:

Prior to there being a mandate? Prior to it being put on the Schedule?

MR HAGUE:

Yes, I believe so. I'll try and find that exact pinpoint. I was looking at that this morning. Perhaps that may be something I'll come back to your Honour on, but I recall the evidence and I'll give you the specific reference later today.

MILLER J:

You're going to talk about pleadings at some point, aren't you?

MR HAGUE:

Yes, I am, but before I do I'll conclude my remarks about deference and then I'll hand over to Mr Woodd to talk about the incremental limitations. But just to conclude my remarks, regarding the further evidence in the UK alternative, well, I've spoken about that. I won't repeat my points except to say that when it comes to procedural fairness the Crown has had every opportunity to adduce leave in response and to apply for leave to adduce further evidence in even the Court of Appeal and has not done so, so I don't, my submission, there is no procedural unfairness there, and again the point of the UK position was it was

doing something the New Zealand Defence Force already did and look at this comparable military who was also doing it therefore it's reasonable.

There is evidence of the CDF now that the booster vaccination has been moved to the enhanced schedule. Well, what that means is unboosted personnel, and I'm looking at the affidavit of Dr Town at 201.0241 at paragraph 70 there, and as I say, unboosted personnel are essentially unvaccinated six months after that primary vaccination. That's why the Crown wanted boosters.

So moving that booster vaccination to the enhanced schedule and doing what we say should have been done, well, it was a reasonable alternative all along, essentially means that the Defence Force are tolerating the presence of anyone who's unboostinated being essentially the same as unvaccinated. There was no justification from the CDF as to why that was able to be tolerated, yes, it was necessary and justified to subject those 55 unvaccinated to a mandatory retention review. The movement of that booster vaccination to the enhanced schedule after a short period of time demonstrates the finite nature of the time requirement that related to vaccination. Discharge, of course, is a permanent solution to what we say could be a temporary problem and, indeed, the movement of the booster vaccination to the enhanced schedule bears that out.

GLAZEBROOK J:
Are you able to bring this up when you're not challenging the actual placing of the COVID vaccine?

MR HAGUE:
Ma'am, the way that I'm bringing it up is that this is a reasonable alternative. So I'm not suggesting that the presence –

GLAZEBROOK J:
Well, is that pleaded?

MR HAGUE:
That may be the point and, when we move to our pleadings, ground of appeal.

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GLAZEBROOK J:

I'm not sure it is because this seems to be the first time it's been brought up at all, because in your submissions you've got three changes that you say are the ones that you're challenging.

MR HAGUE:

Yes.

GLAZEBROOK J:

Where does this come in?

MR HAGUE:

So this comes in – this is what we say is a reasonable less rights limiting alternative and this is something that we argued in the High Court and Court of Appeal and indeed the point of the UK position was that they essentially did that. They put the COVID vaccination on the enhanced schedule. And my point with referencing the movement of the booster vaccination to that enhanced schedule is that CDF did that in quite short order but there's no evidence as to why he was not able to do that in the months prior when he was discharging unvaccinated people, despite them being in essentially the same medical position as unboosted people.

GLAZEBROOK J:

So where's this in your submissions?

MR HAGUE:

This is at paragraph 68, Ma'am.

KÓS J:

Is there a finding to that effect in the Court of Appeal?

MR HAGUE:

There was a reference in the Court of Appeal decision to the time frame requirements of the Order. Now, I'm certainly not attempting to speak on behalf of the Court, but it was my submissions in that Court on this point and I believe that that was the point they were making is discharge is a permanent solution to what could be a time-bound problem.

ELLEN FRANCE J:

Where is it discussed in the Court of Appeal judgment?

MR HAGUE:

I've been told potentially 155, yes likely time frame. They “needed to engage with the likely time frame for which any additional restrictions would be justified, and whether permanent discharge of unvaccinated members –

TECHNICAL ISSUE – AVL (14:32:14)

GLAZEBROOK J:

Just to let you know that I was just thrown off. I've just come back in again so I missed the reference.

ELLEN FRANCE J:

Yes, I'd asked about the discussion in the Court of Appeal judgment and Mr Hague’s referred to paragraph 155 of the Court of Appeal judgment, in the middle of the page there: “It needed to engage.”

MR HAGUE:

So in my submission where the Court of Appeal says that the CDF needed to engage with that thing and the other things in that paragraph, they relate to the reasonable alternatives that were raised by the appellants and the CDF had the burden of satisfying the Court they’re not reasonably available and it did not do so.

Just reviewing my notes to conclude on the point of deference before I ask permission to hand over to Mr Woodd. I might just finish with one point on deference and that is there seems to be a tension between what is a point of law and what are points of evidence. Of course, the section 5 test is a question of law and it is for the Courts to determine that. Well, the point of tension might be what within the section 5 test can the Court step back from – well what is not a question of law that the Court can step back and give deference on points of evidence. We're here on an appeal on a question of law and I do want to make the point that we submit the Court of Appeal didn't make an error of law, that it did apply appropriate deference to the CDF, and my submission is that we should not go too far into what may become, in essence, a rehearing of that evidence.

If the Court of Appeal has afforded deference appropriately, and I say for the reasons I've outlined they did, then this Court should dismiss the appeal because while a different view may be taken on points of evidence, that could be said in many appeals on questions that are heavily fact dependent. This is an appeal on a question of law and I –

WILLIAMS J:

This is more judgement dependent. That's the zone of deference really. We've got the facts, such as they are, provided, and suggested inferences from them, then a judgement is made.

MR HAGUE:

Yes, Sir.

WILLIAMS J:

And that judgement is always a mix of fact and law.

MR HAGUE:

Certainly. Maybe that's why, I mean why, so there's maybe a point of tension. Where do we draw that line between the points of fact and points of law, and

what I'm asking this Court to do is to afford the Court of Appeal as the appellate body making this decision –

WILLIAMS J:
Deference?

MR HAGUE:
It's a good word, Sir, yes. But no, I think it's too – it's a bit more simple than that. I'm saying that the Court of Appeal did afford deference appropriately, that there may be difference of opinion on where the balance of that deference sits but it was afforded. This was not an error of law, and so for that reason on that ground of appeal we say the appeal should be dismissed.

Pending any questions from your Honours, I will hand over to Mr Woodd to speak about the incremental limitation.

GLAZEBROOK J:
So we can only look at errors of law, not fact?

MR HAGUE:
Certainly, if the error of fact was such that no reasonable decision-maker could.

GLAZEBROOK J:
Why would that be the appellate standard?

MR HAGUE:
Well, Ma'am, I'm not suggesting this should be a legal principle taken. I'm suggesting that's the right course of action to take in this case. There has to be an end to litigation at some point and this is it, but I'm suggesting that end was in the Court of Appeal.

ELLEN FRANCE J:
For myself, I'm not quite sure how that fits with the appellate standard as we understand it these days but I understand the submission you're making.

MR HAGUE:
Thank you, Ma'am.

ELLEN FRANCE J:
All right, Mr Woodd.

MR WOODD:
Your Honours, I'm mindful of time as well. I intended to finish my own submissions by 2.35. I'll endeavour to finish and hand back over to Mr Hague as soon as possible.

I'd like first to bring this Court back to paragraph 1 of the Crown's submissions, that is the concession that was outlined by my learned friend, Mr Hague, that a limit on section 11 has occurred here, and then if I could, because this is sort of setting the scene for section 11 and the nature of it and the nature in which it has been incrementally or more severely limited here, draw the Court's attention also to paragraph 100 of the Crown's submissions, and I'm reading directly: "[O]nce the member is unable to refuse medical treatment the right cannot logically be further (or incrementally) limited."

The premise of this argument, your Honours, is incorrect because at no point did a member become physically unable to refuse medical treatment, rather the consequences of not being vaccinated weighed so heavily that the choice to refuse vaccination was exercised, and that really is the focus of the right to refuse medical treatment. Section 11 is that person's ability to refuse and the degrees to which certain coercive measures weigh on that ability. The focus of the right is autonomy, the autonomy of the individual, and in that context of medical treatment, and this means that when section 11 is engaged, as the Crown accepts it has been here, the focus of any justification under section 5 should be on the circumstances of that limit, of the limit on section 11, and without understanding those circumstances undertaking the proportionality assessment in section 5 would not be possible. The right simply would or would not be engaged if it were binary as the Crown says it is. There would be no degree of proportionality to assess. That's the first point I'd like to make and –

ELLEN FRANCE J:

Sorry, why would there be no degree of proportionality? Might it not just be different?

MR WOODD:

We say that there would be no degree of proportionality if indeed the right was binary, i.e., that it were limited at say point A and then any further limit that was imposed was not able to be assessed, there would be no capability for the Court to assess further limits on a person's right under section 11, and so the proportionality of the measure once it was say increasingly limited by, we say, in this case the severity of the TDFO as opposed to the status quo ante, the Court could not assess the proportionality of that increase in the limit.

KÓS J:

Well your argument I think is that the limit can be scaled up or scaled down.

MR WOODD:

Correct.

KÓS J:

And it has to be able to be scaled down because at some point you have to be able to cast the rule in a way that meets the section 11 requirement.

MR WOODD:

That's correct.

KÓS J:

The protection.

MR WOODD:

That's correct and quite rightly on point the respondents note that this, the Crown's argument directly contradicts the reasoning of this Court on section 11 in the *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 case and in that case this Court discussed

whether the degree to which water was fluoridated itself, an engagement of section 11 being medical treatment at paragraph 135 of this Court's judgment in that case, which I believe is Justice O'Regan, began his proportionality assessment under section 5 and in doing so his Honour noted that the recommended level of fluoridation was a minimal intrusion on the section 11 right, that is the degree, the incremental amount to which section 11 was limited was minimal in that case, that being I believe, in the case was one part per million or less than that was the acceptable level. And Justice O'Regan continued saying that the greater the degree of –

GLAZEBROOK J:
Was that the majority decision? I don't think it was.

MR WOODD:
I'm not sure I have that in front of me, apologies. In any case – pardon? Yes, it was your Honour, and in any case –

ELLEN FRANCE J:
On that point.

MR WOODD:
In any case your Honours he was discussing in a general sense the incremental amount to which section 11 could be limited, Ma'am, and yes so Justice O'Regan continued saying that the greater amount of fluoride and water in that case, or indeed the addition of different substances I believe his Honour refers to are tranquilisers in water or contraceptives, which would need to be a distinct limit from fluoride in that case, would require a commensurately greater justification and the Four Members submit that this goes directly against the Crown's argument in this case that section 11 is binary.

If section 11 were binary then once a person refused medical treatment it would be open we say to a decision-maker to restrict the right on that person, the person who has refused, to a commensurately greater degree without being subject to a justification, a proportionality analysis, and in the context of this

case, the TDFO could have imposed any limit if section 11 were binary, regardless of severity provided refusal had previously been actioned by a member who had refused.

In both *New Health* and in the present case section 11 was limited by a matter of degree, although the Crown say to a vanishing degree. That is not the Four Members' position. And in both cases, each limit imposed an obligation on the decision-maker to carry out a justification analysis, as is the responsibility of decision-makers under section 5 of the Bill of Rights, and the Four Members reiterate that the TDFO introduced a unique COVID-19 focused policy that imposed unique consequences for failing to be vaccinated. My learned friend Mr Hague has pointed to, in particular, the mandatory retention review in support of that proposition, and the TDFO is unique because of this focus and because it was more severe than the status quo ante that being the approach under DFOs 3 and 4.

Now the Court of Appeal chose to conceptualise this limit with regard to the status quo ante by reference to an incremental additional limit on section 11, that being because it was limited in DFOs 3 and 4. However, it is the respondents' position that whichever way this Court today chooses to conceptualise the TDFO, it must, as the Court of Appeal did, acknowledge that the TDFO is a separate instrument to DFOs 3 and 4, imposing a limit that requires justification.

That is the case for the respondents on the second ground of the Crown's appeal. Unless your Honours have any further questions, that will conclude my submissions, thank you.

ELLEN FRANCE J:

Thank you.

MR HAGUE:

I will conclude by addressing the final ground of appeal and that's the pleadings ground. I don't intend on spending a great deal of time but certainly I'm in the Court's hands as to whether there's any detail you'd like to speak about further.

So the Crown says that the pleadings themselves were improperly raised and that the evidence was nevertheless insufficient. We say that both the limbs of this challenge fail to address where the burden in section 5 lies. It's for the authority imposing the limitation, which is accepted by the appellants in this case, to satisfy the elements in section 5. This includes identifying reasonably available alternatives and explaining with reference to evidence why those alternatives are not reasonably available.

In the Court of Appeal this issue was raised and the Court of Appeal dealt with it quite shortly saying that the Crown was squarely on notice of the pleading. We agree.

MILLER J:

What made it squarely on notice? Was it the evidence that was offered or the actual pleading that put the Crown on notice?

MR HAGUE:

Largely the submissions, Sir, prior to the High – well, as early as prior to the High Court hearing and yes, some evidence as well around the enhanced schedule, the UK approach, was all in evidence. I do –

MILLER J:

Looking at the pleadings obligation and your general point that the burden of justification is on the Crown, what do you say are the obligations of someone in your clients' position who plead something which the Crown must answer? Presumably you have to identify a right, a measure that's infringed that right, and you have to allege it's unjustified. You did that in your pleading but you did it by reference to operational effectiveness as I read the pleading. Essentially, you said it can't possibly be right that we need a mandate because

there's a bunch of people who aren't deployable already and you put up with that and you don't need to keep people off bases because there's a bunch of people who come and go. So that's an attack on the idea that you should have to accept the vaccine. But at no point have you gone beyond that to suggest there's an alternative and you say there's no obligation on you to do that.

MR HAGUE:

To answer your Honour's question directly, the burden is on the person bringing the challenge to fairly present sufficient particulars to (a) prove that cause of action and (b) allow the respondent to understand the challenge that is against them. We say that that was achieved in both cases in these proceedings because the need for the decision-maker to satisfy the Court that those less rights limiting alternatives were not available is an inherent and fundamental part of the section 5 test. It's not an optional extra. It's always part of the test.

This is a case where the CDF wasn't required to use his imagination or should not have been to guess what we're trying to say. The consideration of less rights-limiting alternatives was something that should have been done when the decision was made, and where I do accept that pleadings need to be adequate is in terms of procedural fairness, but in this case the alternatives that were advanced by the Four Members were entirely established, the enhanced schedule, the approach of DFO 3.

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They were listed in evidence in submissions for the High Court, and the CDF was well and truly put on notice of exactly what we were saying, despite the burden being entirely on him to disprove those. I would disagree that there's any suggestion of procedural unfairness on that point.

MILLER J:

Right, and your essential point is that he was on notice because of the evidence and the submissions as well as the pleading which is not unusual in judicial review?

MR HAGUE:

Yes. The alternative would be to require applicants to raise those alternatives. It's difficult for applicants who are often not the decision-maker, often not well-resourced like the CDF and his large organisation is and, again, the decision-maker in that culture of justification should consider the alternatives at the time the decision is made. Whether or not they're able to could be that context consideration that the Court uses as a factor when determining deference or otherwise.

In this case, as we said earlier, this was a decision made after many months of the issue existing, many other versions of vaccine requirements coming, going, being set aside as unlawful. It was not, it is not being unfair to the CDF to say to him, you should consider less rights-limiting alternatives and that evidence should be available to be presented to the Court, not only as a reasonable but that's a fundamental part of the section 5 analysis test.

MILLER J:

What do you say to the proposition that the real problem in this case is the use that was made of this two pages from the UK, it seems not to tell us anything very much at all? It doesn't seem to identify a seriously arguable alternative to give us any context which might allow the Court to evaluate it and yet the Court of Appeal seems to have attached some significance to it.

MR HAGUE:

Yes, I can't answer the question as to why the Court of Appeal attached particular significance to that evidence because there were multiple other places where alternatives were detailed to the Court, both in the High Court and the Court of Appeal, and you'll see the footnote at page 30, footnote 104, of my written submissions where I refer to the written submissions we presented prior to the High Court hearing. In the High Court transcript I bullet point them (a), (b), (c), (d), what alternatives are available. So, I can't answer the question why the Court of Appeal focused on that, except to say that there was ample information for the CDF throughout the proceedings.

KÓS J:

Well your basic point, as I understand it, is if justification is foist upon the Crown, it has to raise the alternatives and knock them down, it's not for you to produce them?

MR HAGUE:

Within reason, Sir, within the bounds of procedural fairness, yes.

KÓS J:

Well, comparable military regimes would certainly be within the range of foreseeable relevant considerations.

MR HAGUE:

Yes, Sir, as would the approach taken prior to the decision being made, yes. I will conclude – those conclude my remarks on pleadings and I do want to make some overall concluding remarks but before I do move into those general remarks, are there any other questions the Court has on the issue of pleadings?

Moving to my concluding remarks and I want to turn first to this appeal and the Four Members and those others affected have been drawn in, in part because they brought the proceedings, in part because they're the respondents to appeals to these issues of law which are of public importance. We say for the reasons we've discussed that the Court of Appeal got it right in terms of the law that the appeal should be dismissed on that basis but we also say that, if there are points of law that this Court decides should be addressed by this honourable Court as a matter of precedent, then the outcome of the Court of Appeal decision should essentially be left undisturbed and you'll recall that the outcome was accommodating of the CDF. It required only that he reconsider the TDFO. So this is not something that's prevented him doing anything from now. You've heard why we say that there was a lack of evidence on those important points –

KÓS J:

Well, what relevance would that have now?

MR HAGUE:

Yes, Sir, well that's, yes, that's –

KÓS J:

I mean we're really almost – I mean there's a live point of principle here but the outcome is moot surely?

MR HAGUE:

No, Sir, it's not moot, and I'll explain why that is but quite right that's the question to ask and the first is that during the proceedings the CDF made several undertakings in resisting interim orders. He resisted – for example, we sought an interim order directing him not to discharge people until the determination of the appeal. He resisted that in part because he provided the undertaking that should the appeal be upheld, as it was in the Court of Appeal, those people could be reinstated. While it was upheld in the Court of Appeal because these proceedings are ongoing we haven't sought to enforce that order. We have enquired and the CDF's declined, but it is a live issue for those members that were discharged in reliance on the TDFO.

Now allowing them to – CDF would not have given that undertaking, I suggest, if it wasn't possible for him to comply with it. He gave the undertaking, he voluntarily gave it, and for that reason if the outcome of the Court of Appeal is not disturbed then in my view those undertakings would still apply which is in the interests of justice and fairness for those affected members.

The second part, of course, is costs, and unless the Court wants me to I won't detail the costs in this, in my submissions except to say that this has come at a considerable cost to the Four Members and their supporters. It's not cheap coming up through the chain of appeals and that's understandable. That's just how it is but I would suggest it's in the interests of justice that the outcome of this Court, whatever it may be, should be to consider costs in making its decision, even if it's in parts against the Four Members.

But returning to my real point and that is we say for the reasons we've discussed the appeal should be dismissed.

I won't talk about costs. I have made some submissions and those are in my written submissions, but I do want to finish with just a couple of concluding remarks.

In *Moncrief-Spittle* this Court declined to provide more definitive direction on the issue of what it termed in that case regard to be given to the decision-maker. Professor Taggart says: "It is impossible to articulate a clear set of rules in relation to deference. All attempts degenerate into a list of factors, with contestable weights. As we know, context is everything," and the Four Members say that's good law. That law as part of a responsible, measured development of Bill of Rights jurisprudence should not be disturbed shortly after the *Moncrief-Spittle* decision.

Further judicial direction on this issue of deference is not needed and it's not desirable, and so for that reason the appeal should be dismissed.

That concludes my submissions.

ELLEN FRANCE J:
Thank you, Mr Hague. Right, Mr Butler. Can you hear me, Mr Butler?

MR BUTLER KC:
I can. Can you hear me?

ELLEN FRANCE J:
Yes, thank you.

MR BUTLER KC:
Your Honours, just an indication, I have, as I normally do, prepared a road map for the purposes of the hearing, particularly bearing in mind I'm restricted to 30 minutes. So what the road map does is set out a number of headings that I

think might be helpful to the Court in resolving this appeal and gathers together in the one place pinpoint citations in support of a number of propositions, not all of which I will go to but I think it will prove to be a helpful document as a resource for the Court to go to back to. Do I have your Honour's permission for that to be provided to the Court?

ELLEN FRANCE J:

Yes.

MR BUTLER KC:

Thank you, your Honours, and a copy has been given to Mr Registrar and will be provided now to Justice Glazebrook electronically.

ELLEN FRANCE J:

Thank you.

KÓS J:

I think we were told, Mr Butler, by email to ignore the one that was put on our desk?

ELLEN FRANCE J:

But we've had a subsequent one, the same. That is the final version as I understand it.

MR BUTLER KC:

Thank you. I made some minor adjustments to the road map I prepared in light of the exchanges this morning.

So, your Honours, the first point I'd like to make, which is noted as heading 1, "Actual scope of this appeal?", is that while the Attorney-General has framed the appeal as being one about deference, restraint or margin of appreciation, the Court granted leave, it seems to me, principally on the basis that was the issue at the heart of the appeal.

In the Commission's submission, in fact, when one looks at the submissions that have been filed for the Attorney, and indeed when one has regard to the nature of the exchange that occurred this morning, it seems to me that in fact the appeal has quite a different focus, and that becomes apparent when the Court looks at that part of the Attorney-General's submissions beginning at paragraph 56 under the heading "The Court of Appeal judgment – what went wrong" because it's at that particular point that you see the specific criticisms that are made of the Court of Appeal's decision by the Attorney-General and I've listed those in bold in five bullet points.

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The criticisms are that the Court of Appeal wrongly adopted an incremental change on limited analysis which had been proposed by the respondent; that the Court of Appeal had failed to focus on the justifications that had actually been offered for the incremental change made by the CDF, in other words, the reasons to shift from DFO 3 and DFO 4 to TDFO; the Court of Appeal was wrong to conclude that the TDFO was designed to permanently discharge unvaccinated members; the Court of Appeal was wrong to conclude that there was no evidence explaining why other non-deployable members were treated differently when, in fact, there was such evidence and the Court of Appeal was wrong to act on the UK experience.

Now the reason I've listed each of those out is that in my submission none of these is at its heart a deference question or a margin of appreciation issue. Rather they are disagreements on, first of all, well what are the BORA issues and (inaudible 15:01:31) BORA issue, and what does the evidence say or not say on the issues which arise, and so to that extent, I suppose, just as a starting point the submission that's made on behalf of the Commission possibly resonates with the remark that was made by your Honour Justice Williams a little earlier as to whether this really was a deference question, and I think it also resonates with what your Honour Justice Glazebrook asked as to whether really we were, whether we are correctly straying into the area of deference. I took it from what your Honour Justice Glazebrook was saying was I'm not really convinced that actually the TDFO does necessarily incrementally affect rights.

Now one of the reasons in my submission that perhaps the parties have been talking a little bit past each other is as a result of that paragraph 1 of the Attorney-General's submissions. It's just coming up now. You will recall in the submissions that were made by Mr Hague straight after lunch and then by Mr Woodd while he was addressing his argument, his part of the argument in respect of incremental change, that each of them for the respondents focused on this paragraph 1 because paragraph 1, as they say, does appear to be a concession by the Attorney but TDFO, not the other Defence Force Orders, but the TDFO itself imposed a limit on protective rights. How? By creating a processed respond to a member of the Defence Force refusing vaccination against COVID-19 and then the Crown goes on to say at issue is whether that limit is justified.

So it seems to me in paragraph 1 of the appellants' submission, the Attorney has accepted that the TDFO imposes a limit on protected rights, identifies the limit as being the process that it creates. From what you've heard from Madam Solicitor earlier today, and indeed from Mr Neild, is that in a sense a walking back from that concession. I think if I recall rightly the language that was used was a vanishingly narrow limit, the limit for additional –

ELLEN FRANCE J:

Sorry, Mr Butler, I'm not sure quite where this is going.

MR BUTLER KC:

The point I'm making –

ELLEN FRANCE J:

I mean in terms of the – from the point of view of the Commission, the focus is presumably on the more general issues that are raised rather than getting into the interstices of the particular case.

MR BUTLER KC:

That's correct, your Honour, but the general point I wish to make by raising this particular issue is we came along believing the case to be a case about deference, as we understood the Court did, but on closer examination the Commission says: is it really a case about deference at all? It seemed from the exchanges that occurred earlier today that in fact before one gets to deference there are quite a number of hurdles that first must be jumped, and those seem to be the sorts of issues that were being raised by the bench and a number of questions were being asked. It seemed to me that (inaudible 15:05:23) Commission based on that, we certainly wouldn't want the issue of deference to be clouded or the language of deference to be used unnaturally or inappropriately to address matters or issues, disagreements between the parties that actually don't fairly take that description.

KÓS J:

I don't think I see for myself, Mr Butler, an inconsistency in the Crown argument. Their argument that the limitations are vanishingly slim invite a more deferential approach because they say there's less here to see, less reason for the Court to intrude. There's some sense in that.

GLAZEBROOK J:

I thought that "vanishingly thin" was it's vanishingly thin between the status quo ante and the TDFO.

KÓS J:

Yes, we're saying the same thing.

MR BUTLER KC:

Correct, and I understand the same thing. That's the point that the Crown is making, and the only point I'm making in terms of the walking back, using the language of walking back, is that if you look at that paragraph 1 it opens in quite a bold way of accepting embracing the fact that there is a limit. The limit is because of the process that is created by TDFO and acceptance that it needs to be justified, whereas in fact quite a lot of what you heard from

Madam Solicitor, I'm not criticising her for it at all, it's a question the Court itself will have to determine, all I'm pointing out is that the way in which Madam Solicitor advanced the case was to say that in fact the nature of the limit imposed by TDFO is vanishingly thin, and, in my submission, she queried whether in fact there really is any additional incremental limit that is imposed by TDFO here, and what I'm trying to say is if that is a proposition your Honours accept then we're not really in the area of deference at all because the attack is to the TDFO, not to the vaccine mandate. That's the only point I'm trying to make. I'm trying to, in other words, isolate the issues and the way in which your Honours, it seemed to me at the outset, were trying to isolate the issues, trying to understand what exactly is the dynamic that's going on.

KÓS J:
I'm just suggesting to my colleagues that we should hear you on the principal issue you're here to talk about.

MR BUTLER KC:
Indeed, quite.

KÓS J:
Deference hasn't walked out of the courtroom.

MR BUTLER KC:
No, quite. Having made that preliminary point about what the actual scope of the appeal is, what I wanted to do then was move to the second point, "Latitude and weight", and some preliminary points in respect of that.

Your Honours will be aware from the written submission that the Commission urges some care to be taken with terminology. We note in our written submissions that generally speaking New Zealand courts eschewed the use of "deference" as a term, and the Commission agrees with the reasons for that for the reasons that are set out at paragraphs 7 to 9 of our written submissions.

GLAZEBROOK J:

What about in the sense of there are a range of reasonable alternatives that you can have? It's not deference and it's not even really latitude. It's a bit like "is the sentence outside of the range?" argument.

MR BUTLER KC:

Quite, your Honour.

GLAZEBROOK J:

Which is what I'd really see this as being rather than you pick – you've got a range and you have to pick the absolutely least one, in circumstances of this nature where you are not challenging the underlying "you have to have this vaccination".

MR BUTLER KC:

Yes, your Honour, I was going to come to that later on under my third heading where I call it: "Weight: the detail" –

GLAZEBROOK J:

Okay, I'll leave you to…

1510

MR BUTLER KC:

Thank you. No, that's absolutely fine. So just as I said, terminology we say potentially does matter in this particular area. The problem with "deference" is the one that's been touched on by Lord Hoffmann in the *Regina (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 cases which the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 adopted as being an eloquent statement and was also adopted by the Court of Appeal in the *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 case and essentially the concern with the use of the word deference is it has overtones of civility or gracious concession, almost a kind of a yielding to a particular actor simply by dint of them being an actor, and we say that to the

extent that the word does indeed convey that that's an appropriate posture for the Court to adopt, that is not an appropriate posture for the Court to adopt.

Now in contrast to what you heard from Mr Hague, my reading of the Court of Appeal's judgment is that when it came to the application of section 5 itself, the consideration of section 5 itself, the Court of Appeal did not do what the Crown says the Court of Appeal should have done, namely to directly address the question of whether or not deference should be shown to the CDF as part of the section 5 BORA analysis and, if so, what deference should be shown, and I'm using the word "deference" because that's the way in which the Crown has advanced its (inaudible 15:11:21) I don't like the word "deference".

Of course, the submission we make is that the Court of Appeal, based on the way in which it approached the issues and based on its view of the evidence, didn't reach the question of deference as part of a section 5 analysis because it just simply said for the purposes of the minimal impairment test we lack evidence that is specific to that three process enhancements, if I can call them that, that were effected by the TDFO. But that is a conclusion this Court may or may not agree with.

MILLER J:
Sorry, can you explain that point? Is this about there being no reasonable alternative or?

MR BUTLER KC:
Correct.

MILLER J:
Right. But is that not the very point where deference ought to be engaged so it's a question of its place in the process, to what extent ought the Court be formulating its own list of reasonable alternatives and assessing what the Chief of Defence Force has done against that? That's the essential problem as we know with the *Oakes* methodology when it comes to administrative decisions.

MR BUTLER KC:

I'm not, I don't agree with that, with the way in which that's been pitched, your Honour, if I can respond in that particular way, and if I can just park the question about minimal impairment and, indeed, the range of reasonable alternatives just for a moment because I will come to that in a short moment when I come to the part 3. I simply just wanted to make the submission that as I read the judgment, the Court of Appeal's judgment, it does not do what the Crown says that should have been done, namely an explicit discussion as part of the section 5 methodology or assessment about the expertise of the CDF as part of working its way through the individual particular steps –

GLAZEBROOK J:

That's what you say –

MR BUTLER KC:

– and all I'm saying is that when we –

GLAZEBROOK J:

Sorry, carry on. I thought you'd finished. Are you carrying on to the explanation?

MR BUTLER KC:

Yes, and so the reason why it seems it didn't do that is the reason I gave, namely its view that there was no evidence, it fell well short, in other words what was advanced by the CDF fell well short of what would be expected as part of a minimal impairment assessment, and again I'll just repeat my point, that is something the Court, this Court may or may not agree with. I'm not expressing a view, I'm just simply noting that that appears to me to be the reason why the Court of Appeal didn't actually engage on that question of weight/deference.

So we come then to section (inaudible 15:14:10) just before I come to section (inaudible 15:14:13) detail, the point I'm making in the handout that –

ELLEN FRANCE J:

Sorry, Mr Butler, we were just losing you.

MR BUTLER KC:

I'm sorry. Can you hear me now?

ELLEN FRANCE J:

Yes.

WILLIAMS J:

I think Mr Butler you have got a non-directional microphone and you're going to have to keep your hand away from your mouth and not look down unfortunately.

MR BUTLER KC:

Yes, thank you. All right, that's fine. I will bring the microphone even closer to me. Thank you. Just an important point I think that does need to be made in terms of the context because there has been some reference to the military context and the relevance that may or may not have to the resolution of the issues here. A first point to be made is that the instrument we're looking at here, a Defence Force Order, is made under section 27 of the Defence Act 1990. Section 27 says that any defence orders must not be inconsistent with other enactments which must include the Bill of Rights.

WILLIAMS J:

I don't think there's anyone saying the Bill of Rights doesn't apply, Mr Butler.

MR BUTLER KC:

Correct, but I think it's an important point emphasising that therefore any defence order, when we're talking about defence orders, they must measure up in terms of Bill of Rights consistency. So it's not simply a question of looking at the military in context and saying, well, the military context must prevail. It's a question of seeing the extent to which the military context can be relevant as part of the overall Bill of Rights section 5 assessment.

Another point just worth noting, since there's been some reference to the military justice system, the Armed Forces Disciplinary Act 1971 was the subject of a significant overhaul in the mid-2000s to achieve Bill of Rights compliance. So that was effected through the Armed Forces Law Reform Bill 2007 which at the committee stage split into several different Bills, including amendments to the Armed Forces Disciplinary Act, Discipline Act, 1971.

If I come then to weight detail, some obvious points which I'm not going to detain the Court on, (inaudible 15:16:27) the fact that the Court must be persuaded that the limit has to be demonstrably justified and so on, it is important, of course, to recognise, as our written submissions do, that the courts have recognised that weight can be given to where it is that the decision-maker has landed, and here I'll make reference, for example, to *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, Justice Tipping's judgment in *Hansen*, to the Court of Appeal's decision in *Atkinson* and to this Court's decision in *Moncrief-Spittle*, but, of course, giving weight does not displace the Court's responsibility to make the assessment.

The reasons for weight that have been recognised in the case law include expertise, and I want to come back, at a later point I do come back to the question of expertise and how it is accommodated, but what the case law establishes, in my submission, is that expertise will depend on the context, including the expertise of the decision-maker, the nature of the decision that had to be made, and I note, of course, that in *Moncrief-Spittle* expertise was regarded as particularly significant in that particular case which was a one-off decision that needed to be made in terms of health and safety in a relatively urgent set of circumstances.

The process followed or the depth of the issue exploration that has been undertaken by the decision-maker can be relevant.

The Court of Appeal in *Atkinson* recognised that sometimes weight can be given to recognise that space is needed to make legitimate choices. The courts have also recognised the inadequacies of the forensic processes available to the

court, both generally and particularly arising out of the form of proceeding used, is something that can influence or affect the way in which the court might weigh the evidence and give weight to the views to the decision-maker.

MILLER J:

And you would accept, I imagine, based on the authorities so far, that one of the things a court could not do is assess for itself the efficacy and risks of the COVID-19 vaccine.

MR BUTLER KC:

Correct. So in that sense, your Honour, the case might be fairly compared to something like the *New Health* case where the Court said it was not correct, or this Court said it was not correct to resolve the disputation over fluoridation of public water supplies and the science around that but simply to check whether the evidence that was adduced before it established a sufficient basis in support of the objective being pursued by fluoridation, what its material benefits were and the plausible extent of any disbenefits that might attach to it.

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So in that context it recognised that the nature of the matters to be resolved as part of the section 5 justification process were not ones which a court was necessarily well placed to make a definitive ruling upon. That being so, the form of review it would undertake had to reflect that and, of course, I do note that the particular judgment I'm making reference to is the judgment, the joint judgment of Justices O'Regan and Ellen France, and your Honour Justice Glazebrook in *New Health* expressly reserved your position on the applicability or otherwise of the section 5, the section 5 justification process because your Honour said well it could depend, whether it's justified or not, it could depend on local conditions.

MILLER J:

And that's of course is why we presumably –

GLAZEBROOK J:

So that the other two judges made no comment at all on section 5 –

MR BUTLER KC:

Correct.

GLAZEBROOK J:

– so it was not a majority –

MR BUTLER KC:

So it's not – I agree with that, it's not a majority.

GLAZEBROOK J:

Not that that means that it's wrong of course.

MR BUTLER KC:

No, quite, but I simply use *New Health* not to say it's something the Court must follow so much as a response to Justice Miller's point about the COVID vaccine efficacy in point 5.

Now, I do note, and this is something I spent a bit of time in the written submissions on, that I note weight should be given for constitutional propriety or democratic, so-called democratic legitimacy purposes. In the road map I note simply that that issue is controversial. The written submissions provide plenty of reference to not only the case law where the controversy is discussed, particularly overseas, but also the academic commentary. In our written submissions we make the point that, so far as we understood it, the argument for the Attorney was not that CDF perhaps that should be addressed and shown or weight given to the views of CDF for constitutional propriety or democratic legitimacy reasons but rather more for the – on the expertise ground.

MILLER J:

Well, it depends on how you classify the assessments of operational effectiveness and the needs of military discipline, doesn't it, whether that's an

expertise thing, or a let's call it loosely constitutional or institutional preference thing. It seems to be not entirely to be one of expertise relative to the Court but rather whose function is it to make these decisions.

MR BUTLER KC:

It is true to say that plainly the power to make orders, Defence Force Orders, is the one that's vested in CDF and not in the court. I resist the proposition that because the power is vested in the CDF and because running an armed forces is a complex matter, that that somehow makes it of constitution – that deference or weight should be given simply for constitutional reasons. It seems to me in that area really what the court is saying is we're not as expert, what the court may be saying, depending on the view it takes, is we're not as expert in this area of, for example, operational efficacy as CDF is.

WILLIAMS J:

I'm not sure I'd call it constitutional, although there is an argument for that historically but it's certainly sui generis because this is some thousands of people with authority to discharge lethal force and that makes it pretty special in the context of a western liberal democracy likes ours and we can't possibly ignore that. It's not like the Ministry of Health or the Ministry of Education. Because of its special role, not just in defence of the realm, but in defence of individual citizen, re in emergencies and so forth, so however you articulate that special nature, it's important that it be taken into account.

MR BUTLER KC:

I certainly wouldn't cavil with that. The question becomes when it's taken into account, how it is taken into account, which gets us back to the why that is offered.

WILLIAMS J:

So the latitude is that when decisions are being made about the ability to deploy lethal force in defence of the realm, or in pursuit of security or foreign policy concerns, these are matters judges have traditionally steered well clear of and for good reason. BORA –

MR BUTLER KC:

They are matters that –

WILLIAMS J:

BORA brings another element into that, no argument about that whatsoever, but these are treacherous waters for the judiciary.

MR BUTLER KC:

They can be but are not necessarily so, Sir. I'm sorry to be (inaudible 15:25:32) some degree but not others. So, for example, the reason I hesitate is, for example, the applicability of human rights law in operations in Afghanistan and Iraq is something that was unimaginable 20 years ago but is now orthodox.

WILLIAMS J:

Yes, and I agree with that and, in fact, you'll know that there are about as many lawyers in the Defence Force as there are soldiers.

MR BUTLER KC:

Indeed. Your Honour understands the point I'm making?

WILLIAMS J:

Yes, but there is still, this is still a very special case.

MR BUTLER KC:

Quite.

KÓS J:

It is, but can I suggest that that raises another issue, which is evidence, and it's this. If you have an area in which the Court is not expert, it's not its run-of-the-mill experience, like, for instance, the criminal justice system where we have a measure of expertise, and where you don't necessarily expect the plaintiff to be able to articulate on an evidential basis the considerations that justify that course, isn't that all the more reason then why the Crown has an obligation to articulate in evidence the justification?

MR BUTLER KC:

That is exactly the point of the submissions that the Commission is driving at. Madam Solicitor used a phrase a little bit earlier today but I think it's quite interesting (inaudible 15:27:03).

WILLIAMS J:

You need to get your mouth in front of the microphone.

MR BUTLER KC:

I'm so sorry. Will your Honours give me one moment while I look to my notes so that I give you a correct reference and then I'm not talking and looking at this paper?

KÓS J:

Just don't speak while you're looking at them because that's the problem. As you look away to the left we can't hear you.

MR BUTLER KC:

Madam Solicitor said this morning when she was talking about deference, words to the following effect, and your Honours will be able to check the transcript for it to be accurately reported and I don't mean to misquote her, but she said words to the effect that "if the Court of Appeal had deferred to the Chief of Defence Forces then it would have seen that…" and, of course, the point that the Commission is trying to make which is where evidence becomes important is that it is in many ways for the expert to make seen that which might otherwise not be seen or understood by the non-expert.

That proposition is one which leads me to a point touched on page 4 of the road map under the heading: "What is the reason for weight to be given to the CDF's decision here? To what aspect of the TDFO does it attach and why?" and again I want to emphasise the Commission doesn't have any views whatsoever and doesn't make any submissions as to whether deference should be shown or how it should be shown or to what. We're very much more at the high level.

But something that the Commission has consistently said in all cases where issues of weight have arisen for decision before this Court and lower Courts is that weight or deference, respect, whatever word you want to use, margin of appreciation, must be earned, not asserted or assumed, and there's a number of reasons for that: every expert has an off-day; the person who's asking for their expertise to be recognised may not be an expert at accommodating human rights considerations; expertise can never be an excuse for evidential gaps; and it can indeed be useful to look at the process followed by an expert in deciding what weight is given.

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All of these things, we say, if done correctly, mean that the expert here, the CDF, will reveal to the Court the reasons that have informed TDFO and why it is that the Court can say, putting it colloquially "yep we can see that, yep we can see deployability is important, yep we can see consistency is important, yep we see there might be more –

MILLER J:

Suppose we take the view that they did do that, the evidence did do that, and it's sufficiently raised the considerations I mentioned earlier, just accept that as my premise, so at what point does deference enter the analysis on the Commission's view? So, we're accepting here that they're motivated by concerns of operational effectiveness and military discipline and that leaves the mandate and also to this particular process around the COVID vaccine which was unique because of its – it affected the whole force and raised this question of deliberate non-compliance, so the discipline issue in other words.

MR BUTLER KC:

And so then (inaudible 15:31:32) arises, and this is why I go back to the point I raised, that's issue 1 at least, what one is trying to then assess is all right what exactly is the limit that TDFO imposes on the section 11, which seems to be the particular focus of the case, on the section 11 right and how do those considerations your Honour has touched on relate to those limits. And the

question mark I suppose I still have after listening to the exchanges earlier in the day is I still don't have a good handle on what the incremental limits/changes are accepted to be by the Crown and/or are said to be by the respondents. But what I am accepting your Honour is that at the minimal impairment stage, the sorts of considerations you've touched on may well be appropriately brought to bear in assessing minimal impairment. Now your Honour Justice Glazebrook –

MILLER J:

Sorry, you're not looking at the microphone again.

MR BUTLER KC:

I'm sorry. Her Honour Justice Glazebrook asked me about range of reasonable alternatives and I address that at page 3 of the road map. I spent a bit of time in the written submissions talking to it. The key point I would like to make here, your Honour Justice Glazebrook in response to your question, is where consideration of the case law drives the Commission to is that when one uses the phrase "a range of reasonable alternatives" typically that is the expression of a conclusion reached after weight has been given. In other words, having assessed all of the evidence that's been put before the Court, the conclusion the Court reaches is looking at this particular phenomenon that's before us and having given weight appropriately for the sorts of reasons that I've noted at page 2, it seems to us, it seems to the Court, that there in fact is a range of reasonable alternatives available in response to this particular problem. So it's, in other words, a conclusion that one reaches rather than a test itself. That's how we submit you square the minimal impairment test with the range of reasonable alternatives conclusion that you see in the case law.

KÓS J:

Is that the right way or do we draw a leaf from *Oakes* at stage 3 and ask the question whether the limit restricts the right "no more than reasonably necessary" and if it's a reasonable necessity test then that seems to accommodate alternative potentially, as long as they are reasonable ones, and

if they are reasonable and if the proportionality test is met then I'm not sure we need to go any further. It's within range.

MR BUTLER KC:

That is quite, your Honour. I'm not disagreeing with that proposition at all. I'm simply saying that that's a conclusion one arrives at after having asked the question that your Honour has posed and having considered typically evidence that has been advanced on behalf of the Crown that leads the Court to that conclusion.

GLAZEBROOK J:

I suppose my difficulty here is given that we're comparing it back to what happened before when there was a breach of readiness requirements, if you like, the assumption is that those were clearly reasonable alternatives, then you look at what changes are made and see whether those are somehow worse and if they're worse that actually means not only do they have to be justified but you're comparing back to something that you're assuming is justified but could well be part of – I mean there could be all sorts of ways of dealing with this.

MR BUTLER KC:

I agree with your Honour. I do agree with your Honour in relation to the – because the – it's an unusual conundrum.

GLAZEBROOK J:

A particular case, yes.

MR BUTLER KC:

That's the point I'm driving at and that's why I repeat the point I made under that issue 1. This is an unusual case that has come to the Court in a somewhat unusual way, if I may so, but no criticism of any of the parties or anything like that intended. But because what one is operating with is two lots of concession, as I see it, one concession made by the respondents which is that the vaccine mandate is reasonable, and then a concession made by the Crown, at

paragraph 1, that TDFO itself, as I read that paragraph 1, is itself a limit on section 11.

GLAZEBROOK J:

Well, it clearly is because it's forcing people to make a choice effectively. If there was no – if you could have a vaccine mandate and you could decide that you didn't comply with it and had no consequences, then obviously you've got your full choice, but if there's even a possibility that you will lose your job then that is coercion and I think that is what's been conceded by the Solicitor or by the Crown here.

MR BUTLER KC:

And as I said, that may be so, as I said, from how I read that paragraph 1, which talks about the process that's created by the TDFO. That's why I focused on the whole of the paragraph.

Anyway, not for me to resolve, but simply to explain that I agreed with those members of the Court who were suggesting that the way in which the issues have arisen here are unusual and it's for that reason I would caution the Court when thinking about how it's going to tackle deference weight I say issues here is to have regard to the unusual context or background to this particular case.

ELLEN FRANCE J:

Mr Butler, I'm just conscious of the time, so that we allow people time for a reply.

MR BUTLER KC:

Absolutely.

ELLEN FRANCE J:

Was there anything further you wanted to raise?

MR BUTLER KC:

Just two very brief points. On the section 11 and the notion of a binary – you either breach or you don't, the Commission agrees with the submissions you

heard from Mr Woodd and not those you heard from Mr Neild. There are, of course, many different ways and forms of coercion and degrees of coercion that a measure might place that effectively amount to an inference with section 11, and it's not so that the Court shouldn't be distinguishing between different types of coercion for the purposes of a proportionality analysis.

1540

The second point is one related to pleadings and your Honours know from the written submissions the Commission is quite concerned about any suggestion that there's any obligation on a plaintiff to plead alternatives. I'm content to rely on what I say about that in the written submissions and in the road map and say the following, that one must of course recognise that sometimes the choice of proceeding type, in other words traditional view as opposed to an ordinary proceeding, may create difficulties for the Court in terms of, for example, fact finding if there is any cross-examination and the like.

The Commission's submission is that the Court should resist any temptation to suggest that the test under section 5 differs depending on which type of procedure is used, which type of proceeding is used, albeit the Commission can accept a proposition, but choice of proceedings may primp the ability of a court to reach conclusions on evidence depending on whether it's full trial with full cross-examination as opposed to judicial review, and the reason for particularly emphasising that is, as I think I've done in other cases that have come before the Supreme Court, the way in which the Human Rights Review Tribunal, for example, conducts itself is quite different from say a judicial review.

The test before the Tribunal and before the High Court or whatever should be the same. The type of proceeding shouldn't affect the test but it can affect, we acknowledge, the way in which fact finding might occur and how far the Court can go in reaching certainly conclusions based on affidavits as opposed to on briefs of evidence that have been tested in cross-examination.

Your Honours, those are the points I wanted to make, thank you, for accommodating the Commission and (inaudible 15:41:54).

ELLEN FRANCE J:

Thank you Mr Butler. Ms Jagose or Mr Hague first? It wouldn't be usual Mr Hague for you to have a right of reply but is that what the parties have agreed?

SOLICITOR-GENERAL:

If anything came up, sorry, from the Human Rights Commission submissions.

MR HAGUE:

And that is, your Honour, what I – I don't intend – I responded to the appellant.

ELLEN FRANCE J:

Yes, yes, that's fine.

MR HAGUE:

Just to address the Human Rights Commission point about paragraph 1 of the submissions, and I agree with my learned friend from the Commission that the basis of our response and presence here is on the, we understood to be the concession that the section 11 right was limited, and I'll refer your Honours to the application for appeal and the judgment granting leave for appeal to support that point.

And the other minor points I wanted to make is Justice Williams just on your point on this is a sui generis matter, and certainly there are aspects relating to the Armed Forces which are unique in many ways, but I would just refer back to my earlier submissions about the context of the Armed Forces is tempered by those things that I talked about; the legal position of the CDF and the insulation he has from scrutiny, the length of time he had to make his decision, that the pandemic had passed its high point. These are things that should temper that position in my submission.

Just finally, the other point made by my learned friend from the Commission is the relevance of the AFDA, the Armed Forces Discipline Act and, in particular, section 72, and the only point I'd make on that is that while the CDF might

characterise his decision not to use section 72 as a reluctance to take a coercive approach to order members to do something, in fact there are important safeguards built into section 72. There's the requirement to have a Medical Officer of Health assess that person before they are charged with failing to comply with an order. That's a really important individualised approach to mitigating any limitation on rights which is not available under the TDFO.

Finally, just to accept entirely Justice Glazebrook that Justice O'Regan's decision was not part of the majority and in fact it was slightly further down in that case. That concludes my points in reply, thank you.

ELLEN FRANCE J:

Thank you. Mr Hague?

SOLICITOR-GENERAL:

Thank you, your Honours. I only have a few matters to raise. This isn't technically a reply but just to tidy off a point I said I'd come back to you on. I think it was your Honour Justice Kós asked was there something like the administrative instruction prior to the TDFO in respect of the DFO 3 and there was not.

This question has arisen about deference can't fill gaps in the evidence and I accept that as a general proposition, but where deference is relevant is where a court is uncertain or can't see for itself how this benefit meets the objective it should be a clue to the Court not to reach for a more forensic analysis from the evidence but to question whether that means it should be giving greater weight to the judgment where the cards landed for the expert decision-maker, and I will give some examples of that.

In fact, as your Honour, Justice Miller, in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 in the Court of Appeal, paragraphs 98, 99, your Honour runs through there. There was no evidence of the impact of the protected transactions regime on the cost of the borrowing, and so on. That decision "was a policy judgement

made for social and economic reasons". "[I]n my opinion," 102, it was "reasonable to suppose that the protected transactions regime materially reduces the cost of borrowing". That, we say, is a classic example of where deference takes account of where the Court is uncertain. The Court might not be able to see it but defers to the expertise of the decision-maker.

New Health, this Court, did it too. It's identifying that the Court wasn't "in a position to unpick these disputes" or to determine whether particular scientific reports are robust, but the Court can note the benefits of fluoridation are considered to be significant.

So again the error we say the Court of Appeal fell into was by looking for some more forensic evidence when the evidence was there in front of it. I accept Mr Butler's point that the CDF has to show you, this Court, that it has actually attended to all of the matters that were relevant, and it has, he has, in my submission. The evidence does speak for itself, but that didn't – the Court of Appeal's error was to really give no weight to that and to say it was looking for something else.

Can I also refer to a dissenting judgment of Lord Neuberger in *Bank Mellat*? These are in our authorities although I no longer have the tab reference or the page reference. But it's interesting to see that dissenting judgment. He said: "I entertain real doubt as to whether the Direction was justifiable once one weighs the benefits it was likely to achieve, in the light of the relative weakness of the grounds, against the inevitable and substantial harm it would cause to Bank Mellat…. [I]n the end, I am not persuaded that a court can properly conclude that the benefit of the Direction must have been so slight that the Treasury could not reasonably have concluded that it was right to give it, notwithstanding the harm the Bank would thereby suffer." So again a further example of the Court thinking: "Well, I can't see it but I do see that the expert decision-maker has shown me that they can see it and I accept that."

WILLIAMS J:

This comes down to how deep you look, doesn't it? That's what deference teaches us about. Do you dive into the operational detail or do you not, and look to the indicators as to how deep that should be.

SOLICITOR-GENERAL:

Yes. We say the Court of Appeal got that wrong. Going right back to the beginning of my submissions to your Honours we would also say that's where Justice Cooke in *Yardley* went wrong, same sort of approach. "Where is this forensic evidence that I can see?" rather than – but anyway, sorry, I've gone back into a different case, what I don't need to persuade your Honours on.

That was one point on deference. I think I might have one other point.

KÓS J:

Well, I think we have to look at *Yardley* in the context of this case. I don't see how we could ignore it.

SOLICITOR-GENERAL:

I mean it's certainly part of the narrative to how we're here.

WILLIAMS J:

It's a driver of the facts, in fact.

KÓS J:

Yes, exactly.

SOLICITOR-GENERAL:

Yes. I understood my friend, Mr Hague, to be making a point that Dr Town's evidence shows the waning of vaccination and therefore, why was there not a question about whether this vaccination could be on the other schedule?

ELLEN FRANCE J:

Enhanced.

SOLICITOR-GENERAL:

Thank you, your Honour, the enhanced schedule. Making my first point again, that actually hasn't been part of the challenge, but in any event as Weston says at paragraph 42, and Colonel Tate says in her third affidavit, by the time they understood that, boosters could be the thing that re-energises your primary vaccination. That's what Town is saying, that you get two – well, I should probably turn to it rather than try and remember it. It's at 70 I think.

1550

GLAZEBROOK J:

It's on the screen.

SOLICITOR-GENERAL:

Thank you. It's when you have primary dose, then there's an efficacy waning, then you get one booster and it increases that efficacy which then wanes again, then you get your second booster and so on. So moving – it wasn't illogical, as I thought my friend was saying, to put the boosters onto the enhanced schedule because that did allow for a just-in-time approach to the re-energising of the primary course. That's what I understand Dr Town to be saying which is also what Colonel Tate says in her third affidavit.

MILLER J:

Is this the one filed in the Court of Appeal?

SOLICITOR-GENERAL:

Yes, she filed it in the – thank you, Sir, she filed it in the Court of Appeal. I thought I had it in my hand. 401.0003, she says at paragraphs 8 and 9. At 7 she says: "In considering [COVID], health threat exposure trends have noticeably changed… Clusters of NZDF cases are now being seen more directly related to collective activities and travel rather than widespread in workplaces. These exposure trends make it more effective to consider booster doses of vaccine immediately prior to planned collective activities and travel, rather than their timing being unrelated to the higher exposure periods. As the booster is a single dose and effective within a few days it can be given as part

of planned enhanced readiness preparation…". So she saw that the changing situation meant that boosters could be treated as the same way as other just in time vaccines on the enhanced schedule.

I think that our point might have been understood by this Court but can I just say briefly that the pleading we say was required was to attack the vaccine's presence on the main schedule because, as my friend says, it would have been less rights infringing if it had been put on the enhanced schedule as in the UK. That's why we say it's a matter of pleading. That was never the case as put. Indeed, as the Court of Appeal says, paragraph 142: "As Mr Hague emphasised, the proceedings do not challenge the addition of the COVID-19 vaccinations to the NZDF Vaccination Schedule. Nor do they challenge the consequences that would have followed from adding…to the baseline schedule." So that's why we say it's a pleading question.

I accept my friend Mr Butler's caution that the Crown isn't saying that the plaintiff has the burden of pleading all of the alternatives that a decision-maker might have to think up but that was a pretty clear example of where they might have said, "We do challenge that earlier decision", rather than that they didn't challenge the earlier decision to put the COVID vaccine on the base schedule.

That might make me wade back into the very first paragraph on our written submissions, which I do with some regret, but I understand the Court to have understood the point we make there, that we took a global view of the TDFO which in fairness was the same view that the Crown's taken about where it does – where it took steps that required or put consequences that might be adverse on a person that –

KÓS J:

You're not disagreeing with the way Justice Glazebrook put it?

SOLICITOR-GENERAL:

No.

KÓS J:

No.

MILLER J:

Well, it seems clear that it was rights-limiting in the sense that it required more people to have a vaccine right now than would otherwise have been the case so that is obviously the position. Whether it was a materially greater infringement on the rights of any individual person is quite a different thing –

SOLICITOR-GENERAL:

Yes.

MILLER J:

– and we've been focusing too much on the latter and it seems quite clear that it had a major impact.

SOLICITOR-GENERAL:

And your Honours, and with no disrespect to the Human Rights Commission's submissions, I don't intend to say anything further. We have written in our written submissions the position we take in large measure I would say consistent with the approach put to you by my friend Mr Butler. So unless your Honours have any other questions – I just might check with my colleagues. Unless you have any other questions then, your Honours?

ELLEN FRANCE J:

Anything further? Thank you.

SOLICITOR-GENERAL:

As the Court pleases.

ELLEN FRANCE J:

Thank you counsel for your submissions. We'll take time to consider those and deliver our judgment in writing in the usual way. Thank you. We'll retire.

COURT ADJOURNS: 3.55 PM