15/70

SUPREME COURT OF VICTORIA

COLDHAM v The MINISTER of STATE for LABOUR & NATIONAL SERVICE

Smith J

23 June 1970

NATIONAL SERVICE – APPLICATION FOR EXEMPTION FROM NATIONAL SERVICE – ONUS OF PROOF ON APPLICANT – SOME OF THE APPLICANT'S EVIDENCE SUPPORTED A FINDING IN HIS FAVOUR – OTHER EVIDENCE SUGGESTED THAT THE APPLICANT'S STATE OF MIND MIGHT HAVE BEEN NO MORE THAN AN INTELLECTUAL PERSUASION ON HUMANITARIAN GROUNDS – APPLICATION DISMISSED – WHETHER MAGISTRATE IN ERROR: *NATIONAL SERVICE ACT* 1951-1968, S29D.

HELD: Order nisi discharged.
1. Once it was seen that there was no finding by the magistrate that he accepted as accurate all the evidence given by the applicant, there was no basis for saying that the magistrate was guilty of an error of law. The onus of proof was, by virtue of s29D of the *National Service Act*, cast upon the applicant; and the evidence, though it would have supported a finding in his favour, it contained the other passages which indicated that he arrived at his objections by reasoning about the matter, and which suggested that his state of mind might have been no more than an intellectual persuasion on humanitarian grounds.

2. It was therefore in no way unreasonable for the magistrate to have said that he was not satisfied that the applicant had more than an intellectual objection; and indeed it was open to the magistrate to find affirmatively, as he appeared to have done, that though the applicant had a genuine objection, it was not, in truth, a conscientious one. He saw and heard the whole of the applicant's evidence and was in a position to decide what weight should be attached to different parts of it.

3. Accordingly, the applicant failed to show any error of law on the part of the magistrate and none of the grounds of the order nisi were established. The order nisi was discharged.

SMITH J: This is the return of an order nisi to review a decision of a Court of Petty Sessions constituted by a stipendiary magistrate sitting in the City Court at Melbourne on the 22 January 1970. The decision was one dismissing an application made under s29D of the *National Service Act* 1951-1968 and Regulation 31 of the *National Service Regulations*.

The applicant sought to establish before the stipendiary magistrate that he was exempt from national service by virtue of s29A(1) of the Act which is in these terms:

> "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."

And s29B(1) provides, *inter alia*, that where a question arises whether a person is exempt by virtue of s29A(1) the question shall be heard and decided by a court of summary jurisdiction of a State or Territory of the Commonwealth constituted by a police, stipendiary or special magistrate.

The magistrate dismissed the application upon the ground that the applicant had no conscientious objection but only an intellectual objection. The order nisi was granted upon three grounds to the following effect;

> 1. That having found on the evidence that there was no doubt whatsoever of the genuineness of the applicant's belief, it was not open to the magistrate to decide that the applicant's objection to engage in any form of military service was not a conscientious objection within the meaning of s29A(1) of the *National Service Act*;
>
> 2. That on the evidence the magistrate should have found that the applicant held a conscientious

belief that did not allow him to engage in any form of military service;

3. That the magistrate misdirected himself as to the meaning of s29A(1) of the *National Service Act*.

At the outset of the hearing of the order nisi, the respondent raised a preliminary objection that this Court has no jurisdiction to review, upon order to review, the decision of a magistrate upon an application under s29B of the *National Service Act.* It was contended that the provisions of that Act relating to appeals and to the investing of courts with federal jurisdiction excluded the operation in the present case of s39(2) of the *Judiciary Act* 1903-1968 and it was contended further that there could not be found in any other legislation a grant of jurisdiction to this Court to review an application under s29B upon order to review. On behalf of the applicant it was conceded that if the jurisdiction exists, it is vested in this Court by s39(2) of the *Judiciary Act*.

I am not persuaded that the reference in s39(2) to the limits of jurisdiction of State courts is sufficient to prevent that sub-section from operating to invest this Court with the jurisdiction to review on order to review a decision on an application under s29B of the *National Service Act*.

Furthermore, I find it difficult to see that in s29 of that Act, which until 1953 contained the only provision for applications to courts of summary jurisdiction to determine questions of exemption, there was any language sufficiently pointed to exclude the operation of s39(2) of the *Judiciary Act*. It is true that under s29 the constitution of the court of summary jurisdiction was and is defined more narrowly than it is under s39(2)(d) of the *Judiciary Act*; but having regard to what was said by the High Court in *Goward v Commonwealth* [1957] HCA 60; (1957) 97 CLR 355; [1957] ALR 825, it does appear to me to be clear that such a disparity is sufficient to exclude the operation of s39(2).

Then in 1953 the legislation was changed by the enactment of ss29A, 29B, 29C and 29D and 57A of the *National Service Act*. Those provisions stated additional grounds of exemption, made additional provisions for applications to a court of summary jurisdiction, made provision for an appeal by way of re-hearing to a District Court or County Court or, in some cases, to the Supreme Court, and expressly invested with federal jurisdiction the several courts of the States by which questions might be decided, or to which applications or appeals might be brought, under the Act.

It does not appear to me, however, that the provision of a system of appeals by way of re-hearing was in any way inconsistent with a continued operation of s39(2) of the *Judiciary Act* in relation to the review by this Court of decisions made on applications under the *National Service Act*; and the inclusion of the express provision investing State courts with federal jurisdiction may have represented no more than the application of a precautionary drafting practice which there had been an omission to follow when the *National Service Act* was first enabled. There is a reference to such a drafting practice in Cowan *Federal Jurisdiction in Australia* at p183.

The final step in the relevant statutory history is that by the *National Service Act* 1968 provision was made for an appeal to the Supreme Court of the State, constituted by three judges, from decisions given by the Courts to which appeals had been authorised under the 1953 legislation. But once again I am not satisfied that the legislation is in any way inconsistent with a continued operation of s39(2) of the *Judiciary Act*.

I feel, however, that it would be undesirable for me to express a definite opinion upon this preliminary point without having heard fuller argument. It raises questions of considerable difficulty, some of which are discussed in Cowan, *Federal Jurisdiction in Australia* and Howard's *Australian Federal Constitutional Law*. In particular the question of how the views expounded in *Goward's Case* (*supra*) should be applied to the facts of the present case is one on which I think I would need further assistance from counsel. For reasons which will presently appear, I do not find it essential in this case to decide the preliminary objection and I think it preferable not to do so. I pass then to the substantial matter raised on the argument on the merits.

The applicant, in the course of his evidence before the magistrate, made statements which would, I think, have warranted a finding that he was exempt; but he also made statements which showed that he had arrived at his present beliefs and opinions relating to military service in recent

times and by intellectual processes. Moreover he said at one stage that his objection was based on humanitarian grounds, and at another that his belief was a humanitarian one although his religious experiences had contributed to it. He also gave the following evidence;

> "I believe that war as a method of solving disputes between nations is out-dated. I believe that in this era we must decide these matters by negotiations. The problem is one of communication. The use of television and improved travel has brought countries together so that every war is in a sense a civil war. As a pacifist I believe my duty is to take this stand with a view to bringing about this resort to negotiations rather than resorting to war."

It is true that he then said:

> "I could not under any circumstances undertake military duty."

But that sentence was followed by the statement:

> "I have thought carefully about the matter."

In the course of cross-examination he said, amongst other things, that he had a belief in God, that he accepted Christian moral teachings because he agreed with them, that he believed there was a definite tie-up between the humanitarian and the religious, that his beliefs were humanitarian and were therefore, partly religious. And although he said that his conscience told him it was wrong to kill and that he was brought up that way and that that was the basic reason for his belief, he went on to say that there were secondary reasons, too, and that to act otherwise was to destroy yourself and others.

The applicant called a number of witnesses in support of his case and although they were not, of course, able to say what was going on in his mind, they were able to give him some general support.

The magistrate at the conclusion of the applicant's case was asked to rule that a case had not been made out. After hearing argument on that matter the magistrate said:

> "I have listened to the applicant and the evidence he has given and I have listened to his witnesses. I am not satisfied that he holds a conscientious belief that does not allow him to engage in any form of military service. It is not a conscientious objection; therefore I dismiss his application."

The applicant's solicitor the asked the magistrate to give reasons for his finding. The magistrate replied:

> "I have given the reason. I am not satisfied that he has a conscientious objection".

The solicitor then said:

> "Will you say whether you do not accept his evidence, that is that you do not accept his genuineness, or do you accept his evidence but find that the belief which holds does not come within the ambit of the conscientious belief required by the Act?"

The magistrate replied:

> "Yes, that is the position. I have no doubt whatsoever of his genuineness but he has no conscientious objection. It is an intellectual objection."

Now if the magistrate had said that he accepted the accuracy of all the evidence given by the applicant, then having regard to some of the statements that I have quoted and to some other parts of his evidence, it might have been argued with force that the magistrate was guilty of an error in law in going on to find affirmatively that here was no conscientious objection. But I do not understand the magistrate's findings as amounting to an acceptance of the accuracy of all the evidence given by the applicant.

It appears to me that the solicitor for the applicant, in order to improve his chances of obtaining some helpful comment from the magistrate, watered down the expression "accept his

evidence" when he said "that is, that you do not accept his genuineness." The expression "accept his evidence" was by this means put to the magistrate with a special meaning attached to it which must be taken into account when construing the magistrate's meaning when he said: "Yes, that is the position."

It seems to me that all he was he saying was:

> "I accept his evidence in the sense you put, that I accept the view that he does have a genuine objection to military service."

I think that the attribution of that meaning to the words "Yes, that is the position" is confirmed by the next following words of the magistrate,

> "I have no doubt whatsoever of his genuineness."

Now it appears to me that once it is seen that there was no finding by the magistrate that he accepted as accurate all the evidence given by the applicant, there is no basis for saying that the magistrate was guilty of an error of law. The onus of proof was, by virtue of s29D of the *National Service Act*, cast upon the applicant; and the evidence, though it would, I think, because of some passages in it, have supported a finding in his favour, it contained the other passages to which I have referred which indicated that he arrived at his objections by reasoning about the matter, and which suggested that his state of mind might have been no more than an intellectual persuasion on humanitarian grounds.

It was therefore in no way unreasonable for the magistrate to say that he was not satisfied that the applicant had more than an intellectual objection; and indeed I think that it was open to the magistrate to find affirmatively, as he appears to have done, that though the applicant had a genuine objection, it was not, in truth, a conscientious one. He saw and heard the whole of the applicant's evidence and was in a position to decide what weight should be attached to different parts of it.

In my view, therefore, the applicant has not shown any error of law on the part of the magistrate and none of the grounds of the order nisi has been established. The order nisi will be discharged.
