17A/72

SUPREME COURT OF VICTORIA

PRAIN v MINISTER of STATE for LABOUR and NATIONAL SERVICE

Gillard J

30 June 1972

NATIONAL SERVICE – CONSCIENTIOUS OBJECTOR – APPLICATION MADE BY OBJECTOR TO BE REGISTERED EXEMPT FROM LIABILITY TO RENDER ANY FORM OF NATIONAL SERVICE – MAGISTRATE SATISFIED THAT APPLICANT WAS OPPOSED TO KILLING AND WAR BUT NOT SATISFIED THAT THE APPLICANT SATISFIED THE BURDEN OF PROOF IN RELATION TO NON-COMBATANT DUTIES – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR: *NATIONAL SERVICE ACT* 1951-68, S29A(1).

HELD: Order nisi discharged.
It does not appear that the Magistrate took into account any irrelevant matters to make the formal order he did. His order was based upon the failure of the applicant to persuade him by his testimony, that he had a conscientious aversion to all forms of military service at all times and under all circumstances. It was open on the testimony to find that the applicant had never turned his mind to service which went to saving life as opposed to destroying it. The choice by the applicant in his testimony of various practical non-combatant duties could well have led the Magistrate to hold that although he accepted that the applicant was opposed to war and killing, he was not satisfied as to his aversion to carrying service of a genuine non-combatant character.

GILLARD J: This is the return of an order nisi to review an order of the Magistrates' Court at Melbourne, made on 4 November 1971, dismissing an application by Vaughan Richard Prain to be registered exempt from liability to render any form of National Service pursuant to s29A(1) *National Service Act* 1951-68, and directing, pursuant to s29A of the said Act, that he be registered as liable to perform non-combatant duties in the national service.

The order to review was granted on six grounds. Mr Eames who appeared for the applicant Prain limited himself to four broad propositions which were covered by the six grounds of the order nisi.

At the threshold of the proceedings before me Mr Winneke who appeared for the Minister of State for Labour and National Service, objected to the jurisdiction of the Court on the grounds that the only right of appeal from the Magistrate's Order was that now provided in the *National Service Act* itself, and that the applicant Prain was precluded from reviewing the decision of the Magistrate under s155 *Justices Act* 1958. In effect Mr Winneke submitted that the jurisdiction conferred on the Magistrate by s29B of the *National Service Act* was a new federal jurisdiction created by the provisions of Act no. 30 of 1955. By s29C also introduced by Act No.30 of 1953, a right of appeal from the Magistrate's order was conferred upon the applicant to a Court of Review, which in this State would have been constituted by the County Court.

By the same Act, another new section was introduced which now appears as s57A, and it is in these terms:

> "The several courts of the States by which questions may be decided, or to which applications or appeals may be brought under this Act are hereby invested with federal jurisdiction to hear and determine those questions, applications or appeals."

To me these provisions would have strongly suggested that a new federal jurisdiction was being conferred on State courts apart from the jurisdiction already granted under the provisions of the *Judiciary Act*. It appeared to me that the federal Parliament intended to create a new federal jurisdiction for Magistrates with a statutory right of appeal from any order made by a Magistrate to a court of review, which, in turn, would have been exercising a new federal jurisdiction.

It would appear to me that the intention was to create a new procedure apart from that already existing under State law in State courts exercising federal jurisdiction, and that it was not intended that the existing procedure was to apply to proceedings in relation to applications for exemption under the *National Service Act*. But this opinion is contrary to the views expressed by Smith J of this court in an unreported case of *Coldham v The Minister of State for Labour and National Service* given on 23 June 1970. I have had the benefit of reading his reasons for judgment and appreciate the difficult problem that is facing this court in determining the question. Perhaps I should add here that this does not raise any question *inter se* and consequently this court has power to adjudicate on the matter.

It would appear that it is a question of what was the legislative intention of the federal Parliament in relation to conferring federal jurisdiction on State courts. The problem is, what was the effect of the creation of the new federal jurisdiction under the provisions of the *National Service Act*? Smith J, however came to no concluded view as to whether the review proceedings were open to a party to such applications. He assumed jurisdiction and dealt with the order to review before him on its merits. Although I was somewhat tempted to adopt my own opinion to enable the applicant to challenge its correctness in the High Court, on reflection I believe it would be unfair to put the parties to the expense of such proceedings without my expressing my views on the merits of this order to review.

I have therefore refrained from dismissing this order at the threshold and I am assuming jurisdiction and will proceed to deal with the matter on its merits. Before embarking on such an enquiry, having regard to submissions I have heard, something should be said about the nature of the procedure of an order to review.

The jurisdiction of the Supreme Court in this kind of proceeding is limited to dealing with orders made in error or mistake by a Magistrate sitting in a Magistrates' Court. So far as findings of fact are concerned, generally speaking this court is bound by a Magistrate's findings. The rule developed in this State in relation thereto is stated by the Full Court in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at p351; (1961) 19 LGRA 232, in these terms:

> "We have come to the conclusion that we should adopt the view that the Supreme Court on appeal from Petty Sessions by way of Order to Review should with regard to any question of fact act according to long-established practice, and treat the matter in the same way as an appeal from the verdict of a jury. ... It is a very long established practice and appears to have been adopted by the Full Court in the early days of the colony by analogy to the practice followed in England under earlier procedures whereby decisions of magistrates were called into question... The rule which prevails with respect to appeals from the County Court or from a single judge of the Supreme Court to the Full Court or from this Court to the High Court and which is stated in *Dearman v Dearman* [1908] HCA 84; (1908) 7 CLR 549 therefore does not apply. Accordingly, it is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witness. This Court had merely to see whether there was evidence upon which the magistrate might as a reasonable man come to the conclusion to which he did come."

In the end, despite the earnest and able argument of Mr Eames on behalf of the applicant in support of the four propositions referred to above, the ultimate decision on whether the Magistrate has been guilty of any error or mistake in the order he made depends primarily on the proper interpretation of the Magistrate's comments in answer to submissions made by Mr Eames as counsel in the court below, and of the effect of the evidence given by the applicant.

Dealing first with the applicant's evidence the substance of it was that the applicant because of his Christian teaching objected strongly to killing and believed that war was wrong. He said in the course of evidence:

> "Even in times of national emergency where this country is under attack, I do not believe it can be morally justified."

This is an expression of a very strong view as to his beliefs on war and killing. Although the validity of such a view should not be tested on the basis of reason, if the view should be genuinely held, nevertheless to test the sincerity and depth of such an opinion, the Magistrate was quite entitled to examine the opinion in the light of reason, and to assess how genuine it was and upon what foundation such opinion was based, and the ultimate effects of holding such opinions.

These decisions are essentially determinations of fact, or inferences of fact drawn from facts proved. In dealing with the question of non-combatant duties the applicant in his testimony said:

> "I object to non-combatant duties mainly on the ground that by being a member of the Army I believe I am supporting the principle of the Army and killing. It is inconsistent for me to belong to the Army and yet profess an objection to killing. I also object to non-combatant duties because in a practical sense, by handling stores, ammunition or whatever I do, I would actually be helping the people who do the killing. So both because of the association with the principle of killing, and the active role I would play in helping killing, I oppose non-combatant duties. My objection to war extends to all war and not just the Vietnam war; I believe that no war is morally justifiable."

After evidence was called from two further witnesses who testified that the applicant had entertained his views on war and killing for a period known to them of approximately three years, that being the period in which they were in contact with him, the Stipendiary Magistrate stated:

> "I am satisfied that he is opposed to killing and war but I am not satisfied he has satisfied the burden of proof as to non-combatant duties."

This, in my view, was clearly a finding of fact. On one matter the Magistrate was stating that he was persuaded by the testimony that he had heard. On the other hand he was also saying that he was not persuaded as to the second and important matter to the applicant's case. Doubtless he would arrive at such a finding on the basis not only of the statement of the applicant in the course of his evidence corroborated as it was by the testimony of his two friends, but also upon the demeanour of the applicant and, as Mr Winneke pointed out in argument, an assessment of his sincerity on the views he was expressing. This could only be obtained by an observation of the witness in the witness box. I shall again refer to this when dealing with Mr Eames' argument.

After this statement by the Magistrate, counsel then apparently addressed the Magistrate on the question of the burden of proof as to non-combatant duties, and in the course of his address be referred to a number of decided cases and the evidence given in the proceedings. Unfortunately, the precise nature of counsels' submissions is not set out in the material before this court. I believe that great assistance might have been obtained from knowing precisely what Mr Eames had submitted to the Stipendiary Magistrate. I think certainly the Magistrate's remarks made subsequently would become more understandable.

According to the affidavit, the Magistrate then replied to Mr Eames' submissions. He said:

> "I have read these matters."

(What that refers to is a little difficult to understand, but I assume that counsel had given him the citation of authority and that is what he as referring to.) He continued to say:—

> "But I do feel here he has only held these convictions over a period of some four or five years, his later mature life, but at the same time I think these people are in a world where we have very much killing without discussing whether it is otherwise necessary or unnecessary. His main objection is that he does not believe in killing, so he possibly says he is a person whose conscientious beliefs do not allow him to engage in any form of military service. I think the matter must stop there: This is his reason and this much I are prepared to accept. At the same time, as he is a young man living in a society, and I think the purpose of this *National Service Act* is for the protection of the society, certainly it is not just war or killing; its aims are very far removed from that without going into various kinds of self protection and protection of the community and every community must have to maintain himself. He speaks of Christian beliefs; he does not take the matter much further. He is quite honest and says he does not pursue them to any great depths. Of those who do pursue them to great lengths there are many strong in their views, one must defend one's rights. There are many instances in the Bible where it is right to defend one's rights and circumstances some violence which is said to be necessary. But being so I think that despite that you have said I have come to the conclusion he has a conscientious belief which, whilst having made out the situation in (1) I feel he has not satisfied me that he should not or he has a belief which does not allow him to serve in duties of a non-combatant nature. That being so the order I do propose to make is, he holds a conscientious belief that does not allow him to engage in duties of a combatant nature. He has not satisfied me he has any beliefs which would not oblige him to undertake military duties of a non-combatant nature."

I set that statement out in full because Mr Eames has based most of his argument upon what the Magistrate there said. The only comment I make at this stage is that it is unfortunate that the court has not before it the submissions of Mr Eames because it is quite clear, as the affidavit itself sets out, that the Magistrate was answering certain submissions he made, matters that he, as counsel, had raised. Secondly, the Magistrate has already expressed himself on the salient issue. Sitting as a jury he said he was satisfied as to the applicant's opposition to killing and war but he was not satisfied that he had sustained the onus of proof' as to non-combatant duties.

The purpose of those comments made by the Magistrate is not clear, save that it was as the affidavit set out in reply to Mr Eames' submissions. Not knowing what Mr Eames' submissions are, it is difficult to understand to what particular matter the Magistrate was addressing some of his remarks. Nevertheless, because in the applicant's testimony he said he objected to non-combatant duties: "because in a practical sense by handling stores, ammunition or whatever" he "would be actually helping the people, who did the killing", it was open to the Magistrate to find that the applicant's view on the practical effect of military service was incomplete and therefore erroneous.

Non-combatant service might very well be for the purpose of saving life and not destroying it. This appeared to prompt the Magistrate to comment that the applicant's main objection to service was killing, and he accepted that this was genuine belief. But the Magistrate proceeded, in a not very elegant fashion, to point out that service under the Act was for the protection of the community, not just war or killing.

Before me, Mr Eames seemed to regard the finding that a person who was opposed to war and killing constituted complete proof of a belief that would not allow him to do any form of military service. It is sufficient to point out that in time of war there are non-combatant units devoted to saving life, even of the enemy, and not committed to killing. It is notorious there are certain international conventions which clearly recognise the existence of personnel on military service who are dedicated to the pursuit of saving life and not destroying it. It is also a notorious fact that in modern armies of countries subscribing to the Geneva Conventions, these units are well established and recognised.

As these views were open to the Magistrate it would be quite justifiable for him to find that be was not satisfied that the applicant's belief did not allow him to perform any form of military service: that is to say, that he had a conscientious aversion to serving in each and all of the units of the service whatever the purpose of the unit might be, even if its purpose was to save life. But because the ambiguities that patently do appear in the extemporaneous statements made by the Magistrate, a careful argument has been submitted by Mr Eames to have the Magistrate's order as to non-combatant duties reversed.

Four submissions were made by Mr Eames all of which were quite relevant to the grounds of the order nisi the numbers of which are referred to hereunder, namely:

(a) in his findings the Magistrate has determined that the applicant was fulfilling the requirements of s29A(1) *National Service Act* (Ground 5).

(b) If that were not his finding then on the uncontradicted evidence of the applicant supported as it was by the evidence of the other two witnesses, the Magistrate should have found that the applicant was a person within s29A(1) (Ground 6).

(c) There was no reasonable basis on which the Magistrate could find that the applicant was liable under s29A(2) (Grounds 1, 2, 3 and 6).

(d) Finally the Magistrate must have taken into account irrelevant and extraneous matters in reaching his conclusions (Ground 4).

As to the first of these submissions, the Magistrate has made a formal order which, in fact, is now being sought to be reviewed and which is quite contrary to this submission. In his reasons for that order given prior to the address of counsel, the Magistrate had stated that he accepted that the applicant was opposed to killing and war but he had not been satisfied that the applicant's conscientious beliefs did not allow him to carry out non-combatant duties.

On the views that I have already expressed this appeared open to him acting as a reasonable man. Mr Eames however has taken three or four ambiguous sentences from the context of the Magistrate's subsequent comments to him, and has based quite ingenious arguments upon what was said. The statements he referred to were ambiguously phrased. In this regard, Mr Eames stressed that the strongest point in the applicant's favour was the acceptance by the Magistrate of the applicant's genuine and strongly-held objection to war and killing. To add to that, the Magistrate also said:

> "Despite what you have said, I have come to a conclusion that he has a conscientious belief but whilst having made out the situation in (1)."

If the statement stopped there, it would have strongly supported Mr Eames' first submission. Unfortunately, for the applicant, it did not stop there. Besides being premised by the words "Despite what you have said" the complete statement of the Magistrate concludes with the words "I feel that he has not satisfied me that he should not or he has a belief which does not allow him to serve in duties of a non-combatant nature."

It would seem that the Magistrate's reference to the applicant's situation in (1) was intended to convey that the Magistrate was finding the applicant held a conscientious belief in relation to military service. By his subsequent statement however the Magistrate was clearly limiting the nature of the applicant's aversion to service; or, to put it more precisely, he was not satisfied that the applicant had a genuine aversion to all forms of military service; those devoted to killing and those devoted to saving life.

Having regard to what the Magistrate said before counsel addressed him and the formal order he subsequently made these remarks must be interpreted in the light of those two matters. In my view it would be quite erroneous to seize upon that one sentence in his finding to justify Mr Eames' first submission. Accordingly I reject it.

The second submission of Mr Eames depends primarily on a rule that has been developed in Victoria, that the consequence of a Magistrate disbelieving uncontradicted evidence which is inherently probable without giving a relevant reason is to create a ground for setting aside his finding; See *Llewellyn v Reynolds* [1952] VicLawRp 24; [1952] VLR 171; [1952] ALR 358, Full Court; *Stephens v McKenzie* [1904] VicLawRp 89; (1904) 29 VLR 652. But see *McPhee v S Bennett Ltd* (1935) 52 WN (NSW) 8; *Crisfield v Ireland* [1918] VicLawRp 11; [1918] VLR 105; 24 ALR 23; 39 ALT 169; *Quinn v Shepard* [1921] VicLawRp 98; [1921] VLR 555; *Taylor v Ellis* [1956] VicLawRp 72; [1956] VLR 457; [1956] ALR 1092; *Re Gear* [1964] Qd R 528.

Mr Eames submitted that the applicant's evidence, as to his belief was uncontradicted, inherently probable and was not all shaken by cross-examination and accordingly should have been accepted by the Stipendiary Magistrate to justify a finding that he had a conscientious belief to that would disallow the applicant Prain from engaging in any form of military service, and therefore he would have brought himself within the provisions of s29A(1).

In order to understand the argument of Mr Eames, the provisions of s29A(1) should be referred to. The sub-section reads as follows:

> "A person whose conscientious beliefs do not allow him to engage in any form of military service is, so long as he holds those beliefs, exempt from liability to render service under this Act."

The phrase "in any form of military service" imposes a very heavy burden upon an applicant for total exemption. This section calls for the applicant to establish, as a fact, the existence of a present compulsive and completely conscientious aversion to military service including non-combatant service of any kind at any time and in any circumstances. See *R v District Court of Queensland; ex parte Thompson* [1968] HCA 48; (1968) 118 CLR 488; 42 ALJR 173; (1968) Argus LR 509. To use Windeyer J's expression in *R v District Court of Sydney; ex parte White* [1966] HCA 69; (1966) 116 CLR 644; (1967) ALR 161 at 171; (1966) 40 ALJR 337.

> "The requisite for total exemption is thus it seems a conscientious and complete pacificism."

In effect the conscientious belief must be of a character that does not allow the applicant

to take part in any one of all the various forms of military service, even to those devoted to saving life, not destroying it.

Having regard to the view that might be taken of the applicant's evidence referred to above, it was open to the Magistrate to say that in his view of the evidence he was not satisfied about the nature of the applicant's aversion to performing non-combatant duties. This was essentially a question of fact and on the evidence it was open to the Magistrate, as a reasonable man, to so find. Furthermore it must be remembered what Joske J said in *Birkett v Minister for Labour and National Service* (1971) ALR 87 at p90. Earlier I referred to this aspect, but the verbiage used by Joske J in upholding an appeal of an applicant is apposite to the present discussion. His Honour said:

> "One must have regard not only to the statement of the witness but also to the witness's demeanour, and I am quite satisfied from the applicant's demeanour when the questions were put to him that notwithstanding he answered as he did, it would have been abhorrent to him and repugnant to his conscientious beliefs and objectionable to carry out non-combatant duties apart from combatant military duties."

The Stipendiary Magistrate here had the benefit of his observation of the applicant in the witness box to assess the sincerity and true nature of the applicant's aversion to service. The Magistrate had to be persuaded by the applicant not only by what the applicant said, but also by the applicant's sincerity, to be measured by his reaction to questions in the witness box. It was necessary for the Magistrate to determine whether he was satisfied of the applicant's aversion to any form of military service. As the Magistrate expressed himself in the only way known to a judicial officer faced with such a problem, he stated he was not satisfied of one particular aspect so essential to the applicant's success.

Sitting here as a court of review, all I am concerned about is to discover whether that was open, remembering the rule that evidence is not to be rejected which is inherently probable, but which had to be examined in the light of the duty imposed upon the Magistrate by the legislation. The second submission therefore must fail.

The third submission involves a consideration which caused some concern to Windeyer J In *White's case* at p173. The applicant here did not seek to obtain an exemption under s29A(2) but s29B(2) provides:

> "Where a question arises whether a person is, by virtue of subsection (1) of the last preceding section, exempt from liability to render service under the Act, the court by which the question is heard may, if it is satisfied that the person is not so exempt but that the person is a person to whom sub-section (2) of that section applies, decide accordingly."

Under this sub-section it was clearly within the Stipendiary Magistrate's power to make the Order he did. If one refers to the provisions of regulation 34 of the regulations made under the *National Service Act*, it would appear that this is the only order the Magistrate could have made, having regard to the findings of fact to which I have already referred. This submission therefore also must fail.

Turning to Mr Eames' final proposition, he submitted that the Stipendiary Magistrate in his comments had made reference to a number of irrelevant matters which must have influenced him in his decision. This submission ranged over a wide number of criticisms of various remarks made by the Stipendiary Magistrate. First, his reference to a period of time during which Mr Prain had held his beliefs was criticised, that he should not have taken into account the period, or, alternatively if he did take it into account, to deprecate the applicant's beliefs.

I did not interpret it in the fashion that Mr Eames has sought to put it. Regulation 35 under the Act required the Magistrate to consider the period that the applicant has held his beliefs. By referring to the period, the Magistrate was simply carrying out the statutory direction. How influential that factor was upon his decision did not appear, but it cannot be said that by referring to it, he was taking into account something extraneous or irrelevant to the application when the regulations required him to do that very thing. It was not apparent that the period referred to had any effect upon the ultimate order of the Magistrate. It must be remembered that before he made

that remark he had already stated he was not satisfied as I would have thought the remark was provoked by counsel's submissions.

Mr Eames also criticised the Magistrate in his referring to "the world where much killing occurred" and he suggested that the Magistrate was holding that in such a world it was unreasonable for the applicant to hold pacifist views. I do not agree that that is a proper interpretation of the remarks made. The Magistrate did not appear to be concerned at all about the reasonableness of the applicant's views to determine the application. Indeed, he accepted the applicant's objection, his strong objection to war and killing. It would be quite untenable to find in such a determination, an implication such as is being sought to be put upon this particular aspect of the case. I repeat it is unfortunate that we do not know what submissions were made by counsel; but again I venture to think that this statement was made as a result of something that had been addressed to the bench.

The third criticism made by Mr Eames was, the Stipendiary Magistrate in his remarks was stating his own opinion as to the purposes which the *National Service Act* was passed. He submitted this was an extraneous consideration. In one sense that submission is quite a valid one. I do not know what prompted it, again I repeat it may very well have been from something that counsel has said. But, having regard to the applicant's own evidence, as to the practical effect of carrying out non-combatant duties, it may very well be that the Magistrate had this in mind when he was referring to the nature of National Service. In any event, I find it difficult to see how such a view vitiated the final conclusion which the Magistrate came to, both before counsel addressed him and, in his concluding remarks in answer to counsel's submissions. He was not persuaded by the applicant's evidence of his aversion to all forms of military service, and he so stated.

The fourth criticism made of the Magistrate's remarks was on his reference to the depth of the applicant's Christian beliefs. I found some difficulty in understanding this criticism because in his testimony the applicant had given some clear account of his beliefs. It is true that the foundation of his case was that he had certain conscientious views and objections to war and killing because of the Christian ethic. He did not claim any great Biblical knowledge, but he shared, I would think, with the great majority of the community an aversion to war and to killing. Other than the relevance to the foundation of the nature of his beliefs it is a little difficult to understand why the evidence was led by him. Clearly it could have little influence upon the ultimate form of the Magistrate's order and really it only went to the applicant's credit. Having regard to the content of the Magistrate's remarks on this matter, it is difficult to find that it had any effect whatever, either on his initial finding before counsel addressed him or to the ultimate finding and the formal order made.

The fifth criticism is on the Magistrate's remark about his views on the Bible. This statement by the Magistrate was quite out of context with what else he had said, and one has a feeling again that this was probably prompted by something that counsel had urged to him. It is difficult to see how his views on the Bible had any effect upon his ultimate decision, having regard to his remarks before counsel addressed him. Examining the statement in the context I can find no connection with or the relevance of his remarks in either influencing or compelling the ultimate decision. Despite the obvious difficulties in his way, Mr Eames earnestly argued that the Stipendiary Magistrate had wrongly taken into account the rightness and wrongness of the applicant's views, that the applicant should not have held his beliefs, that the applicant's views were unreasonable in today's society, and finally that the Magistrate should not have been affected by the period of time during which the applicant had held such views.

For reasons I have ventured to give, it does not appear to me that the Magistrate took into account any of these matters to make the formal order he did. His order was based upon the failure of the applicant to persuade him by his testimony, that he had a conscientious aversion to all forms of military service at all times and under all circumstances. It was open on the testimony to find that the applicant had never turned his mind to service which went to saving life as opposed to destroying it. The choice by the applicant in his testimony of various practical non-combatant duties could well have led the Magistrate to hold that although he accepted that the applicant was opposed to war and killing, he was not satisfied as to his aversion to carrying service of a genuine non-combatant character.

Having regard to these views the order nisi must be discharged. From the record of the judgment of Smith J it appears that Mr Emery, who appeared for the Minister in that case, pointed out that in these applications no order for costs should be made. I shall follow that precedent and there will be no order as to costs.
