Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M-66 OF 1995

BEFORE: THE HON. MR. JUSTICE SMITH, J.
THE HON. MR. JUSTICE REID, J.
THE HON. MRS. JUSTICE HARRIS, J.

REGINA V. JAMAICA DEFENCE FORCE
- Exparte Granville William Pitter -

Arthur Kitchen instructed by Messrs H.G. Bartholomew and Company for Applicant.

Laxton Robinson and M. Harrison instructed by Director of State Proceedings for Respondent.

HEARD: 8th, 9th, 11th October, 7th November, 23rd December, 1996 6th January and 30th May, 1997

SMITH, J.

I have read the draft judgment of my sister Harris, J. and I am in agreement with the reasoning and conclusion. I wish only to say one thing. It is my view that this case concerns matters of military law and rules of procedure. This court can only interfere with military courts and matters of military law in so far as the civil rights of the soldier may be affected. See **R. v. Secretary of State for War Exparte (Martyn) (1949) 1 All E.R. 242.** The applicant is a member of the Jamaica Defence Force.

The relief sought by him is "an Order of Certiorari to quash Jamaica Defence Force Part 2 Orders Serial No.37 dated the 26th day of June, 1995, whereby it was ordered by the Chief of Staff and/or the Commanding Officer of the Support and Services Battalion that the Applicant re-engage in the J.D.F. for a further period of 6 years and 6 days."

The grounds upon which the relief is sought are:

(i) that the purported re-engagement is unlawful, arbitrary, null and void and in breach of the Defence Act and the Defence (Regular Force Enlistment and Service) Regulations in that at no time did the Applicant agree to re-engage in the J.D.F. for a further period of 6 years and 6 days terminating on the 30th

day of July, 2001, for the purposes of attending a course of study at C.A.S.T.;

(ii) that the Chief of Staff of the J.D.F. and/or the Commanding Officer of the Support and Services Battalion acted and/or continue to act without or in excess of jurisdiction and/or in breach of law and the principles of natural justice by virtue of the said Part Two Orders.

A third ground viz "that the Applicant is no longer subject to The Jurisdiction of the Military Law and/or the Defence Act and/or regulations thereunder and is now a civilian" was withdrawn by Mr. Kitchen. Counsel for the Applicant had no choice but to withdraw when he was confronted with Section 22(1) of the Defence Act which provides:

> "Save as in this Act provided, every solider of the regular Force upon becoming entitled to be discharged, shall be discharged with all convenient speed but until discharged shall remain subject to military law under this Act."

Thus it is not in dispute that the applicant is subject to military law.

The Applicant was the beneficiary of at least three courses of study paid for by the J.D.F.

The Respondent's contention is that the Applicant attended a two year J.D.F. sponsored course at C.A.S.T. Instructions 13 of the Force Standing Orders deals with the service liability incurred following attendance on courses. Copies of the Instruction are sent to soldiers attending the course. The Instruction specifies the period of liability which a soldier incurs when he attends a course of a specific duration.

A soldier is required to sign a certificate of re-engagement prior to attending a course.

Through administrative bungling the Applicant did not sign the certificate of re-engagement before embarking on the course.

At the end of this two year course the Commanding Officer instructed the Applicant to sign his re-engagement certificate in respect of his service liability.

The Applicant refused to sign the certificate. On his refusal to sign, his service liability was published in Part 2 Order Serial 37 dated 26th June, 1995.

The Respondent claims that the Applicant went illegally absent on the 31st July, 1995 and was subsequently classified as a deserter and a Board of Enquiry was convened to investigate and report on the facts relating to his absence.

The Applicant in denying that the full time two year course was sponsored by the J.D.F., claims that he paid for the course and so did not incur any further service liability in the J.D.F. He is thus contending that he was entitled to refuse to sign the re-engagement certificate. He states that on his refusal to sign he was charged with 'Disobeying a lawful command' and "Conduct to the prejudice of good order and military discipline."

There is not one iota of evidence that the Applicant's civil rights as opposed to his military rights have been infringed.

This court is asked to quash an order which concerns the re-engagement of the applicant in the Force. His civil rights are in no way affected.

In **R. v. Jamaica Defence Force-Exparte Ian Hugh Clarke** Suit M.91 of 1993 Rattray, C.J. (Ag.) considered the jurisdiction of the court in relation to the decisions of military authorities. The learned Chief Justice (Ag.) cited with approval the following passage from Judicial Reviews of Administrative Action by S.A. DeSmith (4th Edition) page 146.

> "Special considerations apply where procedural errors have been committed by authorities administering military discipline. The courts have always shown a marked aversion from seeming to interfere with the proceedings of military authorities except where the civil rights of an individual have been infringed....."

The cases of **R. v. Army Council-Exparte Ravenscroft (1916-1917) All E.R. 492** and **R. v. Secretary of State-Exparte Martyn** (supra) were considered. The Chief Justice (Ag.) quoted Lord Goddard C.J. in Exparte Martyn at page 243:

> "It is now suggested that we ought to bring up the Order of this Court Martial and quash it on the ground that the Court had no jurisdiction to try the applicant. Once it is conceded, as it has been in this case, that he was a soldier, a Court Martial has jurisdiction to try him. If the Court Martial in the present case has not observed the proper rule of procedure, that is a matter for the convening officer, and, if necessary, the Judge Advocate General to deal with it, but it is not a matter for this Court, which can only interfere with military courts on matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be effected. This application really amounts to asking us to decide that the members of the Court Martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this Court has any jurisdiction."

I should be prepared to decide this case upon the ground that it is a military matter and therefore, a civil court should not interfere.

HARRIS, J.

This is an application by Granville Pitter, a soldier with the Jamaica Defence Force for an order of certiorari to quash a Jamaica Defence Force Order Serial #37 made on 26th June, 1995, wherein it was ordered that he re-engages for service with that institution for a further period of 6 years and 6 days, consequent on his attendance at a course of study.

The grounds on which he placed reliance were expressed in the following terms:-

(a) The said purported re-engagement is unlawful, arbitrary, null, void and in breach of the Defence Act and the Defence (Regular Force Enlistment and Service) Regulations, in that at no time did the Applicant agree to re-engage in the J.D.F. for a further period of 6 years and 6 days terminating on the 30th day of July, 2001, for the purpose of attending a course of study at C.A.S.T.

(b) The Chief of Staff of the J.D.F. and/or the Commanding Officer of the Support and Services Battalion acted and/or continue to act without or in excess of jurisdiction and/or in breach of law and the principles of Natural Justice by virtue of the said Part Two Orders.

(c) The Applicant is no longer subject to the jurisdiction of Military Law and/or the Defence Act and/or regulations thereunder and he is now a civilian.

Ground 3 was abandoned by Mr. Kitchen. He conceded that in light of the Defence Act Section 22, which provides that a soldier until discharged, remains subject to military law, that ground would be withdrawn.

The applicant was enlisted in the Jamaica Defence Force in July, 1987 for a period of six years colour service, expiring in July, 1993. In March, 1992 he was accepted to pursue a course in Computer Studies at C.A.S.T, commencing September, 1992.

In an affidavit in support of his application the applicant

states that funds to meet cost of the course were met by him personally and not the J.D.F. In the month of August, 1992 he orally requested and was granted permission by Major Karl Chambers for time off his regular duties to pursue his course which was scheduled to run from 8:00 a.m. to 5:00 p.m., provided that in case of an emergency he would be available to carry out his regular duties during school hours and after school hours on Saturdays and Sundays and during school holidays.

It was also his averment that his contract of service would have expired on 23rd July, 1993 but he applied for and was granted permission to re-engage in service for a further period of one year. In 1994 he again made an application for and was granted permission to re-engage for a further period of 1 year's service ending July, 1995.

He also stated that in February, 1995 he applied for and was granted privileged leave in the month of June of that year, which is the normal procedure preceding the date of his final discharge from the army. While on leave he submitted his application for discharge. He was then recalled to active duty and was ordered to attend on an Adjutant who requested him to sign a re-engagement certificate. This he refused to do. He was then sent to Major Chambers who ordered him to sign. He also refused to comply with the order. Two charges were brought against him. He was taken before Major Miles to answer the charges. Major Miles dismissed one charge of conduct to the prejudice of good order and military discipline but referred him to Lieutenant Colonel Linton Graham to answer the other charge of disobeying a lawful command. Lieutenant Graham adjourned the hearing sine die and informed him he was allowing him 48 hours to sign the certificate after which he would make a decision as to how he would proceed in respect of the charge.

An affidavit in response was filed by the Respondent through Major Karl Chambers to whom the applicant had directly reported since 1988. Major Chambers was charged with the responsibility of the general supervision, training, and assignment of duties to

the applicant. It was averred by him that Chapter 13 Instruction B of the Standing Orders provides for service liability consequent on the attendance of a course by a soldier. A submissiion of nominees for courses are made annually to headquarter J.D.F. on approval of the course by headquarter J.D.F. joining instructions are issued. Joining instruction state the name of the soldier, the title of the course, the period of the course and other relevant information inclusive of his service liability. Copies of these instructions are sent to the soldier and to his unit. He is not allowed to attend course without joining instructions. He is also required to execute a re-engagement certificate before proceeding on the course. The J.D.F. meets expenses consequent on the course and if a soldier incurs any expenses in relation to a course, reimbursement of those expenses are made to him by J.D.F.

The applicant attended a course in 1989 on the approval of the J.D.F., for which he attracted an additional service liability of three years. This required him to re-engage until July, 1994. The records did not reflect that he re-engaged in the manner prescribed but Part II Orders Serial 59 showed he re-engaged up to 23rd July, 1994.

He also declared that on 14th February, 1992 the applicant was nominated to attend a two year full time Diploma course in Computer Studies at College of Arts, Science and Technology to run from 22nd September, 1992 to 31st July, 1994. His attendance was approved by headquarter J.D.F. and joining instructions issued on 22nd September, 1992.

It was his further averment that the Publication of the applicant's name was made in Part II Orders Serial 192. The Applicant was then instructed to report to an Adjutant of his battalion to sign his re-engagement certificate. He did not comply. On a date prior to 21st September, 1992 the applicant had told the Major that 7 years liability was too long. Mr. Pitter also informed him that the tuition fees for the course was $9,100.00 and had to be paid by the 21st September, 1992. He instructed the applicant to advance the sum. He subsequently wrote to the head-

quarter J.D.F. seeking a refund of the amount. The applicant then submitted a receipt for sum paid by him/and a cheque was drawn in his favour which he did not collect. In October, 1992 he gave him a book list and requested that books be purchased by the J.D.F. He also wrote to the headquarter J.D.F. requesting the books.

Rererence will first be made to the applicant's contention that the order made by the Commanding Officer of the Defence Force for him to re-engage in service of 6 years and 6 days is illegal. In support of his contention he sought to rely on the Defence Act, S.20 and the Defence Regularions S.9(1).

S.20 of the Defence Act provides as follows:

> "Any soldier of the regular Force of good character who at any time has completed or is within two years before completing the term of his colour service may, with the approval of the competent military authority, re-engage for such further period or periods of colour service and service in the Reserve as may be prescribed:
>
> Provided that such further period or periods of colour service together with the original period of colour service shall not, except as provided by subsection (2), exceed a total continuous period of twenty-two years of colour service from the date of the soldier's original attestation or the date upon which he attained the age of eighteen years, whichever shall be the later.
>
> (2) Any soldier of the regular Force who shall have completed a period of twenty-two years' colour service may, it he shall so desire and with the approval of the competent military authority, continue to serve in all respects as if his term of colour service was still unexpired except that it shall be lawful for him to claim his discharge at the expiration of the period of three months beginning with the day on which he gives his commanding officer notice of his wish to be discharged."

The Act grants to a soldier among other things an option, with the approval of the relevant military authority, to re-engage in service on completion of his initial term of colour service. This option he may, or may not exercise. There is no obligation on his part to continue to serve if he does not so desire.

Regulation 9(1) of the Defence Regulations reads:

> 9(1) A soldier may, in accordance with subsection (1) of section 20, from time to time re-engage for a period of colour service, beginning on the expiration of his then current engagement, of 6 months, 1, 2, 3, 4, 5 or 6 years but so that a total continuous period of 22 years colour service from the date of his attestation or the date upon which he attained the age of 18 years, whichever shall be later, shall not be exceeded."

The regulation restricts the period of voluntary re-engagement to a minimum of 6 months and a maximum of 6 years service at any one time. It also places limitation on the continuous aggregate period of re-engagement to 22 years service.

In the case under review, the applicant's term of re-engagement is founded on provisions of the Force Standing Orders which govern the administrative and operational procedure of the Jamaica Defence Force. Chapter 13 Instruction B of the Standing Orders provides:

> (1) "It is the J.D.F. policy where officers or soldiers undergo protracted or specialised training, particularly on long courses in Jamaica or overseas, they should be required to continue serving with the J.D.F. for a reasonable period after their course finishes.
>
> (2) This instruction lays down the minimum residual service required for students attending long courses.
>
> (3) In every case the minimum service period will count from the date upon which the course concerned is scheduled to end."

Annex A of Chapter 13 of the Standing Order paragraph 0.3(d) provides that courses of duration of 12 months or in excess of that period attract service liability of 7 years.

The provisions of the Standing Orders demonstrate conclusively that there is a distinction between the dictates of the Order and those of the Act and the relevant Regulation. On one hand obedience to the Standing Order is mandatory. Conversely there is no obligation on the part of a soldier to continue military service once he has completed his original term of service. Consequently, re-engagement under the provisions of the Standing Orders is compulsory but consensual under the Act. A soldier who proceeds on a course, immediately falls within the parameter of the provisions of the Standing Orders and has a duty to continue to serve for a period commissioned by those Orders.

The order for the applicant to re-engage is lawful and valid. The provisions of S.20 of the Act and S.9 (1) of the Regulations cannot therefore avail him. It is necessary for the maintainance of discipline and good order in the J.D.F. that the applicant adheres to all terms and conditions laid down in the Standing Orders.

It was further contended by the applicant that the authorities acted arbitrarily in compelling him to re-engage. He stated that the course which he attended was not one sponsored by the Jamaica Defence Force. His attorney-at-law submitted, inter alia, that he did not agree to re-engage nor was the extent of the service liability brought to his attention and as a consequence he ought not to be bound by the Standing Orders.

The evidence discloses that the applicant proceeded on a full time course at the College of Arts, Science and Technology commencing on the 22nd September, 1992 for a period of two years. He received the approval of the Jamaica Defence Force to do so and this had not been challenged by him. There is also evidence from Major Chambers, which I accept, that he submitted a voucher for the re-imbursement of the sum of $9,100.00 advanced by him on Major Chambers' instructions, for the first year's cost of tuition. A cheque was made available to him to cover this amount which he failed to collect. In October, 1992 Major Chambers, on receipt of a book list from the applicant, wrote to the Headquarters Jamaica Defence Force requesting payment of fees for books. There is no evidence that the applicant paid the full cost of tuition. He advanced the first year's fees which he elected not to recover although a cheque was drawn in his favour to satisfy the amount. He attended the course for two years yet proffered no evidence to show that the J.D.F. was not responsible for payment of the tuition fee for the additional year. During the two years of his pursuit of the course of study he was paid his salary in full. In light of the foregoing, it is patently manifest that the course was pursued by him by virtue of sponsorship from the Jamaica Defence Force.

Further, the applicant's name was published in Part 1 Orders serial 192 dated 29th September, 1992 as one of the soldiers

proceeding on a course. He was requested to sign a re-engagement certificate for liability period terminating on 30th July, 2001. He refused. Major Chambers stated that on a date prior to 21st September, 1992 the applicant had told him that a liability period of 7 years for the course he was about to attend was too long. The applicant was requested on subsequent occasions to execute the relevant certificate but he declined.

Standing Orders direct the incurrence of service liability of 7 years for a soldier's attendance at a course exceeding 12 months. This applicant is under a duty to obey. He is deemed to have knowledge of the fact that he would have been incurring such liability before he embarked on the course sponsored by the J.D.F. In fact, there is evidence which clearly indicates that he had known. All soldiers are conversant with Standing Orders. These are read and discussed not only with recruits but also with soldiers throughout the term of their military careers and are made available to them for their scrutiny if, or when they so desire. Joining instructions outlining, inter alia, the applicant's liability were issued to him. He informed Major Chambers that the designated period of 7 years was too long. In any event, neither the fact that he had not signed the certificate nor his counsel's assertion that the liability period was not bought to his attention would in any-way exonerate him from his obligation to serve the requisite period. This being so, it cannot be acknowledged that the J.D.F. authorities had acted arbitrarily. The authorities have sought to ensure that the applicant fulfils the terms and conditions laid down in the standing orders.

It was also asserted by the applicant that there was a breach of natural justice on the part of the military authorities in compelling his re-engagement and such act was ultra vires. In observance of the rules of natural justice the concept of what is right, just and fair in any given circumstances or situation, must be imported.

De Smith's Judicial Review of Administrative Action (4th Edition 1980) p.199 recognises the rule in the following context:

> "Where an act, or proposal is only the first step in sequence of measures which may culminate in a decision detrimental to a person's interest, the court will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage."

The question now to be answered are whether the two year course which the applicant pursued at College of Arts, Science and Technology commencing in September, 1992 was sponsored by the Jamaica Defence Force and whether the military authorities acted unfairly or unjustly in commanding the applicant to re-engage for a period of 6 years and 6 days.

The first matter for consideration is whether the course was done under aegis of J.D.F. The applicant enrolled in and completed a two year course at C.A.S.T. with the approval of the J.D.F. A cheque was made available to him to cover the first year's tuition for which he had sought re-imbursement but failed to collect. He produced no evidence to establish that J.D.F. had not met tuition expenses for the second year. In October, 1992 applicant submitted to J.D.F. a book list in respect of text books for the course. It follows that the course was in fact sponsored by the J.D.F.

An additional matter to be addressed is whether the command for his re-engagement was unfiar or unjust. The ordinance to re-engage was ordained by rules in the form of the Standing Orders. Where rules are prescribed for the guidance or, conduct of military personnel or their military discipline a civil court ought not to intervene in issues relative to military conduct or military law. In **Dawkins v. Lord Rokeley (1866) 4F & F 806** N.P. Wiles J. gave support to this proposition when he stated:-

> "It is clear that, with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned military men must determine them... with respect to persons who enter into military state, who take Her Majesty's pay, and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only the statement of it to recommend it to the consideration of anyone of common

> sense, become subject to military rule and military discipline .... they are subject to a test of law which is different from that administered in civil courts."

This case under review relates to military matters. The applicant is subject to military law and regulations. The complaints by him were directed against his superior officers. Mr. Kitchen submitted that applicant was not required to sign and did not agree to sign re-engagement certificate when he proceeded on the course. He also stated that joining instructions were not issued to him and that no Part II Order which would have covered the initial period of the course of study in September 1992, existed.

The applicant enlisted in the J.D.F. on 24th July, 1987. In the ordinary course of events, he would have been due for discharge on the 23rd July, 1993. He received permission to attend and did attend a 3 year course at C.A.S.T., commencing on the 2nd October, 1989. He stated that the course had ended prematurely. There was no record that he re-engaged in 1989. This he ought to have done. He would have at that time incurred three years service liability which would have extended his period of liability to July, 1994. Part II order issued on 24th July, 1992 listed his re-engagement for a further period of 1 year expiring on the 23rd July, 1994. The periods would clearly be reference to re-engagement for the 1989 course, as there is evidence that his service liability in respect of this course would have been three years expiring on 23rd July, 1994. On 22nd September, 1992 he proceeded on another course of study at C.A.S.T., incurring further service liability of 6 years and 6 days. Consequent on which, Part II Order Serial 192 was issued and applicant's name was published therein. He did not sign the relevant re-engagement certificate. On June 5, 1995 he submitted an application for discharge with effect from 23rd July, 1995 but failed to employ the appropriate procedure in seeking to have his enlistment terminated. He subsequently proceeded on leave. The leave was terminated, after which, he reported to his commanding officer who instructed him to execute the re-engagement

certificate. He refused. This refusal, in itself does not absolve him from the obligation to serve for the period mandated by the Standing Order. He is bound by the order.

The action taken by the commanding officer was a matter of military discipline and a matter of necessity and the officer was acting within the scope of his authority. The date of applicant's discharge was July, 1995 and was therefore imminent, if the commanding officer did not ensure that he re-engaged then, he could not have enjoined him to do so after he was discharged.

Further, the applicant was afforded the opportunity to raise objections on occasions when he was requested to sign the re-engagement certificate but declined to do so. He cannot now assert that he was not given an opportunity to be heard.

Where a person has knowledge of certain circumstances and has opportunity to raise objections, or respond to those circumstances and refuses to do so, he cannot afterwards declare that he has been denied the right to he heard. See In the matter of Tropical Airlines Limited - M.042/1996.

The applicant averred that following his refusal to sign the certificate a charge against him relating to Disobeying a lawful command was heard on 18th July, 1995 and adjourned sine die. Major Chambers however stated that on 31st July, 1995 applicant was absent from duty and a Board of Enquiry was convened to investigate facts relating to his absence. I find that there is no charge pending or contemplated against him nor is there any sanction being imposed against him.

The process of re-engagement is an obligation imposed on him when he proceeded on and pursued the two year course at C.A.S.T. The matter of whether he agreed to sign or did not sign the re-engagement certificate is immaterial. He is compelled to conform to decision of the military authorities to serve the requisite period. Additionally, there is no evidence that compulsory re-engagement will or is likely to result in his experiencing any loss or deprivation or any benefit, or loss of reputation.

It is interesting to note that although the applicant asserts

that he has been aggrieved by the order to re-enlist for an additional 6 years and 6 days he had taken no steps to invoke the provisions of paragraph 8 of the Standing Orders, which affords him a redress. It provides:-

> "Appeals against the provisions of this instruction will be made to the headquarters, Jamaica Defence Force."

Here he is offered a recourse, to which he could have been resorted but has chosen not to do so.

Further S.174 of the Defence Act also offers him a remedy. S.174 states:

> (1) "If a soldier of the Jamaica Defence Force thinks himself wronged in any matter by any officer other than his commanding officer or by any soldier, he may make a complaint with respect to that matter to his commanding officer.
>
> (2) If a soldier of the Jamaica Defence Force thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under subsection (1) or for any other reason, he may make a complaint with respect thereto to any officer under whom the complaint is for the time being serving, being an officer not below the rank of colonel or corresponding rank.
>
> (3) It shall be the duty of a commanding or other officer to have any complaint received by him under this section investigated and to take any steps for redressing the matter complained of which appear to him to be necessary."

The act clearly provided a conduit through which he could adequately address his complaint. He has however elected not to take advantage of this avenue which is available to him. He cannot now approach the court and request that he be heard.

The order which directs that applicant re-enlists with the J.D.F. for an additional period of service of 6 years and 6 days, his having undertaken a course of study sponsored by J.D.F., is lawful and enforceable. The applicant has not established that the military authorities had exceeded their jurisdiction and acted unfairly in ordering him to serve for a further period, nor has it been shown that this act of the authorities was done unjustifiably.

Further, certain avenues were and are still open to the applicant to obtain redress of any grievance he may have with the J.D.F. This being so, the court will not interfere. His application cannot be entertained. Order for certiorari is refused.

REID, J.

Like my brother Smith, J. I agree that the matters raised in the proceedings should properly be before a Military Tribunal and that there is no ground for interference by a Civil Court.

I have had the benefit of reading a draft of the judgment of my sister Harris, J. and support entirely not only the conclusions of facts drawn from the affidavits before us but also the reasoning as set out by her. The applicant had been afforded the opportunity to raise objections when requested to sign the re-engagement certificate. His refusal precluded him from asserting later a denial to him of a right to be heard.

I too am in agreement that his application must be dismissed.