[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

SCHERGER AND OTHERS;

Ex Parte BRIDEKIRK.

H. C. of A. 1957.

Sydney, Dec. 10, 11, 19.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

Defence—Air Force—Airmen—Application for discharge from service—Refusal by Air Board—Irregular enlistment—Mandamus directed to Air Board to compel discharge—Whether mandamus appropriate remedy—Enlistment validated by subsequent regulation—Refusal of remedy—Air Force Regulations 1927-1952, *Pt.* IV, *regs.* 91, 92 (1) (5), 93, 94, 95, 99 (2)—*Air Force Act* 1923-1956, *ss.* 3 (3), 9—*Defence Act* 1903-1956, *s.* 124.

Paragraph (5) of reg. 92 of the *Air Force Regulations* 1927-1952 provides :— " (5) A person who, prior to the commencement of this regulation, has engaged to serve for one of the periods specified in this regulation shall be bound to serve in the Air Force in accordance with the tenor of his oath of enlistment until he is discharged, dismissed or removed from the Air Force."

Held, that the paragraph suffices to overcome all irregularities in the enlistment voluntarily made of a person falling within its description.

In 1950 B., then aged sixteen years eight months, enlisted in the R.A.A.F. for a term of not less than three and not more than four years as an airman apprentice and for twelve years thereafter unless sooner discharged, dismissed or removed. B.'s enlistment was inconsistent with the provisions of the *Air Force Regulations* then obtaining in that he was under the age of eighteen years and had enlisted for a period longer than six years. In 1952 a new reg. 92 was adopted, par. (5) whereof is hereinbefore set out. The period of B.'s enlistment was one of the periods specified in such new regulation. Subsequently B. applied to the Air Board for his discharge pursuant to reg. 99 (2) upon the basis that he was not duly enlisted but the board relying upon reg. 92 (5) declined the application. B. sought a writ of mandamus directed to the members of the board to compel his discharge.

Held, that by virtue of reg. 92 (5) B. was not entitled under reg. 99 (2) to claim that he had not been duly enlisted and accordingly his application should be refused.

Quaere whether, in any event, mandamus would have lain against the members of the Air Board.

MANDAMUS.

On 6th November 1957 *McTiernan* J. on the application of John Richard Russell Bridekirk, a leading aircraftsman in the Royal Australian Air Force stationed at Richmond, New South Wales, as prosecutor, granted an order nisi directed to Frederick Rudolph William Scherger, Allan Leslie Walters, Ellis Charles Wackett, Henry George Acton, Reginald Max Rechner and Archibald Bertram McFarlane, members of the Air Board constituted under the *Air Force Regulations* made pursuant to the *Air Force Act* 1923-1956, calling upon the respondents to show cause before the Full Court of the High Court why a writ of mandamus should not issue directed to the said respondents commanding them to discharge the prosecutor from service in the Air Force of the Commonwealth of Australia upon the grounds that the prosecutor was not duly enlisted in the said Air Force because (a) his enlistment was for a period which was not provided for by the *Air Force Regulations* and (b) he was under the age of eighteen years at the time of his purported enlistment.

The relevant facts appear in the judgments of the Court hereunder.

J. D. Holmes Q.C. (with him *R. F. Loveday*), for the prosecutor. The enlistment of the prosecutor was irregular in that it was inconsistent (a) with reg. 93, he being under the age of eighteen years and (b) with reg. 92, he having enlisted for a period exceeding six years. Therefore, apart from the amendment effected by reg. 92 he was entitled to be discharged by virtue of reg. 99 (2). Paragraph (5) of the new reg. 92 introduced by S. R. No. 14 of 1952 has no application to the prosecutor because within the meaning of that paragraph he is not a person who " has engaged to serve ", there being at the time of his enlistment no authority to enlist him (a) because of his age and (b) because of the duration of his engagement. The paragraph requires a valid not a *de facto* engagement. There was here no power to enlist, so that what was done was not enlistment. There being no enlistment, the prosecutor notwithstanding his application and his oath had not engaged and could not engage to serve. Alternatively, the paragraph is directed

H. C. OF A. 1957.

THE QUEEN v. SCHERGER; EX PARTE BRIDEKIRK.

to curing defects in the specification of too great a period in the enlistment of a person who by reason of age etc. is otherwise validly enlisted. He referred to reg. 93 (B). On either ground, therefore, the paragraph does not apply to the prosecutor and he is entitled to his discharge. Upon the assumption that that paragraph is capable in point of construction of embracing a *de facto* engagement then it is beyond the regulation-making power contained in s. 9 of the *Air Force Act* 1923-1956 in that it turns the right of the prosecutor to be discharged under reg. 99 (2) by reason of irregular enlistment into a compulsive obligation to serve. The paragraph offends against the requirements of the *Air Force Act* that enlistment should be voluntary. [He referred to *Morton* v. *Union Steamship Co. of New Zealand Ltd.* (1).] Mandamus should go.

B. P. Macfarlan Q.C. (with him *J. J. Davoren*), for the respondents. The prosecutor is not entitled to be discharged because reg. 92 (5) introduced in 1952 completely covers his case. He is within the meaning of that paragraph a person who " has engaged to serve ". The oath taken by him is not merely an oath but a promise on his part to serve for the time mentioned and that promise to serve constitutes an engagement by him which he makes with the Crown. The prosecutor seeks to read the paragraph as if it were " has been engaged to serve " and that is an erroneous construction. [He referred to *The Commonwealth* v. *Quince* (2).] The paragraph does not seek to compel the prosecutor to do something which he is not willing to do ; it operates only on that which he has already promised by his oath to do. There is no legal significance in the fact that at the time when he took the oath the prosecutor was a minor. Minors are capable of engaging for service in the armed forces. [He referred to *R.* v. *Walpole St. Peters in Norfolk* (3); *R.* v. *Inhabitants of Rotherfield Greys* (4)]. The respondents' argument does not depend in any way upon the validity or invalidity of what took place in 1950. That may be put to one side. The respondents take their stand upon the new reg. 92 made in 1952 which operated on a state of facts then existing and which spoke as to the future.

[DIXON C.J. I doubt very much whether there is under the regulations a public duty enforceable at the instance of the subject by mandamus.]

(1) (1951) 83 C.L.R. 402, at pp. 409, 410.
(2) (1944) 68 C.L.R. 227, at p. 250.
(3) (1769) 1 Black W. 669 [96 E.R 390].
(4) (1823) 1 B. & C. 345, at pp. 349, 350 [107 E.R. 128, at pp. 129, 130].

The Court's attention is drawn to *Ex parte Koutalianos*; *Re Rushton* (1); *R.* v. *Bevan*; *Ex parte Elias and Gordon* (2); *R.* v. *Cox*; *Ex parte Smith* (3); *The Commonwealth* v. *Welsh* (4); *Ex parte Young*; *Re Johnston* (5). Alternatively to the first argument, if reg. 92 (5) operates only where there is due and proper enlistment, then there was here such an enlistment. The age of the prosecutor does not affect the regularity of his enlistment. He took the oath under reg. 94 and he thereby became bound by reg. 95 to serve according to the tenor of such oath. Regulations 94 and 95 are not expressed to be subject to reg. 93, they are in perfectly general terms and are intended to operate in all cases where the oath is taken. Regulation 93 is directory not mandatory in its terms. [He referred to *Cross* v. *The Commonwealth* (6).] As to the prosecutor's right to mandamus regs. 25-27, 39, and 109 are relevant. These regulations impose duties on the Air Board as servants of the Crown. The duties are not public duties but are duties owed to the Crown. [He referred to *Reg.* v. *Secretary of State for War* (7); *R.* v. *Army Council*; *Ex parte Ravenscroft* (8); *The King on the Prosecution of Howard Freeman* v. *Arndel* (9).] Mandamus accordingly does not lie.

J. D. Holmes Q.C., in reply. The Air Board has full authority to determine all questions arising under reg. 99 and is to give effect to all claims for discharge properly brought before it. There is no room for interference in any such matter by the Minister. The mandamus to the board would not be mandamus to the Crown and accordingly in the instant case mandamus lies.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

DIXON C.J., WILLIAMS, WEBB and TAYLOR JJ. This is an order nisi for a prerogative writ of mandamus directed against the members of the Air Board. The Air Board is constituted under the *Air Force Regulations* by the Governor-General. It is composed of the Chief of the Air Staff, the Air member for Personnel, the Air Member for Technical Services, the Air Member for Supply and

(1) (1945) 45 S.R. (N.S.W.) 269; 62 W.N. 191.
(2) (1942) 66 C.L.R. 452.
(3) (1945) 71 C.L.R. 1.
(4) (1947) 74 C.L.R. 245.
(5) (Supreme Court of N.S.W., *Ferguson* J., 6th November 1956, unreported.)
(6) (1921) 29 C.L.R. 219, at pp. 223, 224.
(7) (1891) 2 Q.B. 326, at pp. 334-336.
(8) (1917) 2 K.B. 504, at p. 508.
(9) (1906) 3 C.L.R. 557, at pp. 568, 569.

H. C. OF A. 1957.

THE QUEEN v. SCHERGER; EX PARTE BRIDEKIRK.

Dixon C.J. Williams J. Webb J. Taylor J.

Equipment, the Citizen Air Force Member and the Secretary to the Department of Air. The Air Board, subject to the regulations and the policy laid down by the Minister, is charged with the control and administration of the Air Force (reg. 26). The alleged duty for the enforcement of which the writ of mandamus is sought is said to be imposed upon the Air Board by reg. 99 (2). That sub-regulation provides that except in time of war a person serving or in pay as an airman within the Commonwealth but not duly appointed or enlisted may claim to be discharged and the claim shall with all reasonable speed be allowed: provided that until the claim is allowed he shall for all purposes of these regulations be deemed to be a member of the Air Force. The applicant for mandamus applied under this regulation for his discharge. The Air Board, however, decided that he did not qualify as a person not duly appointed or enlisted. He is not commissioned and we may neglect the word appointed. His claim that he was not duly enlisted depends upon the regulations as they stood before amendments were made by S.R. No. 14 of 1952, reg. 12. He actually became a member of the Air Force on 25th January 1950. At that time his entry into the Air Force was governed by the regulations contained in Pt. IV of the *Air Force Regulations* 1927-1949. That Part begins with reg. 91 which says that the Air Force shall be raised and kept up by voluntary enlistment only. Regulation 92, as it then stood, provided that, with certain immaterial exceptions, persons voluntarily enlisting as members of the Air Force might be required to engage to serve for certain specified periods. The relevant period is that for the Permanent Air Force which was a period of six years. Regulation 93 as it then stood provided that any person between the ages of eighteen years and thirty-five years might be enlisted for service in the Air Force. There is a proviso which is immaterial relating to persons over thirty-five years. Regulation 94 provided that a person enlisting in the Air Force shall take before an officer or justice of the peace an oath in accordance with a particular form. The form consisted of an oath that the person taking it would well and truly serve the King in the Air Force of the Commonwealth of Australia for a term of . . . years or until sooner lawfully discharged dismissed or removed. The remainder of the oath is not relevant to present purposes. The state of war with Japan was terminated by proclamation made under s. 4 of the *Defence Act* on 8th May 1952 and gazetted on 15th May 1952. The proclamation has effect for all purposes of the *Defence Act* 1903-1956 including the provisions which are incorporated in the *Air Force Act* 1923-1956.

Regulation 95 provides: "95. The oath of enlistment shall bind the person taking it to serve in the Air Force in accordance with the tenor of the oath until he is discharged dismissed or removed therefrom or until his resignation is accepted."

The applicant for prohibition, who is one John Richard Russell Bridekirk, was born on 25th May 1933. On 25th January 1950, he signed his attestation papers for the purpose of enlisting voluntarily in the R.A.A.F. He was then sixteen years and eight months old. It may not be material but it is a fact that at the time he made his application, viz. on 18th June 1949, his father signed a form consenting to his son being accepted into the R.A.A.F. for a period covering his apprenticeship, viz. three years, and twelve years regular service thereafter. By his oath of enlistment he swore that he would serve his Majesty in the Air Force for a term of not less than three and not more than four years as an apprentice training and twelve years thereafter unless sooner discharged dismissed or removed. He claims that at that time he was irregularly enlisted for two reasons. First of all he was under the age of eighteen, and that made his enlistment inconsistent with reg. 93. In the second place, he enlisted for more than six years, and that was inconsistent with reg. 92. The answer made by the Air Board is that notwithstanding the irregularity of his attestation and enlistment papers, he became a member of the Air Force. By S.R. No. 14 of 1952 which was adopted on 21st February 1952, a new reg. 92 was promulgated replacing the old reg. 92. The material parts of this new reg. 92 consist of sub-reg. (1) and sub-reg. (5). By sub-reg. (1) three periods of service are provided for different circumstances for enlistment in the Permanent Air Force. The regulation states that a person voluntarily enlisting as a member of the Air Force shall, subject to this regulation, engage to serve in the Permanent Air Force in one or other of the periods covering the three respective modes of service. The material one is that contained in sub-cl. (ii) of par. (*a*) of sub-reg. (1). This provides that where a person is enlisting as an airman apprentice he may engage to serve for a training period not exceeding four years as an airman apprentice and for a period of twelve years commencing at the expiration of that training period as an airman. It will be seen that if this paragraph had been in force in January 1950 when the applicant entered the Air Force the period for which he enlisted would have been within the authority of the regulation and regular. Sub-regulation (5) has a validating effect. It provides that a person who prior to the commencement of this (new) reg. 92 has engaged to serve for one of the periods specified in the regulation shall be bound to

H. C. OF A. 1957.

THE QUEEN v. SCHERGER; EX PARTE BRIDEKIRK.

Dixon C.J. Williams J. Webb J. Taylor J.

serve in the Air Force in accordance with the tenor of his oath of enlistment until he is discharged dismissed or removed from the Air Force. Now clearly enough the applicant falls within this description. Prior to the commencement of the regulation, viz. 25th January 1950, he had engaged to serve for a period specified in the new reg. 92, viz. for a training period of three years and a period of twelve years commencing at the expiration of that training period. On that footing sub-reg. (5) stated that he was bound to serve in the Air Force in accordance with the tenor of his oath of enlistment until he be discharged dismissed or removed from the Air Force. It is on the basis of this validating provision that the Air Board decided that the application under reg. 99 (2) of the present applicant for mandamus should be refused, inasmuch as he was not at the time of making the application a person who was not duly enlisted. It may be noticed that reg. 95, already quoted, is reproduced from s. 38 of the *Defence Act* 1903-1956 in its application to the Army. Regulation 99 (2) is reproduced from s. 42A (2) of the same Act. The policy of these provisions is to prevent any question of the irregularity of enlistment operating to enable a soldier or airman as the case may be to claim that he does not fall under military or air force discipline. Whatever objection there may be to the regularity of his enlistment he remains a member of the forces unless and until he obtains his discharge. Accordingly in February 1952, when S.R. No. 14 of 1952 was adopted, the applicant was a member of the Air Force. There is no reason therefore why sub-reg. (5) should not operate to validate his membership and prevent the operation of reg. 99 (2) upon his case. On behalf of the applicant, however, various answers were put to this position. In the first place it was said that upon the proper construction of sub-reg. (5) of reg. 92 it did no more than apply to persons who had regularly enlisted and thereby validly engaged to serve for the period stated. That, we think, is not its meaning. It is plainly referring to a *de facto* engagement operative, though irregular, as a result of the combined application of reg. 95 and reg. 99 (2). It was then said that it was intended at most to cure defects arising from a specification of too great a period in the enlistment. In support of this view it was pointed out that by reg. 15 of S.R. No. 14 of 1952 a reg. no. 93B was introduced, the purpose of which was to authorise the consent in writing of a parent or guardian to the enlistment of a person who is between fifteen and eighteen years of age. It was pointed out that there is no validating or retroactive provision attached to the new reg. 93B. There is some weight in the argument that an inference may be drawn from this that reg.

92 (5) was meant to cure nothing but excess of period in enlistment. But on the whole we think that the natural meaning of the language of sub-reg. (5) of reg. 92 should receive effect. Clearly, according to its natural meaning, the language of sub-reg. (5) suffices to overcome all the defects in the enlistment of a person who falls within its provisions. Then it was said that sub-reg. (5) was outside the power to make regulations. That power is to be found in the combined operation of s. 9 of the *Air Force Act* 1923-1950, and of s. 3 (3) of the same Act operating upon s. 124 of the *Defence Act* 1903-1950. Section 3 (3) of the *Air Force Act* operates to incorporate s. 124 of the *Defence Act*. The earlier part of s. 124 authorises the making of regulations prescribing all matters which by the *Defence Act* are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the discipline and good government of the Defence Force, and in particular prescribing matters providing for and in relation to " (a) The enlistment, appointment, promotion, discharge, and dismissal of members of the Defence Force." Section 9 of the *Air Force Act* is in very similar terms in relation to the Air Force. Paragraph (*a*) of s. 124, of the *Defence Act*, however, is a particular power to prescribe matters providing for or in relation to the enlistment, appointment, promotion, discharge and dismissal of members of the Defence Force which for present purposes includes the Air Force. It must be steadily borne in mind that *de facto* enlistment both in the military forces and in the Air Force was, under the *Defence Act* in one case and the *Air Regulations* in the other case, operative although irregular. With that in mind there seems no difficulty in construing the powers which have been stated as sufficiently extensive to give complete effect to an enlistment which has in fact been made voluntarily by the person making it although irregularly in the first instance. For these reasons it would appear that the Air Board was right in its decision that the applicant was not entitled under reg. 99 (2) to claim that he had not been duly appointed or enlisted.

This application for mandamus against the officers of the Air Board was made on the footing that they rested under a public duty enforceable at the instance of the subject to give a correct decision under reg. 99 (2). During the course of the argument it was suggested that the correctness of this assumption ought not to go unexamined and reference was made to *R.* v. *Secretary of State for War* (1) and to *R.* v. *Army Council ex parte Ravenscroft* (2): see further *Halsbury's Laws of England*, 3rd ed., vol. 11, p. 98, par. 184 et seqq. In view of the opinion we have expressed as to the

(1) (1891) 2 Q.B. 326.

(2) (1917) 2 K.B. 504.

H. C. OF A. 1957.

THE QUEEN v. SCHERGER; EX PARTE BRIDEKIRK.

meaning of the regulations it is unnecessary for the Court to consider this question. But we must not be taken as proceeding on the basis that mandamus lies against officers of Her Majesty's Armed Services unless the real meaning of the legislative provisions which are relied upon is that the officers shall rest under a public duty the responsibility for the discharge of which is upon themselves personally and not upon the Crown. The order nisi should be discharged.

McTIERNAN J. I agree in the reasons and judgment of the Chief Justice. At the hearing of the application for the order nisi, I said that if the applicant's right to be discharged was established, a question would arise whether his right remedy was mandamus.

Discharge the order nisi for mandamus with costs to be paid by the prosecutor.

Solicitors for the prosecutor, *William Walker & Son*, Windsor, New South Wales by *William Walker, Taylor, Edwards & Smith.*

Solicitor for the respondents, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. A. H.